New Approaches to Law and Planning
<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION: NEW APPROACHES TO LAW AND PLANNING</td>
<td>3</td>
</tr>
<tr>
<td>KARTHIK RAO-CAVALE</td>
<td></td>
</tr>
<tr>
<td>PLACE, POWER, AND THE CITY SQUARE: OCCUPY VANCOUVER AND THE UN/MAKING</td>
<td>13</td>
</tr>
<tr>
<td>OF PUBLIC SPACE</td>
<td></td>
</tr>
<tr>
<td>BRADLEY ALEXANDER POR</td>
<td></td>
</tr>
<tr>
<td>LAW'S ECOLOGICAL RELATIONS: THE LEGAL STRUCTURE OF PEOPLE-PLACE</td>
<td>35</td>
</tr>
<tr>
<td>RELATIONS IN ONTARIO'S AGGREGATE EXTRACTION CONFLICTS</td>
<td></td>
</tr>
<tr>
<td>ESTAIR VAN WAGNER</td>
<td></td>
</tr>
<tr>
<td>PUBLIC INTEREST LITIGATION AS A SLUM DEMOLITION MACHINE</td>
<td>67</td>
</tr>
<tr>
<td>ANUJ BHUWANIA</td>
<td></td>
</tr>
<tr>
<td>DEPENDENT DEVELOPMENT: LAW AND SOVEREIGNTY IN SOPORE, KASHMIR</td>
<td>99</td>
</tr>
<tr>
<td>AMRITA SHARMA &amp; PEERZADA RAOUF</td>
<td></td>
</tr>
<tr>
<td>PRIVATE MAINSTREAMING: USING CONTRACTS TO PROMOTE ORGANIZATIONAL AND</td>
<td>119</td>
</tr>
<tr>
<td>INSTITUTIONAL ADAPTATION</td>
<td></td>
</tr>
<tr>
<td>JESSE M. KEENAN</td>
<td></td>
</tr>
<tr>
<td>AUTHORS' BIOGRAPHIES</td>
<td>140</td>
</tr>
</tbody>
</table>
INTRODUCTION:
NEW APPROACHES TO LAW AND PLANNING

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In April 2013, the Planning Accreditation Board (PAB) reaccredited the MIT city planning program after a year-long comprehensive review. But the board, in its review, once again raised a long-standing concern about the treatment of “Planning Law” in the curriculum. The PAB requires planning programs in North America to demonstrate that all students develop an “appreciation of the legal and institutional contexts within which planning occurs” (Planning Accreditation Board 2012). In most graduate planning programs in the U.S., this requirement is met through a mandatory course (often taught by adjunct faculty members with law degrees,) which exposes students to a limited set of statutes and judicial precedents in American property, land use, and occasionally municipal and administrative law. In contrast, the Department of Urban Studies and Planning at MIT (DUSP) does not have a mandatory course on the subject, though it does offer several elective courses in which legal institutions are taken very seriously. DUSP has always had a large contingent of students interested in topics other than conventional land use planning (such as economic development), both in the U.S. and internationally, and the faculty have been of the view that a course on American Planning Law may not be the best way to develop an appreciation for the importance of legal institutions.

Nevertheless, in the past two years, a small group of students and faculty within the department have responded to PAB’s provocation by posing the question – what would a deeper engagement between Law and Planning look like? This special volume of Projections – the MIT Journal of Planning – constitutes a preliminary attempt to address this question. From the beginning, we have seen the two professions in decidedly non-essential terms. By this, I mean that our approach is to treat both Law and Planning as historically constituted, but constantly shifting constellations of institutional(ized) practices whose relationship to other institutions and professions is not fixed in time or space. It then follows that the engagement between Law and Planning must reflect these ongoing changes in the two professions.

This introductory essay tries to highlight some of the new fronts of engagement that have emerged, lacking which “Planning Law” as a field of study risks losing relevance and becoming anachronistic.

The importance of Law to Planning must be obvious to a student of its history in the United States. Lying at the intersection of utopian and reformist traditions of socio-political thought, “city planning” carried out by self-governing municipalities was one of the earliest instances of applying new forms of social knowledge to solve the problems of industrial societies. The legitimacy of such planning in the
early 20th century depended heavily on legal recognition of the tools adopted by planners (and the institutions they served) to improve urban environments in the industrial age, such as sanitary and zoning ordinances, eminent domain, and building controls (Heathcott 2005; Akimoto 2009). The standard zoning enabling act adopted by most American states during the 1920s, for instance, required local governments to prepare a “comprehensive plan” in rational pursuit of the general welfare of the community (Knack et al. 1996).

Planning thinkers, of course, disagreed vehemently about whether the contribution of the legal profession was beneficial to the development of Planning. In the 1930s, Rexford Tugwell, who played an important role in advocating for both city planning and national economic planning as necessary to tackle contemporary challenges in the United States, bitterly complained that “[t]he Constitution is used as a holy of holies within which the ugly practices of free competition can be hid from vulgar eyes”. Two decades later, Norman Williams Jr. (1955: 319) was able to legitimately argue that planning lawyers ought to take on the creative task of applying the “great constitutional guarantees of fairness, equality, and liberty of action” to planning problems. These debates about the role of Law sought to identify the place of the “social” in relation to the “market” within a capitalist framework, and the focus was on the limits exogenously imposed by Law on the powers of the State to undertake planning activities (Kennedy 2002). But the competence of planners to unilaterally pursue “public interest” was not brought under the scanner during this period.

It is widely accepted that, by the 1960s, the profession was facing a deep crisis of confidence because of its reliance on singular articulations of “public interest.” As American cities suffered from unemployment, inner-city crime, poverty and a variety of other problems, and as urban renewal programs continued to fail, many critics within and outside the profession argued that pluralist, collaborative, and incremental decision-making processes are more appropriate for identifying widely acceptable ways of tackling these “wicked” problems (Rittel & Webber 1973). The attention of planning theorists shifted to the tension between technical and communicative rationality (or, to phrase it differently, the tension between ‘top-down’ and ‘bottom-up’ approaches.) For new proponents of communicative rationality, the distinction between private and public sector organizations was less relevant than the methodology of “planning” used within both kinds of organizations (Healey 1992; Schon 1983). Soon after, the planning profession became the target of an even more devastating critique; scholars like Bent Flyvbjerg (1998) argued that, given the visible and invisible forms of power routinely exercised by elites in the decision-making process, rationality typically gives way to rationalization. Planning, according to these latter traditions, requires not just a calculus of “facts,” but also a calculus of coercion, consent and resistance.

It is possible to distinguish at least three levels at which the Planning profession has experienced radical transformations: the substantive, the institutional, and the methodological levels. Tackling “wicked” problems has forced the planning
profession to expand its substantive horizons beyond land-planning to incorporate certain aspects of economic and community planning, and to incorporate a variety of governmental and non-governmental actors at various scales (from local to international) within the planning process through institutional reform. Methodologically, this means that planners seek not only to use coercive power, but also to gain the consent of citizens, anticipate resistance, and on occasion, even to contribute to it (Yiftachel 1998; Sanyal 2005; Miraftab 2009). The imperative to adopt such a broad perspective has also been enhanced by globalization and the internationalization of the planning profession. Even simple problems seem to turn into wicked ones when they are encountered in developing country environments, given the lack of resources and expertise; moreover they often need to be addressed through an institutional patchwork even more multi-scalar than what American planners are typically accustomed to. Finally, the dangers of methodological reliance on technical rationality (and even communicative rationality) increase manifold with greater social distance between the planner and the subject of planning (a common feature in postcolonial settings).

Each of these transformations in the field of Planning opens new fronts for engagement with Law. The substantive expansion of planning as a field, for instance, requires planners to be aware of legal precedents more relevant to planners interested in economic development and environmental policy. Institutional diversification has meant that planners have, on many occasions, been compelled to engage with legal issues related to decentralization and public finance in their new roles. One solution to the anachronistic nature of Planning Law in its current form would consist of introducing legal precedents in these newer topics as well, and to adopt an explicitly comparative and international perspective.

A solution along these lines, however, tackles only one half of the challenge of renewing the engagement between Law and Planning. While it captures the diversity of Planning as a field, it continues to treat Law as a field whose doctrines are produced through autonomous “legal” reasoning, based on a coherent set of ideas about society, to solve disputes in a deterministic fashion and to shape society in its image. Such a treatment of Law is equally anachronistic, given that most traditions of legal analysis now explicitly acknowledge the indeterminate and contradictory character of Law as a social practice (Trubek 1984; Galanter & Edwards 1997). These recent methodological shifts allow us to think of the relationship between Law and Planning on a more symmetrical basis, and to look for resonances in the institutional practices that constitute the two professions. For instance, those who see Planning as a form of participatory problem solving might find that their arguments resonate with the pragmatist tradition within the “Law and Society” movement, which emphasizes bargaining, negotiation, and learning in the “shadow of the law” (Galanter 1981; Sabel and Simon 2004). Similarly, those who see resistance as an essential aspect of planning might benefit from engaging with more heterodox traditions such as legal mobilization (McCann 1994), critical legal studies (Klare 1981), critical legal geography (Ford 1994), and third world approaches (Gathii 2011). In a
nutshell, planners must learn to treat Law not as received doctrine, but as a potential resource for a more diverse set of social groups and their political projects. Such an approach provides a more useful form of engagement between Planning and Law, consisting of resonances that travel in both directions, rather than a unidirectional influence of Law (in its doctrinal form) on Planning as a profession.

The volume of Projections brings together five empirical research articles that advance the intellectual project described in this introductory essay. They are not likely to provide a comprehensive survey of the ground that Planning Law needs to cover; a systematic mapping of various legal and planning traditions that have emerged in the past five decades and the empirical research already being conducted in the intersectional spaces would be too ambitious a goal for this volume. However, the articles in this volume do offer some direction regarding areas might benefit from further research. In the next two sections, I identify some of the key contributions of these five articles by grouping them under the following headings: a) the sources of Law; and b) the mechanisms of socio-legal change.

The Sources of Law

At the most immediate level, the articles in this volume call for a broader understanding of the kinds of Law that matter for planners. Jesse Keenan, in his article on private mainstreaming, argues that environmental planners concerned about climate adaptation should pay attention to private law (including contracts and intra-organizational rules) as an important tool for promoting climate adaptation in the private sector. Based on his work, it is possible to imagine public-sector and private-sector planners working to circulate model contracts in the domain of real estate, thus bringing about a positive change in the adaptive capacity of the built environment. Amrita Sharma and Peerzada Raouf investigate the effects of constitutional law in India regarding the federal distribution of powers, such as the provision for greater autonomy for the state of Jammu and Kashmir, regarding the political economy of apple farming. Their work emphasizes the importance of legal provisions related to intra-governmental relations on social and economic outcomes. Bradley Por’s article examines the impacts of new human rights doctrines in Canada that allow homeless persons to take shelter in public spaces in the absence of alternate provisions. This is an important example of recent innovations in human rights jurisprudence being applied to issues of deprivation and poverty in the Western world. Though the last two cases do not invoke international law, in many cases planners have also been confronted by international legal norms (such as the Universal Declaration of Human Rights or World Trade Organization rules) that alter the powers and responsibilities of the local State (Frug and Barron 2006).

Two other articles highlight the impacts that legal procedures may have on social outcomes, quite independent of the impacts of legal doctrines. In her article on the siting process for aggregate extraction projects, Estair Van Wagner argues that
by allowing property owners to initiate the permit process for aggregate extraction, land-use law in Ontario limits the ability of community groups to resist these new projects and to assert affective claims on land that go beyond the logic of property. In her account, the work of restricting the kinds of claims that can be made against environmentally sensitive projects is done not by legal doctrine, but by the procedures adopted during the permit process. Similarly, Anuj Bhuwania argues that to explain how appellate courts in Delhi turned themselves into “slum-demolition machines,” one needs to understand the far-reaching procedural innovations adopted by Indian courts, rather than just the legal discourses employed by them. Whereas the first three articles encourage planners to pay heed to new areas of Law such as private law, human rights law, and inter-governmental law, the latter two articles highlight the importance of procedure on its own terms.

The mechanisms of socio-legal change

Liberal theories of Law assume that the legal order exercises its influence over social outcomes (including those related to Planning) in a somewhat determinate and uniform manner, such that all similarly placed individuals are governed identically. As discussed earlier, more recent heterodox legal traditions acknowledge the fragmented and uneven nature of the legal field, and argue that the impacts of Law are mediated by a variety of other social forces. These traditions of legal analysis are also more careful to distinguish between the coercive power of Law, its role in agenda-setting, and its persuasive force in the form of new ideologies and discourses— which corresponds broadly to Steven Lukes’ (1974) three faces of power.

For Estair Van Wagner, the procedure of granting permissions for aggregate extraction allows project initiators the right to set the pace of decision-making and to set the terms of the debate to their own benefit, such that the majority of the concerns of environmental groups and other dissenters are excluded. In Anuj Bhuwania’s article, elites in Delhi were empowered by the procedural innovations not due to the rigidity of procedure but because of its flexibility at the hands of the Indian courts. Under the “public interest litigation” regime, rules requiring petitioners to prove standing, and for adjudication to be limited to specific and narrowly defined disputes were done away with. Because of this, elites were able to set an extremely ambitious agenda of slum evictions that encompassed the entire city. Both examples correspond to Lukes’ second dimension of power—the power of agenda-setting.

For Amrita Sharma and Peerzada Raouf, constitutional provisions meant to guarantee the special autonomous status of Jammu and Kashmir played the dubious role of providing the Indian State with an alibi with respect to questions of economic development in India’s “internal peripheries.” Formalist analysis elides the asymmetric ties that bind Kashmir to India, and the deepening of dependency through the installation of rent-seeking political regimes at the state level (in addition to the continuing violence of the armed forces.) But it is evident that the provision for
autonomous status ultimately fails to legitimize Indian rule in Kashmir; it merely
dresses up brute domination to make it appear defensible at a very superficial level.

Another example of a mechanism by which the symbolic power of Law is deployed
is found in Bradley Por’s account of the engagement between the homeless and the
local state in Canada. Por argues that new legal norms which allow the homeless to
take shelter in public places simultaneously reinforce their invisibility as political ac-
tors, since they do not allow the homeless to organize around their common claims
to public space and to make these claims in public. Moreover, in Por’s account, this
invisibility is produced not just by actively preventing efforts to establish tent cities
and other practices of public claim-making, but also by inscribing - through urban
design - conceptions of “public”ness in physical space that exclude those who do
not have access to private spaces where bodily needs can be met (such as the home-
less.) Put together, these articles offer an extremely nuanced and multi-layered un-
derstanding of Law. Indeed, all the articles in this issue treat the influence of Law on
planning outcomes as necessarily contingent results that defy easy generalizations.

This introductory article is an extended critique of the paradigm – still popular in
most courses of Planning Law offered in American graduate programs – that tries
to identify the limits for Planning based on legal doctrines. In contrast, one of the
most revealing facts about all five articles is that it is impossible to identify where the
realm of “Law” ends and where “Planning” begins. This is perhaps most evident in
Bhuwania’s article, in which judges and lawyers themselves seem to take on the role
of planners to set out on a city-wide campaign to demolish slums. As D. Asher Ghe-
ертнер (2010) has shown, many judges in Delhi involved in the demolition of slums
were primarily motivated by aesthetic concerns – typically considered the province
of architects, urban designers, and planners, rather than that of judges. But even
in Ontario, the process of granting permits for aggregate extraction often involves
decision-making by the Ontario Municipal Board, which creates a fuzzy boundary
between Law and Planning (Van Wagner, this issue). In Vancouver, designers and
judges both take part in reinforcing the public/private distinction, but it is clear this
ideology does not flow from the legal profession to designers in any linear fashion
(Por, this issue).

Indeed, it can no longer be assumed that legal rationality always trumps other forms
of reasoning in these intersectional spaces. Based on the articles in this volume, the
reader may conclude that social power, in its basest form, is profoundly irrational;
it privileges no form of rationality, whether it is the legal rationality of Law or the
technical and aesthetic rationalities typically employed by Planning. If Van Wagner
and Por argue that the conservatism built into both Law and Planning prevents
marginalized groups from making novel claims, then Bhuwania suggests that
marginalized groups should be equally wary of procedural innovations supposedly
meant to attend to the concerns of the poor. Only Jesse Keenan’s article adopts an
optimistic tone by suggesting that the mainstreaming of climate adaptation measures is possible through the use of private law by real estate firms, but Keenan’s argument may well be making a virtue out of necessity.

It is evident that the articles in this volume paint a bleak picture of both Law and Planning, by highlighting the inability of both professions to play a consistently progressive role in wider social processes. In this context, it is helpful to recall E. P. Thompson’s powerful defence of the “rule of law” in his history of 19th century enclosures in Britain.

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class’s hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just (Thompson 1975: 263).

One might argue that this defence of Law applies just as forcefully to Planning. In the case of the Occupy Vancouver protests, for example, neither the ideological construction of public space, nor its inscription in the design of the public park could prevent homeless persons from re-appropriating such space for their own political uses (Por, this issue). Rather, it was only with brute force that the sanctity of the public/private distinction was restored. Moreover, for the State to maintain this distinction, it has had to establish places where those without private places of their own can attend to their bodily needs, and the need for such alternate places of shelter has been codified both in Law and in Planning. These concessions have emerged as opportunities for political mobilization by the marginalized, which may lead to further gains and cannot be dismissed entirely.

A renewed engagement between Planning and Law, therefore, cannot be limited to introducing planners to more laws or even to various approaches towards legal reasoning. Rather, our engagement with Law should focus on what to learn from the too-common tendency for Law to become an alibi for domination, and the occasional opportunity it provides for countervailing political action. How do we ensure a better fate for Planning, and how do we plan a different fate for Law?

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REFERENCES


ABSTRACT

This article looks at a public place in Vancouver, BC – Robson Square – and considers how laws inscribe dominant notions of public space that politically exclude the homeless. Reflecting critically on the BC trial and appeal court decisions in Victoria (City) v. Adams that found a right to temporary overnight shelter in public places for the homeless under s. 7 of the Canadian Charter of Rights and Freedoms, the clarified limitations on the right are seen to reinforce notions of public and private that enable individual bodies to be protected from the elements, but ensure that tent cities like the one that initiated the case can be treated as illegal. The Occupy Vancouver tent city, and current proposals to redesign Robson Square, are employed to demonstrate how law and design intersects in public places to keep the homeless politically invisible, and how this exclusion is unmade by homeless actors gathering in community.

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Robson Square is the central public gathering place in Vancouver, British Columbia (BC), Canada. This article considers how by-laws regulating Robson Square as public space function to exclude the homeless from the city “public,” embodied in the city square, and how a tent city that violated these By-laws placed the homeless at the center of the urban landscape as empowered political actors. This is a story about the Occupy action in Vancouver, during which a tent city was set up and inhabited by many homeless people, but ultimately dismantled by the City of Vancouver. Occupy Vancouver demonstrates how the regulation of public space is shaped by dominant legal and political narratives that were unmade, for a time, by homeless and other political actors gathered in a tent city. Before delving into this story, I discuss a Canadian legal decision that found a right to temporary shelter in public places, and the political theory I adopt to analyze how homeless people in tent cities empower themselves as political actors.

*Victoria (City) v. Adams:* The Power of Gathering

The legal right of homeless people in Canada to occupy public places with temporary shelter was decided in *Victoria (City) v. Adams (Adams)*, by a BC trial court in 2008 and again on appeal in 2009. The case arose from the actions of the City of Victoria, BC, which sought to enforce its By-laws that regulate public places (*Parks Regulation By-law, Streets and Traffic By-law*) by evicting a group of homeless campers from Cridge Park, a small park in the city center, where they had set up a tent city to protest a lack of affordable housing and problems of homelessness.

In the trial decision, Ross J concluded that the City’s By-laws, which prohibited taking up temporary abode in public places with tents or other structures (2008: 26), violated s. 7 of the *Charter of Rights and Freedoms*, which protects life, liberty, and security of the person, because they infringed the liberties of homeless people by denying them the choice to protect themselves with shelter, and deprived them of adequate protection from the elements required for bodily security (2008: 153-5). Key to the decision was the fact that far fewer shelter beds were available in Victoria than there were homeless individuals (2008: 69).

The BC Court of Appeal used this fact to uphold but clarify the decision, limiting the scope of protection by concluding that the By-laws were inoperative “only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds” (2009: 166, emphasis mine). *Adams*, which is a victory for finding a right for the homeless to set up overnight shelter in public places, also solidifies a legal principle that permanent encampments, like the one that initiated the case, are not allowed. Even the decision of the trial judge, which does not include a time limitation on the right to sleep in public places at night, retains a right for police to force the dismantling of temporary shelters each morning (Buhler 2009: 213).
The result of *Adams* is that homeless people in Canada now have a constitutional right to sleep overnight in public places under temporary shelter on an individual basis when there are no available shelter beds, but no right to gather or stay in these places. While the By-laws are neutral, in the sense of applying to homeless and non-homeless individuals at the same time and place, *Adams* has been critiqued for maintaining a perspective that excludes the homeless from the public. The City’s arguments for enforcing the By-laws were “thoroughly political,” according to Buhler (2009: 215), because they assumed that semi-permanent structures such as tents and strung-up tarps “represent the antithesis of ‘order,’” and frustrate the ability of the surrounding community to make use of and enjoy the place. The City’s enforcement of its By-laws placed the homeless in an ongoing cycle of “real and symbolic ‘eviction’” from the public places they inhabit (Buhler 2009: 217). This effectively excludes the homeless, who do not have private space of their own, from the community of the city, by treating them as having no place. Other commentators have noted the same problem with the City’s arguments in *Adams*; without access to private space, excluding the homeless from public places leaves them with no right to be in any place, or at best without the choice to be anywhere but an institutional shelter (Milne 2006:12; Hamill 2011: 93).

In rejecting the City’s arguments, the *Adams* judgments show care and concern for homeless bodies, but do not fundamentally challenge dominant and exclusionary views of public space (Buhler 2009: 216). My concern is the political invisibility wrought by limiting the scope of the right to individuals sleeping in temporary shelters overnight. While s. 7 now protects homeless *individuals* against forced removal of temporary overnight structures, the source of power for the *Adams* claimants was not the legal decision itself, but the political action that brought the claimants to court. The tent city challenged the City’s By-laws, but did so by *gathering* homeless people in a public place with wide visibility where they asserted themselves as a community of political actors.

Power, according to the political theorist Hannah Arendt (1973:143), “corresponds to the human ability not just to act but to act in concert. Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together.” This theory sees gatherings themselves as sources of power. Arendt (1958: 179-80) says that the way people reveal themselves as more than mere bodily existence is through “speech and action,” but this can only be done “where people are *with* others and neither for nor against them – that is, in sheer human togetherness.” This, according to Arendt (1958: 180), “is only possible in the public realm.”

It has been noted that Arendt’s view of good public visibility requires access to both public and private space, with the private being essential to care for the natural needs of the body before appearing in public as a political actor (Borren 2010: 165, 167-70). Leonard Feldman (2004:120) draws on Arendt to study the politics of homelessness, and finds that Arendt makes three interrelated points about the necessity of having
private space for good public visibility: first, the home is where the necessities of “bare life” are attended to; second, the household provides necessary shelter from “the glare of the public realm”; and third, the home “provides the head of household with a political and spatial location and orients him as a citizen in the public sphere.”

The importance of movement from the private to the public and then back again, Feldman (2004: 15) suggests, is reflected in the treatment and representation of the homeless in society, which discloses a “fundamental relationship between political power and ‘bare life’.” Feldman seeks to uncover the dynamics at play in the political exclusion of the homeless, and looks at the role of the state and the political sphere in constituting relations of exclusion (2004:15). He draws on Agamben (1998: 2, 7) to argue that the confinement of bare life to the household is not “natural,” because this act of exclusion is present in the constitution of these separate spheres (Feldman 2004: 15). “Home-dwelling citizen and homeless bare life,” Feldman (2004: 20) says, “are political statuses, not social statuses,” and law functions to produce these statuses while “effacing the traces of its own constituting power to produce hierarchically ordered categories of persons.” This effacement can be seen in public space By-laws, which regulate activities that the homeless do in public out of necessity, effectively constituting homeless existence as illegal. The constitutive aspect of these laws is their embodiment of a public sphere that is free of bare life, and thus made exclusively for those who have homes.

What is interesting about tent cities, when placed in this public/private figuration, is that they make the homeless visible as political actors by harnessing their lack of private space, which generally functions to exclude. Arendt’s theory seems to consign the homeless to bare life status, but it has been observed that her view of public space is broad, and does not see “bounded public spaces” as exhausting or consummating politics (Kalyvas 2008: 192-3). Public space, for Arendt (1958: 198), “is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.” Place is important from this view, but the gathering of people is more important to a place’s public character than the particular boundaries attached to its official designation as public space. A public space may be “bounded” by law and design that legitimates and enables certain uses, but the people who inhabit a space can unbind it by using it in a different way; this unbinding is an enactment of a different sort of “public” than the “public” embodied by the space’s “official” boundaries. At Cridge Park, homeless people occupied public space and challenged the constitutionality of Victoria’s By-laws, and by transgressing the way this place was bounded they were making public space in a new way. The visibility of the tent city forced the surrounding community to pay attention to problems of homelessness, and did so because homeless people came together and stayed in place. The representation and treatment of homeless persons as bare life was subverted by the view of homeless people gathered in community for a political purpose. The tents provided private space for bodily maintenance, while collectively they formed a city-within-a city that was a new, non-exclusionary public space for the homeless. The legal transgression of public space affected by the tent city was also a subversion
of the constitutive exclusion of the homeless that dominant notions of public and private are built on.

At Cridge Park, homeless individuals asserted themselves in public as a community of political actors, and their transgression of the City’s By-laws was also a subversion of the dominant discourses inscribed in this public place. Participants were aware that by gathering and staying in place, they were empowering themselves, and the court case their visibility initiated and constitutional right that resulted were seen as key to what made this tent city extraordinary (Sargent 2012: 77). By making Cridge Park into a place of community for the homeless, public space was made anew as a place of inclusion and power, rather than exclusion and subjection. While the By-laws and dominant perceptions of public space depicted the tent city as inappropriate and illegal, the physical possibilities offered by the place and the physical reality of homeless people’s existence in public enabled a re-making of the place that was partially legitimated in court. The limitations placed on the s. 7 right in Adams, however, maintain the illegality of tent cities, even though it was the public visibility of a tent city that empowered the homeless claimants and brought them to court. These limitations reinforce the constitutive exclusion of the homeless that was temporarily subverted by the inhabitants of Cridge Park.

Robson Square: Law, Design, Exclusion

Robson Square is at the very center of downtown Vancouver, and contains the Vancouver Art Gallery, the BC Law Courts, an outdoor ice rink, numerous gardens, lawns, seating areas, pathways, and a large plaza at the north end of the square. Robson Square is the main public gathering place for the people of Vancouver, including many who come here to make themselves visible for political purposes (see Image 1 in Appendix).

Designed in the late 1970s by BC architect Arthur Erickson, Robson Square, in the words of a 1981 architectural review, was built as a “terraced urban park” that gave to the inhabitants of Vancouver a “much needed open space in the central downtown core” and became a “meeting place and a major civic cultural center” (Oberlander 1981: 7). Erickson’s (1986) goal was to create “a singular architecture that is in dialogue with the world.” The Law Courts complex was constructed as a low profile structure with a landscaped usable open space on top of its roof, surrounded by terraced steps, waterfalls and gardens, so that people can “walk down and through the building complex in pursuit of many daily tasks,” and the old courthouse was converted into the new art gallery (Oberlander 1981: 7). The one part of the square that maintained much of its pre-Erickson appearance, the north plaza, is commonly used for political gatherings and protests. Robson Square was built as a central gathering place for the city, but as the above description shows, the emphasis was on movement through the square, and temporary uses, such as lounging among the gardens and visiting the art gallery, or the less pleasant activity of going
to court. Designed to be the “city square” of Vancouver, Robson Square embodies the constitutive exclusion dominant political and legal discourses effect by dividing the world into public and private space.

The city square is the center of the urban landscape, and is the place in the city where public space is most clearly associated with the public conceived as political society. City squares are supposed to embody the city’s public: “[a]t their best, squares are microcosms of urban life, offering excitement and repose, markets and public ceremonies, a place to meet friends and watch the world go by” (Webb 1990: 9). The essence of a public square, according to Webb (1990: 9), is the particular features of “[p]ublic access and activity” that distinguish it from residential and other private squares. These features make city squares the main stage for the public visibility Arendt (1958: 7) sees as fundamental to human existence, because they embody the plurality of public life by being places that everyone can go to. Webb (1990: 217) sums up by saying “[w]hat makes the square so rewarding is that you need neither money nor a room with a view to enjoy it.” The experience of the homeless, who do not pass through public places but stay in them, suggests that while this accessibility may be the ideal behind city squares, people must in fact have a room somewhere in the city to be able to enjoy them.

Considering my own experiences in Robson Square, I am aware that my enjoyment of the place has been largely determined by the fact that I had a home elsewhere in the city. I have wandered “down and through” the staggered landscapes of concrete, glass, gardens, and waterfalls, just as Erickson intended, and have spent time inhabiting the place for leisure, work, and political purposes. But I have always returned home at the end of the day, and have always been in private places to take care of my bodily needs before and after being in the square.

Between 2007 and 2010, I worked as a canvasser for political organizations in Vancouver, and spent much time in this role on the street-fronts that bound Robson Square, soliciting for memberships and financial contributions. This job gave me a deep attachment to the place, as I met and persuaded many people here to support the organizations I was working for, and spent many hours developing relationships with fellow canvassers. Smith and Bungi (2006: 124) employ symbolic interaction theory in analysis of architecture, and submit that this theory contributes to our understanding of designed places by emphasizing “designed physical environments and the self potentially influence and find expression in the other.” I can say that this place has shaped me, and has influenced the development of my political personality, since I have spent so much time here promoting political organizations and campaigns, and participating in protests. I have also made its built landscape a place for myself, by interacting with the physical environment in ways that are open to me. Robson Square is designed to enable particular uses that I have harnessed to my benefit, some of which may not have been intended but are still seen as acceptable, and the law has allowed me to do so. A centrally located streetlamp on Robson Street, meant to light the way for people walking by, served as a perfect object for
me to lean back against and pitch pedestrians; the “grassy knoll” on the landscaped roof of the Law Courts complex provides space for taking a break or having lunch, but was used by our canvass crew as a place for briefings and practicing our canvass pitches. I have been empowered as a political actor in Vancouver as a result of these symbolic and physical interactions.³

My own experience, when contrasted with the experience of the homeless, indicates that my place in Robson Square is determined by my objective location in public space only in the sense that my body could be located at a designated place at a certain time. This fact would mean very little to me, or anyone else, without the stories I have to tell about what I did there. I do not know how the physical environment of Robson Square has played a role in the lives of homeless persons, because I only know my own experience of this place. I do know, however, that its design was not intended to shelter people, or to help people care for their bodies. It does enable common uses, notably the ability of anyone in this busy place to interact with a stranger near them, which is why this is a prime location for canvassing. Often when canvassing I would share space with people who were involved in a similar action, except theirs is considered by law to be “panhandling.” Each of us would speak to people passing by and ask for something, sometimes for money, sometimes only to have a conversation, but our actions were classified much differently. This difference brings law into connection with design, since the similar communicative possibilities that are offered in common to myself as a canvasser, and to another as a panhandler, by the built environment of this place, have been made illegal for the panhandler. In Vancouver, the Street and Traffic By-law makes it illegal to “solicit” in a way that is “obstructive” by specifying activities that essentially describe the act commonly known as “panhandling” (s. 70A). The British Columbia Safe Streets Act labels similar activities as “solicitation in an aggressive manner,” and “solicitation of a captive audience,” and prohibits them throughout the province (ss. 2 & 3). Canvassers for registered non-profits or charity organizations, however, are allowed to raise money in public places in Vancouver if they obtain a “Soliciting for Charity” license, and are permitted to canvass without a permit if they are not soliciting money (City of Vancouver 2014).

There may be some differences between what I did as a canvasser and what people panhandling do, but both are forms of solicitation, and I cannot say that I was never seen as “obstructive” or “aggressive” to someone who does not like canvassers. In the 1990s the city of Oshawa, Ontario, adopted a range of “public nuisance” By-laws that were explicitly based on a normative distinction between “begging” and other activities, such as solicitations conducted by charities and busking performances, which the City saw as posing no harm to the aesthetics and safety of the city center (Hermer 1997: 188). This distinction depicts the “beggar” as a threat to the order and beauty of public space, but the distinction between the activities is hardly an objective one. Indeed, the Oshawa By-laws were put in place in response to a perceived “image problem” in the downtown area from the presence of “troublemakers” and people “loitering,” who threatened the safety of more
respectable visitors (Hermer 1997: 173). The City presented a “vision” of a better “quality of life” due to the creation of “a perfectly ordered, sanitized sphere where the public nuisance of the loiterer has been ‘moved on’,” and the urban center is “cleaned up” and “restored” (Hermer 1997: 180). The logic of these By-laws reflects what Mitchell (2003: 186-7) sees as the privileging of “landscape” over public space; judgments about urban aesthetics preclude a concern for inclusiveness, so laws are designed to keep public places clean and ordered by effectively targeting homeless people whose existence disrupts the idealized landscape.

While the targets of these laws are not explicitly homeless persons, the inevitable placement of the homeless in public space means they are highly likely to be the ones “caught” loitering or panhandling. Amster (2004: 116-17) considers how public space is contested by the existence of “street people,” and notes that while laws are presented as neutrally regulating activities, the fact that these laws are put in place after a problem of loitering and panhandling has been identified, and many of the people so identified as causing the problem are homeless, exposes the flaw in this objectifying justification for sanitizing public places through the construction of deviance. I do not know who among the people panhandling near me in Robson Square were homeless, but the legality of my soliciting on the sidewalk alongside someone else whose soliciting has been made illegal raises questions about the politics at work in these by-laws.

Considering what I have discussed about the exclusion of the homeless from the political sphere by relegating private life to the household, the emphasis of these laws on clean and ordered public places devoid of “loitering” suggests a connection to dominant political and legal discourses that maintain a bounded space for public activity. Mitchell (2003: 183) writes that “[b]y being out of place, by doing private things in public space, homeless people threaten not just the space itself but also the very ideals upon which we have constructed our rather fragile notions of legitimate citizenship.” Political acts are seen as necessarily voluntary, by people who appear in public space to make themselves visible for a purpose; the involuntariness of homeless people’s existence in public space thus elicits both the fear that the political sphere is not safe and secure, and the perception that homeless persons are not real citizens (Mitchell 2003: 183). In this space, where bare life is excluded, the fact that the homeless do not “move along” is constitutively disruptive because it disturbs the boundary between public and private that political society is built on. The Oshawa by-laws even listed “gathering,” defined as “[a] ‘person’ alone or in a group that does not ‘move on’” as an offence (Hermer 1997: 186). By making the ongoing presence of people in public places illegal, laws reinforce the constitutive exclusion of those who do not have a private place. This political exclusion was challenged by the activists at Cridge Park, whose tent city rejected the illegalization of homeless people’s existence in public places, and created a new public space that was visible and disruptive of dominant notions of public space. The importance of such gatherings for the homeless is evident when I recall my own experience of being in Robson Square. This public space was designed and regulated by law to be inhabited
only temporarily, by people like myself who have a private place to go home to. As the city square for Vancouver, Robson Square provides a high-profile stage for the homeless to subvert the discourses that exclude them, and at Occupy Vancouver many did just that. It is to this event I now turn, to show how more than any other public place the city square embodies both the possibilities and challenges for homeless people marking their place on the urban landscape as political actors.

Occupy Vancouver: Un/Making Public Space

At Robson Square, the political exclusion of the homeless was subverted in a highly visible event that brought the homeless into community with other activists, who had a wide range of messages to convey and issues to draw attention to, but who collectively disrupted the boundaries of public space. On October 14, 2011, “more than two thousand people gathered in downtown Vancouver…for a rally against financial inequality” inspired by the Occupy Wall Street movement that had begun the month before in the United States (CBC News, 15 October 2011). Occupy Vancouver began similarly to other protests. People gathered at a rally in the north plaza, followed by a march around downtown (see Image 2 in Appendix). At the end of the day a tent city had been set up in the north plaza (see Images 3 and 4 in Appendix). A number of homeless people, estimated by a lawyer who represented the Occupiers in court to be twenty-six at one point, came to inhabit the Occupy tent city (Globe and Mail, 17 November 2011). A local professor of ophthalmology and visual sciences, who “put up a medical and first aid tent” in the tent city on the first day of the Occupy action, described the place as “a safe and welcoming haven for the homeless” (Pablo 2011).

My experience of Occupy Vancouver was exciting and affirming of my existence as a political actor in the city, as I imagine it was for many of its participants. I did break the law during Occupy, along with over two thousand other people, when we marched along downtown streets and closed them to traffic. This was allowed but it surely would not have been had we sat down in the street and decided not to leave. The people who stayed in the tent city, however, were in violation of by-laws similar to those at issue in Adams. In Vancouver, Section 3 of the City Land Regulation By-law states:

3. A person must not, without the prior written consent of the manager: (d) construct, erect, place, deposit, maintain, occupy, or cause to be constructed, erected, placed, deposited, maintained or occupied, any structure, tent, shelter, object, substance, or thing on city land…

Unlike at Cridge Park, this tent city was not set up specifically to house the homeless or draw attention to issues of homelessness, although these were major topics at Occupy Vancouver. It was, however, in violation of the same sort of laws at issue in Adams that prohibited the setting up of temporary shelter in public places, and many residents of the tent city were homeless. For these homeless Occupiers, at
least, *Adams* had some potential to afford constitutional protection of their right to stay in Robson Square overnight, but the illegality of the tent city may have been a foregone conclusion.

On November 4, the City of Vancouver served notice to the Occupiers that the tent city was in violation of the *City Land Regulation By-law*, in conjunction with a Fire Order pursuant to the city’s *Fire By-law (Vancouver (City) v. Sean O’Flynn-Magee 2011: 5 [O’Flynn-Magee]*). The Occupiers did not comply with the notice, and the City served a second notice along with a notice of civil claim to initiate injunction proceedings (*O’Flynn-Magee 2011: 6-7*). The City was granted short leave for an injunction hearing that occurred on November 8/9, at which the Occupiers were granted an adjournment until November 16 (*O’Flynn-Magee 2011: 8-9*). By the time of the hearing, after receiving a third notice, the Occupiers “had not removed the structures, tents and shelters” from Robson Square (*O’Flynn-Magee 2011: 10, 14*).

It is interesting how the City’s perceptions of Occupy Vancouver, and public reaction as depicted in the media, appear to have evolved between the initial rally and the move to evict the Occupiers nearly a month later. A news report the day after the rally described the event as a “protest” aimed at “building community,” and reported that the Vancouver Police found “a large but well-behaved crowd” and made no arrests, because “there were no serious incidents” (*CBC News*, 15 October 2011). This report, which noted the community building aspect of Occupy, did not mention the tent city that was set up after the rally and march, and its fairly positive depiction of the event was about a protest that gathered over two thousand people on a single day.

By early November public opinions about Occupy appeared to have soured. The overdose and death of a young woman in her tent led to Mayor Gregor Robertson’s decision to announce that he would take efforts to “end the encampment as soon as possible” (*CBC News*, 5 November 2011). The Mayor, in the midst of a re-election campaign, was seen to be facing his “toughest test” yet, in avoiding being “too aggressive” against the Occupiers while appeasing “the growing percentage of the public who, however sympathetic they might have been to the goals of the Occupy movement, are fed up with the camp” (Bula 2011). Some media reports debated whether Occupy had become either a “drug den” or a “haven for those most affected by the very societal problems raised by the protests.” Calls for the tent city to be disbanded were presented alongside the views of Occupiers, who noted the high number of overdose deaths that occur in Vancouver in “hotels, alleys or shelters” that the Mayor does not vocally respond to (Ball 2011). Other reports simply depicted the death as evidence that the tent city was unclean, unsafe, and had to go. A reporter for an online newspaper generally sympathetic to Occupy’s complaints about financial inequality declared: “[p]eople sleeping in tents in the cold and rain with obvious hard-drug use going on is not going to mobilize working people” (Tieleman 2011). A line between the acceptable first day march and the unacceptable ongoing occupation of Robson Square was drawn. The frustration with Occupy Vancouver reflected social fears about public space, in
which clean, ordered, and welcoming public places are seen as threatened by people who occupy these places for longer than deemed acceptable, particularly the homeless. The political goals of Occupy and its initial rally were widely supported, but the tent city was not, and the emphasis on the health and cleanliness of the encampment portrayed the Occupiers as a threat to public space. This is despite the fact that Vancouver Coastal Health, the organization responsible for delivering health services in the region, declared there were “no health concerns” regarding the tent city (Hui 2011). The notion that the tent city was unclean, unsafe, and unhealthy seems to have been influenced by its appearance, populated by homeless persons, and including some people who use drugs. Occupy took over the city square that is supposed to be the meeting place for the public at large, and this likely increased its threatening appearance to the inhabitants of Vancouver who did not stay in the tent city.

Douglas (2002: 162, 44) argues that notions of cleanliness tend to address situations of moral ambiguity or political contentiousness, where no obvious “right” answer can be found, and are often invoked in such situations to sanction persons when it would be otherwise hard to do so, by responding to actions that are seen as transgressive because they are constructed as so by a system of social ordering that classifies them as “dirty.” Douglas’ insights about uncleanliness have been applied in critiquing limitations on the ability of people to occupy public places, to reveal how charges of uncleanliness signal that occupations like tent cities transgress notions of the proper ordering of public space, and in particular the proper place of political dissent (Brash 2012: 64). A narrative based on health, safety, and cleanliness helped justify the City’s eviction of Occupy Vancouver. This narrative legitimated the rally, a form of protest people who had homes to return to at the end of the day participated in, but framed the tent city many homeless people stayed in, through which they gained political visibility as part of a community, as threatening and illegitimate.

At the injunction hearing which decided the fate of the tent city, lawyers for the Occupiers provided evidence about “the problem of homelessness in Vancouver with its insufficient shelter spaces and dangerous conditions,” citing “a shortfall of approximately 500 shelter spaces in the city,” and describing the shelter options that are available to the homeless as “far worse than at Occupy Vancouver’s encampment” (O’Flynn-Magee 2011: 32). Evidence was also presented refuting the health and safety concerns of the City (O’Flynn-Magee 2011: 34, 36). In response to the City’s claim that the tent city breached the City Land Regulation By-law, the Occupiers argued that a “clear breach” had not been shown because the by-law “was essentially the same as the by-law declared inoperable” in Adams “in indistinguishable circumstances” (O’Flynn-Magee 2011: 38). Mackenzie ACJ found that the Occupiers who “maintained and occupied tents and other structures” without the consent of the City were in clear breach of s. 3(d) of the by-law, and that the City had properly exercised its authority in serving notice that the tents needed to be taken down (O’Flynn-Magee 2011: 39-40). The constitutional argument employing Adams was deemed inappropriate for consideration at the interlocutory injunction stage, but Mackenzie ACJ found that this argument would not have assisted the Occupiers anyway, because Adams had
been decided on its “own unique facts” and applying it in this case would have been “an inappropriately broad interpretation” (O’Flynn-Magee 2011: 42). Mackenzie ACJ found that:

*Adams* only permitted temporary overnight shelter when the number of homeless people in Victoria exceeded the available number of shelter beds. Thus, it cannot be said that the decision in *Adams* supports an argument that the by-law in question in this case is “evidently unconstitutional” or “constitutionally suspect” (O’Flynn-Magee 2011: 42).

Mackenzie ACJ also found that the City would suffer “irreparable harm in terms of access to, and use of, public space,” despite the defendants’ claim that the Occupiers did “not pose a safety concern” and were “cooperating with other groups who may want to use” the space (O’Flynn-Magee 2011: 56-60), and held that the “balance of convenience” favoured the City, which had a right to “regulate the use of its land” in response to the tent city which “prevents others from using this public space” and raises “health and safety concerns at the site” (O’Flynn-Magee 2011: 61-7). In conclusion, Mackenzie ACJ granted the City its injunction, and ordered that the tent city be disbanded (O’Flynn-Magee 2011: 72).

Had the Occupiers challenged this decision in a trial court, using *Adams*, there could have been a case to be made refuting Mackenzie ACJ’s rejection of the constitutional argument, in which he attached the decision in *Adams* to the difference between the number of homeless in the city and the number of available shelter beds. Indeed, given the evidence supplied by the Occupier’s lawyers that shelter options in Vancouver were insufficient for housing the city’s homeless population, it is surprising this is the angle from which the constitutional claim was rejected. A more obvious reason that *Adams* would not help the Occupiers defend against eviction is the clarification in the *Adams* appeal judgment that only a right to construct temporary overnight shelter in public places exists for homeless persons under s. 7. The *City Land Regulation By-law* clearly makes the construction of any kind of temporary shelter in public places in Vancouver illegal, thus for homeless persons, who have insufficient shelter beds available to them, the by-law could be declared invalid to the extent that it prevents them from sheltering themselves overnight. Since *Adams* allows authorities to enforce public space laws by making homeless persons take down their shelter every morning, it is difficult to see how it could have been used effectively to protect the Occupy tent city, which was also inhabited by many people who were not homeless.

On November 21, the tent city, in compliance with the injunction order, was taken down from Robson Square. Defying the City’s efforts to make them disappear, the Occupiers moved their camp to the other end of the square, on the steps of the Law Courts complex, but under threat of another injunction they disbanded the next day, moving to a park in East Vancouver that did not gather as many people or last for long (CBC News, 22 November 2011). Thus ended the Occupy Vancouver action.5
While this large, multi-issue action did not center on homelessness, the tent city drew in many homeless people, who had shelter and support services as a result of being a part of this community. In the tent city they were able to create private space with individual tents that collectively formed public space in which the homeless could appear as political actors pursuing common purpose with others. The law, which as a result of *Adams* provides protection for homeless persons who need to shelter their bodies in public places at night, did not protect the political visibility gained by a number of homeless people through participation in Occupy Vancouver, and the move to evict the Occupiers was driven by a perception that the occupation was an inappropriate use of public space because it was ongoing, and was unclean and unhealthy. These facts point towards the constitutive exclusion inherent in dominant conceptions of public space, since the notion that ongoing inhabitation is inappropriate functioned to make the homeless participants politically invisible again. They also indicate that the Occupiers, by setting up a tent city at the very place that is supposed to embody the city’s public, were able to disrupt these dominant notions and remake the boundaries between public and private while they remained in Robson Square.

The City’s move to evict the Occupiers, while based on laws that clarify public places are only for inhabiting temporarily between private places, did not immediately stem from this supposedly objective legal fact. Rather, a narrative of uncleanliness, unhealthiness, and lack of safety facilitated enforcement of the by-laws. It is important to clarify that this narrative does not denote the existence of sinister intentions on the part of City officials or members of the city public who became frustrated with Occupy. Concerns with safety, health, and cleanliness, and with obstruction in Robson Square, must be taken on their own terms. Blomley (2011: 3), considering the legal regulation of sidewalks, finds an underlying rationality that he calls “pedestrianism,” which understands the sidewalk as a finite resource that is threatened by competing interests, which authorities must regulate by arranging bodies and objects such that they do not obstruct the sidewalk’s primary function, which is movement and flow. The regulation of the sidewalk, Blomley (2011: 10) says, shows that it is a “legal space,” which helps to “materialize and constitute the legal in the social world.” The focus on movement and preventing obstruction, Blomley suggests, constitutes the sidewalk as a non-political space, so concerns about the rights of the homeless and other people who are affected by laws ensuring the free flow of pedestrians can be sidestepped (Blomley 2011: 12). The ordering of the sidewalk is depoliticized by a logic that is seen to arrange objects but not power relations, because pedestrianism is about the space, not politics or rights (Blomley 2011: 110). With this rationality, the bracketing of concerns about the rights of homeless people can be seen as an outcome of common sense or a deeply felt social imaginary, for it is obvious that obstructions of flow must be regulated to ensure the continuation of the sidewalk’s primary purpose, movement (Blomley 2011: 103).

In Robson Square, we can view the frustration with Occupy as reflecting a similar social imaginary, although it is not so apparent how concerns about movement are
applicable to the city square. Unlike the sidewalk, the city square is a less obvious place to apply the same logic that privileges movement, as one of its primary functions is to serve as a place for gathering. The by-laws that were enforced to evict Occupy were nevertheless about obstruction, and Erickson designed Robson Square for people to “walk down and through” on their way between other places. The emphasis on movement here reflects that while it functions as a place for people to stop and gather, the city square is still only intended to be inhabited temporarily. Robson Square was designed for people to pass through and do things like have a lunch break, or gather and participate in a rally, but not to set up tents and stay on an ongoing basis. The by-laws are intended to prevent obstruction, as the court decision that upheld their application to the Occupiers indicated, so that some users do not restrict the access of others. The right to temporary shelter is an exception to the rules against obstruction, but the overnight limitation placed on the right ensures that such obstructions can be cleared to keep the space open during the day when most people use it. Movement through the city square is different than on the sidewalk because people stop here and gather, but they are expected to move on before long. The city square, unlike the sidewalk, is constituted as a political space by law and design, but dominant understandings of public and private effectively make having a home a requirement for appearing in this space as a political actor. Thus the constitutive exclusion of people without homes is inscribed in the square by it being made as a political space clear of the clutter of private life and open to everyone to gather temporarily in public.

The eviction of Occupy, and the political invisibility this forced back upon the homeless Occupiers, appears to have been driven by the fear of ongoing occupation excluding the rest of the city’s public from the square. While concerns about health, cleanliness, and safety accompanied the move to evict, underlying these was the threat of political space being tarnished by private lives being lived in public. Engaging with this logic on its own terms, as Blomley suggests doing with pedestrianism on the sidewalk (Blomley 2011: 111), means acknowledging that the city square is supposed to be an open space for all members of the public, and that a tent city effectively excludes others from using this space. However, once we see the effects of the public/private divide in constituting the political sphere as a space of exclusion for the homeless, we can critique dominant understandings of public space and reframe the discussion to be about the perpetual political exclusion of the homeless rather than the temporary spatial exclusion of people who have homes. This perspective lets us see how law intersects with design in ways that are deeply political.

Recently, the City of Vancouver has moved ahead with plans for a redesign of the north plaza of Robson Square where Occupy Vancouver took place. Among the stated objectives are to “[m]ake the space inviting and safe,” and “as flexible as possible so that individual and small group use is as comfortable as large events,” and to “be a symbolic and physical center of the city” (City of Vancouver, “Block 51”: 1). The design proposals were influenced by a public questionnaire about how people use Robson Square; all of the specified uses people were asked to check off relate
to temporary, not ongoing use of the place, and by far the most common answer people gave was “[p]ass by on my way to another place” (City of Vancouver, “Block 51”: 3).

In consideration of how the north plaza is used as an “Event and Gathering Space,” the City’s public documents on the redesign project list “various protests,” “Occupy Vancouver,” and the annual “420 Vancouver” rally as examples of gatherings in this place (City of Vancouver, “Block 51”: 11). Both of these last events involve illegal acts of some kind. While the Occupy tent city violated regulations on use of the square, many activities that occurred at Occupy Vancouver, including assemblies, workshops, speeches, and protests, did not. The 420 rally, on the other hand, gathers thousands of people who openly smoke, sell, and celebrate marijuana, possession of which is made illegal under s. 4 of the Controlled Drugs and Substances Act. Despite the clear criminalization of marijuana, the 420 rally is featured as a case study of how the north plaza is used as a gathering place, which includes a schematic diagram demonstrating crowd configuration during the rally (City of Vancouver, “Block 51”: 11). While public acceptance of marijuana may be fairly broad, especially in Vancouver, its use and possession remains a criminal act. The fact that this event is allowed and given more validation than Occupy, by being employed as an example of how gatherings fit into the designed environment of the north plaza, might thus seem surprising, without understanding exactly how public space is bounded through dominant political and legal discourses. A fundamental difference between Occupy and 420, which visually disrupt the order and cleanliness of sanitized public space in similar ways, is that at the end of the day on April 20 the rally ends, and people go home. This distinction, considering the City’s eviction of Occupy while it allows the 420 rally to occur every year, points to what made Occupy seem so threatening; the Occupiers stayed. Golan (2012: 134-5), reflecting on urban design and the Occupy movement, notes that the “public” in public space is both “underspecified” and “overspecified,” by being left open to regulation that is inherently political, and articulated in a “highly formal and programmed” way based on dominant norms of public and private. This underspecification and overspecification is reflected in the proposals for Robson Square, which identify it as an open space for protest gatherings, but emphasize uses of the square that are temporary and unobstructive to movement.

By coming to a rally to smoke or sell marijuana before going home at the end of the day, people break the law, but do not fundamentally challenge the dominant discourses inscribed in public space. By setting up a tent city in Robson Square, the Occupiers broke through the public/private divide that is seen as crucial for keeping public space sanitized for political society. This public space is the space of appearance for political actors, but it is a place where they meet as individuals, and the city square is the place where they become embodied as a community. The existence of a tent city that made its own community in Robson Square threatened the perceived sanctity of public space, because it created a new extra-legal public space that was not built on the same constitutive exclusion of bare life, but rather
subverted this exclusion by creating a city-within-a city that provided both the privacy of a tent and the visibility of a gathering in a public place. At the center of Vancouver, in this place where many city inhabitants have made themselves visible as political actors, a number of homeless people were enabled by Occupy to make themselves visible through participation in a political community. The fact that the law did not protect their visibility, but worked to make them invisible again, demonstrates the significance of actions like tent cities that create new, extra-legal public space where the homeless can both care for their bodies and partake in the empowering experience of revealing their political selves.

NOTES

[1] In October 2015, the Supreme Court of British Columbia (BCSC) found that the s. 7 rights of a group of homeless individuals who had set up a tent city in Jubilee Park, in Abbotsford, BC, had been violated by by-laws similar to those at issue in Adams (Abbotsford (City) v. Shantz at para 247). Hinkson CJ declared the by-laws invalid, but limited the declaration to “overnight stays between 7:00 p.m. and 9:00 a.m. the following day” (para 285) in accordance with the overnight limitation established by the BCCA in Adams. Interestingly, the claimants made arguments under ss. 2 (c) and (d) of the Charter, which guarantee the freedoms of peaceful assembly and association, but Hinkson CJ dismissed these arguments, on the grounds that it was not these freedoms at issue, but “the right to the use of public space for a purpose for which it is not generally intended” (paras 157-68).

[2] Interviews with inhabitants of the tent city conducted by Sargent (2012) indicate that community and political empowerment were important aspects of people’s experience at Cridge Park (70). One of the participants stated that the tent city “meant everything for me, it was a battlefield, although it was also a place for peace and freedom” (Sargent 2012: 71-2). Another participant expressed feeling security as a result of avoiding the negative attention from police that homeless individuals get when they are alone in public (Sargent 2012: 73-4). Others reported becoming politically engaged and involved in protests after Cridge Park, and feeling a sense of solidarity and oneness as a result of their participation (Sargent 2012: 75-8). Some participants indicated that the tent city was not meant to be permanent, but all agreed that tent cities are a feasible option when problems of homelessness are not being addressed (Sargent 2012: 78-80). Having a designated place to meet basic needs and return to each night were noted benefits, and one participant emphasized the importance of “reclaiming public space and making space for everyone, even those alienated from social services” (Sargent 2012: 78-9). From the perspective of the people who inhabited the tent city, belonging to a community and expressing a collective political will was deeply connected to the individual need to shelter the body at night. Yet these aspects were irrelevant to the judicial finding of a right to temporary shelter in public places.

[3] Kristine Miller’s (2006: 1) article about the politically and aesthetically controversial redesign of New York City’s Federal Plaza in the early 1980s is an interesting case study of how the public nature of a public square is not simply determined by law but constructed by design that limits “people’s ability to decide what they would do in a space and how they would do it,” and “reinforces who the public is by limiting how a site can be used.”

[4] Section 69(1) of Vancouver’s Streets and Traffic By-law states: “[n]o person shall form part of a group of persons congregated on a street in such a manner as to obstruct the free passage of pedestrians or vehicles, except with the written permission of the Council.”
While certain other cities have seen renewed Occupy events occur since the initial actions that sprang up in Fall 2011, particularly during the Spring/Summer 2014 “Wave of Action,” Vancouver has not (Hui 2014).

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City of Victoria, by-law No 92-84, Streets and Traffic By-law.

PHOTOGRAPHIC APPENDIX

Image 1: North plaza of Robson Square, December 2014 (Kris Por).

Image 2: March on first day of Occupy Vancouver, October 2011 (Bradley Por).
Image 3: Occupy Vancouver tent city, October 2011 (Geoffrey Kehrig).

Image 4: Occupy Vancouver tent city, October 2011 (Joseph de Lance).
ABSTRACT

This paper considers the role of law in structuring human relationships to our ecological communities through land use planning. The paper proposes an ecological-relational analysis for land use planning to foreground the people-place relations at stake in contested decisions about the use of private land. Based on original empirical research on Ontario’s land use law and policy, I demonstrate the role of law in upholding the primary role of the landowner as planner. Interview data is analyzed to explore the experiences of ‘more-than-owner’ parties who become involved in disputes related to aggregate extraction and to examine how some relationships with land are acknowledged by existing legal structures, while others are excluded in the context of particular places and communities.
Introduction

What is the role of law in structuring human relationships to the more-than-human world in which our lives are embedded? I consider this question by examining Anglo-Canadian land use law – which I define broadly to include property, environmental, and planning law – in the province of Ontario, Canada. Through land use law we recognize and uphold various forms of control over and particular types of use rights to land (Lametti 2003; Mossman & Girard 2014; Penner 1997); however, we have a much more difficult time recognizing relationships with land and ecological systems themselves, in particular relations of responsibility, or even reciprocity, with place (Graham 2010; Mossman & Girard 2014).1 These conceptual boundaries have important consequences for the people-place relations that are acknowledged and upheld by law.

While some argue that land use regimes have fundamentally redefined property relations from a commodified conception of private property rights towards democratized environmental decision making (Scotford & Walsh 2013), I will argue that we must critically consider the people-place relationships that are structured through the everyday practice of law in specific places. I seek to look beyond the broad and aspirational goals of “sustainability” and “balance” embedded in legislation and policy documents, to ask whether and how planning regimes construct or constrain the space for contestation in order to secure recognition for relations between land and the more-than-human world (Harrison & Bedford 2003:443).

Land use conflicts can provide strategic opportunities for interventions in the way we organize our ecological relationships. As outlined below, land use planning law and policy in Ontario provide important procedural rights to participation and consultation in decision making about the uses of privately owned land. While disputes about the siting of infrastructure and industrial development, such as the conflicts about aggregate mineral mines, or quarries discussed in this article, are sometimes characterized as purely about localized and narrow ‘not-in-my-backyard’ (“NIMBY”) politics in conflict with the broader public interest, land use disputes often raise a complex combination of issues and can become forums for attempts to disrupt traditional property relations. As Groves et al. argue, “siting conflicts over such infrastructure often act as condensation points for wider concerns, which can ‘cross scale’ from the interests of a specific community to connect with national and international issues” (Groves et al. 2013:340). Valverde’s research on the urban planning context in the city of Toronto demonstrates how conflicts about a wide range of socio-political issues are ‘funneled’ into the forums created by planning law’s public and consultative structure in Ontario (Valverde 2012:12).

In this context, I argue that critical examination of the day-to-day operation of participatory planning rights is required to understand how the values and relationships at stake are asserted and defined by parties and decision makers. Do the legal rights to be informed about, and to appeal and contest land use decisions offer more
than a forum for competing claims of property to be efficiently channeled? Do they offer more than a way for opposition to private development to be managed in the interests of public interest narrowly defined as economic growth? Do they create space for rethinking of property relations? Or do they serve as an exclusive channel for privileged groups to perpetuate environmental injustice and spatial inequities?

This paper is an initial attempt to take up these questions through a study of a series of regional planning conflicts over the siting of aggregate mineral mines in Ontario. Below I set out a relational approach to land use conflicts and propose an eco-relational analysis of land use planning law. I then consider the current legislative framework for siting aggregate mineral extraction in the Province to examine law’s work in structuring people-place relations. As part of a larger empirical study, this paper specifically applies the relational approach to consider the ways in which Ontario’s planning law and policy organize and control the types of claims asserted in relation to land and ecological systems. The complex, and sometimes contradictory, values and relationships articulated by a range of parties in aggregate conflicts will be examined in greater depth as part of the larger project.

Relational Theory and Land Use Disputes: Why a relational framework?

What does it mean to be constituted by relationships rather than just living among others? (Nedelsky 2012:19)

The relational work that law does in land use planning disputes has specific and material consequences for land and human and ‘more-than-human’ communities (Graham 2010). Understanding how law structures people-place relations in specific places is essential to our capacity to respond to the current ecological crisis. In particular, the legal construction of the relationships between landowners, other parties, and the land itself, shapes and constrains what is at stake in the land use decision making process, and consequently impacts the ecological and material outcomes. As I have argued elsewhere, a relational legal analysis is ideally suited to exposing and examining law’s role in shaping people-place relations (Van Wagner 2013).

By offering an ecological adaptation of the relational rights theory of Canadian legal scholar Jennifer Nedelsky, my aim is to foreground the specific way in which land use law operates to constitute our relationships with the wider ecological communities in which our are lives are enmeshed. Nedelsky’s work has influenced a growing body of feminist and critical property scholarship whose work reimagines property as responsibility, connection, and belonging rather than as exclusion and protection from the collective (Cooper 2007; Keenan 2010; Nedelsky 1990; Singer 2001; 2009). In Law’s Relations, Nedelsky proposes a relational rights framework with both methodological and normative dimensions. It is this formulation of her relational analysis that I engage with below.
For Nedelsky, an essential element of understanding the world relationally is seeing the interconnection between personal and institutional relationships: “each set of relations is nested in the next, and all interact with each other” (Nedelsky 2012:31). From this perspective, we can understand people-place relations as nested in broader relationships with family and human community, as well as the hydrological, geological, and ecological relations of the more-than-human world in a specific place, which are themselves shaped by societal structures of property ownership, land use regulation, and informal attitudes to the environment. In turn, broader economic forces, as well as global climate trends and environmental conditions, natural disasters, and human-induced ecological crises, shape these structures. In her view, through exposing the way that law structures key relationships we can better understand what kinds of decisions are being made (Nedelsky 2012:65). Nedelsky offers her relational rights approach as both an evaluative and transformative framework through which to resolve disputes (Nedelsky 2012:32). Once this underlying context has been identified, the inquiry shifts to examine the values at stake, which she describes as the broad articulations of what is essential in a particular society. She then asks us to consider the kinds of relationships that would foster those values, leading to a consideration of what particular forms of ‘rights’ would structure relations differently – rights being the “institutional and rhetorical means of expressing contesting, and implementing values” (Nedelsky 2012:236).

Because the abstraction of the dominant ‘bundle of rights’ model of property reduces the rich multi-faceted relationship between people and places to the ownership relation (Graham 2010; Gray & Gray 1998; Penner 1995), it is necessary to first make people-place relations visible in the decision making process before we can evaluate and potentially transform them. In particular it is essential to understand whether there are some people-place relations that are cognizable and others that remain outside the legally recognized rights and interests to land. If so, we must consider how this distinction is made and upheld.

**Relational Theory and Planning: Seeing People-Place relations in law**

Noting the limits of her own analysis to human relations, Nedelsky invites her readers to extend her relational rights framework to ecological relations:

> Once attention is drawn to what kinds of relationships generate a given problem and what is shaping those relationships, it will become clear that the human institutions and norms I offer as examples above are themselves conditioned by the availability of natural resources as well as the way humans have constructed control over those resources and the way humans understand their entitlement to them (Nedelsky 2012:22).

In my view, land use planning disputes offer a compelling context in which to take up this invitation. Indeed, they often serve as one of the few legal forums in which
these questions of control and entitlement are openly contested and alternative relations with land are, to some extent, “performed” (Blomley 2013).

Land use planning disputes are examples of “wicked problems,” (Rittel & Webber 1973) involving “multiple and competing values and goals, little scientific agreement on cause-effect relationships, limited time and resources, incomplete information, and structural inequities in access to information and the distribution of political power” (Lachapelle & McCool 2005:279). As such, they are contentious and notoriously difficult to resolve. Land use planning, and planning law, are also inherently relational in their concern with how we live together (Massey 2005). They are about relationships: relationships between neighbours, both near and far; relationships between those who own land and those who do not; relationships between those who make decisions about land and those who live with these decisions; relationships between humans and the animate and inanimate more-than-human agents we share space with; and, relationships between the present generation and past and future generations. While Valverde’s detailed study of Toronto’s planning regime points to the fundamentally “social” nature of all planning, she points to the integration of the governance of human and more-than-human as one of the unique elements of planning in need of much more scholarly attention (Valverde 2012:217). Planning processes provide for a wide range of parties to participate in legal decision making processes (Arnold 2002). Further, the physical world is uniquely exposed in land use decision making through photos, maps, technical data, but also stories and site visits (Van Wagner 2013). Land use planning is also prospective in nature (Arnold 2002:47; Van Wagner 2013). Unlike environmental and property law that intervene in people-place relations to remediate after harm has been done, planning law has the potential for proactive restructuring of relations to avoid ecological harms.

However, the important relational work that planning law does is under-examined by legal scholars and often overlooked by others concerned with environmental disputes. Valverde notes how the logic of zoning and land use law, focused on ‘uses’ rather than people, obscures law’s ordering of people and things (Valverde 2005:40–41). She has noted the incommensurability of the use logic of planning law and constitutional rights-based arguments relied on in many high profile land use cases (Valverde 2005; 2012). As Nicole Graham observes, law “swiftly transform disputes about physical land use practices into disputes over abstract property rights.” Parties that speak of property as place and the loss associated with transformation of the nonhuman environment become “dissident voices” (Graham 2010:163). In the context of land use disputes, a resource-oriented and instrumental planning perspective, can serve to obscure a range of relations that may be put forward by intervening parties (Henwood & Pidgeon 2001; Nash et al. 2010). In this context a relational analysis aimed at examining “the way law participates in a problem” is particularly relevant to understanding the relationship between law and planning (Nedelsky 2012).
My point is that while environmentally-motivated participants in land use disputes may find themselves frustrated with the process and the outcomes, land use planning is not inherently problematic from an environmental perspective. In fact, as noted above, it has some particular strategic potential for the transformation of ecological relations. Through careful and detailed attention to the legal structuring of relations through deeply embedded constructions of land as property and more-than-human others as objects, proprietary rights of control, exclusion, use, and destruction, facilitate power over the more-than-human world rather than responsibility to, and even reciprocity with, our ecological communities. As Harrison and Bedford argue, “a planning system underpinned by an ideology of private property rights and a free market forecloses alternative ways of valuing the natural world” (Boucher & Whatmore 1993; Cowell & Murdoch 1999; Foster 2002; Harrison & Bedford 2003:352). Therefore, while land use planning can be understood as creating space for alternatives to traditional property relations and may facilitate “public reflection on substantive issues” (Groves et al. 2013:342), we need to understand whether, and how, such opportunities are being realized on the ground in particular places. In my view, the promise of an ecological-relational analysis is the opportunity to link the broad participatory opportunities of planning contexts with the unique visibility and presence of place in land use disputes. In doing so, it opens up space for transformative performances of ecological relations and the treatment of people-place relationships as socially and legally significant.

From Relational Rights to Eco-Relational Rights: Place in land use law

In shifting the relational rights analysis towards an ecological-relational framework, this paper adopts the language of ‘place’ and ‘people-place relations’ to understand the overlapping and nested relationships within the ecology of specific landscapes inhabited by communities of human relation alongside complex and layered networks of materials and entities. Place is used to express an explicit acknowledgement of the relationality of the human and more-than-human: the negotiated “thrown-togetherness” of relation that make up the social and material dimensions of particular places (Massey 2004:140–141). In this way, the language of place replaces the division imposed when we talk about ‘resources’ – rocks or trees, plants or animals, lakes and rivers removed from their networks of ecological interdependence to enable use and profit. At the same time, the affective elements of people-place relations that are often excluded from technical resource-based planning are also made visible in this conception of place (Nash et al. 2010), and acknowledging the political nature of claims about, and to, place therefore reveals place-making as a site of power relations (Murdoch 2005:23; Pierce et al. 2011). This paper builds on Martin et al.’s conception of place as, “a setting for and situated in the operation of social and economic processes,” and “place claims” as “attachments to, and identification with, specific places” and their “ideals about land use and how spatial processes should unfold” (Martin et al. 2010:732, 182) to understand the political nature of particular places.
Martin et al. note how land use disputes expose the “discontinuity between place identity and legal regulation of place,” as relevant legal frameworks fail to account for the range of concerns and attachments expressed by participants. Pierce et al. (2011:61) argue that the concept of relational-place is “particularly relevant to conflicts that centre on change in and of places.” Building on Massey’s concept of places as “bundles of space-time trajectories” to construct a multi-scalar and relational concept of place they conclude that “all places are relational places” (Pierce et al. 2011:60). Relational places are made up of “raw materials,” including, “physical features, individuals, coalitions, corporations and groups, as well as myriad parts of the built environment” (Pierce et al. 2011:59). Selection amongst these raw materials shapes both “individual human-environment experiences,” the formation of shared understandings about places and their meaning in pursuit of collective goals. These “bundles” are dynamic, ongoing and change over time, each place-frame being only ever a negotiated and strategic “fraction of a place” (Pierce et al. 2011:61). The disconnect between people’s place claims and law is “one of the central features of the law-space nexus” (Martin et al. 2010:182).

This paper contributes to the need for further research exploring the actors and networks that mediate spatio-legal production in struggles over land use (Martin et al. 2010) by examining law’s role in structuring the people-place relations at the heart of a specific set of conflicts. As will be discussed below, the persistent centrality of private property ownership in substantive decisions about how private land can and should be used is concealed by the procedural emphasis on participation and consultation in Ontario’s provincial land use governance. This privileging of the ownership relationship is further obscured by an emphasis on measurable and purportedly rational and objective criteria in the adjudication of land use disputes despite the affective and embodied nature of the ecological relationships at stake.

By focusing on parties who do not have ownership rights to the land involved, I centre the broad ‘more-than-ownership’ interests engaged by such disputes. In doing so, I examine the ways in which law creates, responds to, and resolves the discontinuities between place claims and legally recognized relations to place. Such parties or participants are most often defined as non-owners, third parties, or objectors, defined by their distance and exclusion from the primary legal relationship of, and the lack of enforceable interests at the outset of the analysis. Here, I reject a negative or residual definition and adopt the language of more-than-ownership to describe these parties and interests. My intention is to capture both the individuals and groups whose direct place-relations will be impacted by land use decisions and those who may be more indirectly connected to specific places but have related expertise and/or interest in the outcome. While not taken up directly in this paper, my intention is also to create space for the more-than-human entities with impacted relationships and interests, such as animals, plants, rivers, rocks or forests. These categories are not intended to simplify or romanticize local or “community” opposition – which can combine potentially exclusionary or parochial site-specific concerns with the assertion or development of more transformative socio-ecological relations. In this
sense, ‘more’ is used to acknowledge those interests that fall outside of property-relations defined by the ownership model and not to grant any particular relation greater or privileged status. This shift in language is an initial attempt to account for the wide spectrum of contested relations with, and within, place that are shaped, obscured, and potentially disciplined by law.

**Methodology**

This paper is part of a larger research project involving documentary analysis of the law and policy governing aggregate siting, which includes applications and appeals between 2001 and 2014 in Ontario, as well as the written and oral submissions made before a legislative review committee. An initial review of the Provincial Environmental Registry, a public online database governed by the *Environmental Bill of Rights* (1993, SO 1993, c 28), where all *Aggregate Resources Act* (R.S.O. 1990, c. A. 8 [the “ARA”]) applications are publicly posted identified 242 decisions on large-scale industrial aggregate mines, including approvals, withdrawals, and denials. A database of the decisions was constructed identifying the dates of proposal and decision, location, depth of extraction, volume of extraction, objections filed, key issues identified, and, decision maker for each.

I selected cases for more detailed analysis through a review of key documents to identify the level and nature of participation by members of the public and regulatory and planning bodies. Cases with high levels of more-than-owner participation were identified and from these I selected proposals or appeals resulting in, or likely to result in, a hearing before the provincial land use tribunal. Selection was informed by the relational-place “methodological hooks” proposed by Pierce et al. (2011:61), in particular to “identify and examine the place-frames central to the conflict” and to “identify those actors and institutions key to place-framing” (Pierce et al. 2011:61) with a specific focus on more-than-owner parties. The cases included applications that were approved, denied, and withdrawn, as well as some additional cases including both large-scale extensions not included in the Provincial reporting regime and ongoing cases identified by a review of media coverage and through interview participants. Unstructured in-person interviews were held with over 25 participants in aggregate extraction disputes. Participants were largely activists in locally organized interest groups who had asserted, or continue to assert, more-than-ownership interests in relation to the land at stake in a particular proposal. In addition, two lawyers, one technical consultant, one policy analyst, and two planners were also interviewed. Interviews took place in both one-on-one and small group settings. Where possible, interviews took place in the area that was the subject of the conflict, or I made subsequent site visits. All participants provided maps and often photographs of the sites. In two cases, participants took me on a tour of the larger area of the proposed development.
Legal and Policy Context:
The law of aggregate extraction in Ontario

Like many jurisdictions, Ontario has developed a complex system of land use planning (Blais 2011; Cullingworth 1987; Kaplinsky 2012; Sandberg et al. 2013), including the overlapping network of laws that govern the use of private land (Environmental Commissioner of Ontario 2012). The ‘public interest orientation’ and consultative nature of the provincial planning regime suggests the existence of legitimate interests in land beyond private ownership. In fact, one of the key promises of planning is to reduce conflict where the ‘private’ and ‘public’ interests in the use of private land clash (Blais 2011:52). Key aspects of provincial land use planning law and policy, such as zoning law, are premised on the acceptance of public limitations on the right of an owner to use their property in any way they wish (Kaplinsky 2012; Valverde 2012:139). Unlike the United States and Australia, Canada does not have constitutional protection for property rights and Canadian courts have traditionally taken a highly deferential stance on the power of the state to regulate the uses of private property (Mariner Real Estate Ltd v Nova Scotia (Attorney General) 1999; Canadian Pacific Railway v Vancouver (City) 2006).

In Ontario, and other jurisdictions, participation in planning processes has realized some “subversive” potential. However, Anglo-Canadian planning remains rooted in the liberal individualism of colonial property law and continues to enforce abstract, hierarchical, and anthropocentric conceptions of human-environment relations that limit the potential to reimagine people-place relations (Borrows 1997; Mossman & Girard 2014; Van Wagner 2013). In particular, despite the lack of constitutional protection for private property, the practice of land use law in Ontario reinforces the role of the owner in determining the use of private land. The case of aggregate mineral extraction in Ontario provides a useful illustration of the private landowner, and particularly, as the “primary land use decision maker” in the Canadian context.

Situating Aggregate Mineral Extraction in the Provincial Land Use Regime

While aggregate mineral extraction developments are open-pit mines, in Ontario they are regulated under land use planning law and policy. Unlike other large-scale industrial mining developments in the Province, they are also largely located on privately owned land. And, unlike other ‘locally unwanted land uses (“LULUs”), the siting of aggregate mineral mines is driven by private-owner proponents rather than public siting processes, such as environmental assessment.

Planning law in Ontario operates through a complex web of legislation and policy. Figure 1 illustrates the detailed “inventory of the laws” potentially applicable to any given aggregate extraction dispute in the Province. Land use planning falls within provincial jurisdiction over municipal institutions and property and civil rights. In the context of aggregate extraction, the legal framework includes, the constitutional
and/or treaty rights of First Nations and Metis communities and the applicable Indigenous legal orders, municipal powers and centralized provincial planning policy under the Planning Act, the Provincial Policy Statement (Ministry of Municipal Affairs and Housing 2014), [“PPS”], provincial planning regimes, particularly the Niagara Escarpment Development Plan Act, and the ARA and associated Ministry of Natural Resources guidelines and standards. While the decision making process flows from the Act, most hearings in quarry conflicts include, and many are focused on, consideration of amendments to the local municipality’s Official Plan and zoning by-laws required. The Province provides broad guidance and maintains considerable power to constrain local government action through both the Planning Act and the PPS, which “sets the policy foundation for regulating the development and use of land.”

<table>
<thead>
<tr>
<th>MUNICIPAL</th>
<th>PROVINCIAL</th>
</tr>
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<tbody>
<tr>
<td>Official Plan(s) and Development Plans (municipal/regional), Zoning, Bylaws, the municipal land survey</td>
<td>Aggregate Resources Act, Planning Act, Endangered Species Act, Ontario Water Resources Act, Environmental Protection Act, Environmental Bill of Rights, Provincial Policy Statement, provincial land use plans, MNR guidelines and manual, common law of property</td>
</tr>
</tbody>
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<table>
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<tr>
<th>FEDERAL</th>
<th>INTERNATIONAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fisheries Act, Endangered Species Act, Trade Agreements (NAFTA), Environmental Assessment Act, s.35 of the Constitution (Aboriginal rights and title) and the Duty to Consult, Canada Lands Inventory, Canada Soil Survey, the Geological Survey of Canada</td>
<td>International Investor Protection Mechanisms and Dispute Resolution in NAFTA and other Trade Agreements, international human rights and environmental obligations</td>
</tr>
</tbody>
</table>

Figure 1: Inventory of Laws for Aggregate Extraction Siting

Within this provincially led planning regime, the bulk of day-to-day planning powers and responsibilities are devolved to local municipalities. However, formal public participation requirements for local planning and development decisions are set out in the Planning Act (s. 17, 22, 26.2, 34). Review of planning decisions is divided between the Ontario Municipal Board (OMB) and the Environmental Review Tribunal (ERT), ostensibly dividing “land use” from “environmental” decisions, despite the environmentally-focused nature of many objections to planning decisions (Sandberg et al. 2013; Van Wagner 2013). However, one of the unique features of Ontario’s planning system remains the powerful role of the OMB, a quasi-judicial administrative body, which serves as the primary appeal body for planning and development decisions, including ARA licensing and associated planning approvals.
The data collected from the Environmental Registry revealed that applications for large-scale industrial aggregate mineral mines under the ARA are overwhelmingly approved, both by the Ministry that oversees licensing, and by the quasi-judicial appeal body that contested applications are reviewed by in Ontario. Table 1 shows that between 2001 and 2014, 86% of large-scale ARA applications listed on the Registry were approved with only 2% having been denied. While close to 12% are withdrawn, in at least two cases, the applications were resubmitted with modifications. In another case, the application was withdrawn after a multimillion dollar settlement with the Province and an unsuccessful claim against the Federal government under the investor protection clause of the North American Free Trade Agreement (NAFTA). While another high profile withdrawal by the Highlands Company in 2011 is widely seen as a victory for the well-organized opposition, which brought together farmers, urban food movement activists, second home owners, environmentalists and indigenous groups, a revised Ontario geological survey now indicates that the applicant’s technical assessment of the quality the rock was incorrect and the value was overestimated.

<table>
<thead>
<tr>
<th>Decisions</th>
<th>#</th>
<th>%</th>
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<tbody>
<tr>
<td>Approved</td>
<td>208</td>
<td>86</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>28</td>
<td>12</td>
</tr>
<tr>
<td>Denied</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>242</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 1: Decisions on Class A Licence Applications under the Ontario Aggregate Resources Act 2001-2014 as reported on the provincial Environmental Registry

An overwhelming majority of the applications are approved. In many cases, this is despite substantial public participation in planning tribunal hearings and strong objections by the community and sometimes planning agencies as well. Community activists often provide alternative expert evidence at their own expense, even in areas covered by explicitly “environmentally focused” development plans, such as the Niagara Escarpment in southern Ontario. Table 2 shows the range of public commentary or objection for each category of decision, based on the Environmental Registry data.

<table>
<thead>
<tr>
<th>Decision</th>
<th>Range of Numbers of Comments Filed</th>
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<tbody>
<tr>
<td>Approved</td>
<td>0-1108</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>0-1563</td>
</tr>
<tr>
<td>Denied</td>
<td>0-441</td>
</tr>
</tbody>
</table>

Table 2: Range of levels of comments/objections filed by members of the public and/or government agencies (local, provincial and federal)

While the Minister has discretion to grant an aggregate extraction license despite outstanding public objections, in practice almost all cases in which the proponent
does not “resolve” all concerns, the adjudication is referred to the Ontario Municipal Board where the planning process is transformed into a quasi-judicial adjudicative process. Table 3 below shows the breakdown of decisions referred to the Board by decision maker. Seventeen percent of applications are adjudicated, with 83 percent being dealt with directly by the Ministry. However, it is important to note that Ministry approval does not necessarily imply that objections have been resolved from the perspective of the more-than-owner parties. As described below, while the applicant has two years to attempt to resolve concerns, once they notify the Ministry, parties have only 20 days in which to affirm their objection, or it is deemed withdrawn. Technical expertise, capacity, and financial resources may be as important in determining whether a party will maintain an objection as their substantive concerns, particularly in light of the near certainty that the application will be referred to the Board. Hearings for contentious applications can be quite lengthy and expensive, particularly if an individual or group obtains legal advice. For example, the Dunroon quarry extension hearing lasted 169 hearing days. One interview participant observed the limitations of poorly funded local groups directly, having worked in environmental departments of government for many years, noting how success was linked to financial resources rather than substantive issues:

“Obviously many of them had very legitimate issues but unfortunately they were … driven by bake sale funds, could not afford the scientific studies … that were needed, so it became very difficult for them to argue their cases.”

Interview participants almost uniformly viewed success before the Board to be unlikely.

<table>
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<tr>
<th>Decision Maker</th>
<th>Approvals</th>
<th>Denials</th>
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<tbody>
<tr>
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<td>%</td>
</tr>
<tr>
<td>MNR</td>
<td>178</td>
<td>82</td>
</tr>
<tr>
<td>OMB</td>
<td>28</td>
<td>13</td>
</tr>
<tr>
<td>Joint Board</td>
<td>2</td>
<td>&lt;1</td>
</tr>
<tr>
<td>Total</td>
<td>208</td>
<td>96</td>
</tr>
</tbody>
</table>

Table 3: Outcomes for approved and denied applications by decision maker for decisions on Class A Licence Applications under the Ontario Aggregate Resources Act 2001-2014 as reported on the provincial Environmental Registry

The discussion below considers the finding that legal outcomes are skewed towards applicants, in this case aggregate extraction companies, from a relational perspective. I first examine the types of claims about what was at stake in the disputes and then explore how the legal and policy frameworks governing the application process structures the people-place relationships involved.
Structuring Legal Relations

While aggregate decisions engage a complex network of law and policy, the ARA and its regulations and Ministerial policies, the Planning Act and the guiding planning policy, the PPS, largely determine the structure of relations. The discussion examines the work that law does to structure people-place relations in the context of aggregate extraction. First, more-than-owner perspectives on the people-place relations at the heart of the disputes studied are examined to demonstrate that amidst the messy complexity of the place-claims involved, assertions of alternative relationships with the more-than-human world emerge with the potential to disrupt legal property relations. It then details three ways in which the people-place relations of aggregate extraction are shaped through legal texts and processes to uphold the legal property relations of private ownership: (1) the relative positions of the potential parties during the application and adjudication stages; (2) the presumptive right to development and approval; and, (3) mitigation-based rather than a precautionary approaches to ecological impact.

Connection, Responsibility, Dependence: The messy story of places at stake

Participants in the study expressed complex and sometimes contradictory relationships with the places identified for extraction in the disputes studied for this project. As noted above, the interests asserted by these more-than-owner parties are neither uniformly environmentally motivated nor are they merely instrumental NIMBYism. They are messy – all at once instrumental and affective, conservative and transformative, exclusionary and reciprocal. Here I am focused on such openings to consider whether the places at stake in aggregate disputes can serve as the “literal common ground” for essential conversations and negotiations about how we want to live together as human communities embedded in the social and ecological complexity of particular material places (Haluza-Delay et al. 2013; Scully 2012). Environmental concerns were not the only concerns expressed by the participants in this study and few of them identified primarily, or at all, as environmentalists; however they were consistently raised as a central issue in both interviews and the texts examined.19 In this paper, I have focused on these concerns because of the challenge they present to the enduring legal primacy of the landowner in land use planning decision-making, often arising in unexpected places. It is not meant to romanticize a particular community or way of life or to simplify the messy and contradictory nature of the disputes. Rather my aim is to unsettle the notion that such disputes can ever be neatly categorized as either NIMBY or environmental in order to better engage with the “complex relations of attachment, belonging, exclusion and otherness that permeate such conflicts” (Woods et al. 2012:568).

Some participants explained their motivations or their role in the process through concepts of advocacy, stewardship or responsibility. One member of
a local environmental group involved in a licensing appeal pointed to both an
interspecies and intergenerational sense of obligation:

“One of the problems you have is the Niagara Escarpment can’t stand
up for itself; it is mute. You and I and all of us have to stand up and
defend and that is what we are trying to do.”²⁰

A sixth-generation farmer on land adjacent to a proposed mine site whose family
rejected repeated offers to buy-out his land reflected on his relationship to the sur-
rounding lands and waters:

“…we realized when these guys came along, they could destroy all that
stuff. We didn’t realize what a great spot we have here. We didn’t want to
see that done. It is deeper than just the money part, eh. A lot deeper.”²¹

One submission on the Nelson Quarry stated, “we are so fortunate to be stewards
of this scenic, special land.” (Appendix C, JART Report, 2009, 14). Another noted,
“[A]s humans we bear an enormous responsibility. While we look for ways to im-
prove our lives through development, we must respect all that nature provides us
and must use its resources responsibly.” (Appendix C, JART Report, 2009, 24). A
farming couple collectively pointed to the need for a sustainable relationship with
the soil:

Participant 1: The big thing is you can’t create soil to grow food in.

Participant 2: No, it is not a renewable resource but produces a renew-
able crop every year and that is the difference. You can’t take aggregate
and produce a new crop every year. …

Participant 1: Yes, look at the cod industry. You spoil it, it doesn’t come
back in a few days.²²

Human-environment interdependence was sometimes discussed in the context of
environmental health. One participant reflected that she was surprised that public
concern about the quarry proposal was quite limited until people were informed of
the environmental health issues:

“We started off strong as a group on traffic impacts and property de-
valuation …and it doesn’t seem to have much of an influence…even
with blasting…but you can’t breathe and your water is contaminated,
people start to listen.”²³

This type of framing was seen by other participants as narrowing the ecological
perspective to centre human concerns. One participant lamented that the “average
person” was more concerned about their own water and real estate values than the
rare bats, butterflies, and orchids found on the site, “they are creatures succumbing to the destruction of the environment.”24 Another viewed the ecological impact as more of a “case-facing” issue than a “community-facing” concern such as traffic.25 For others, the connection between human wellbeing and ecological integrity became important to the shift beyond a site-specific campaign to engagement with broader debates about land use. One group shifted their focus from the particular site to advocating for a regional environmental plan that would recognize “the whole region [as] a system of environmental features and functions that work together.”26 A leading member of another group talked about rejecting the site-specific approach for the “common denominator” of food and water: “our water is not for sale, our water is sacred and not to be polluted, and our foodlands are there for the betterment of this province.”27 He reflected on successfully shifting the local fight to support a more broadly focused campaign, “It is one of those issues in life that is just the right thing to do.”28

Interview participants simultaneously emphasized their own knowledge of the places involved and a sense of humility about how much they had learned about the complexity of ecological systems and connectivity through involvement in the disputes. For several participants the relationship to the place at stake in the dispute changed or deepened through engagement with the planning process. One farmer reflected on his new understanding of the role of the complex groundwater and hydrogeological features in the area:

“I never knew about the reach of water. I never knew that changing cold water fisheries by a couple degrees in temperature could be an issue. I never knew that fish that spawned in the Nottawasaga sturgeon became game fish in Lake Michigan. We were just farming there doing our stuff. We just don’t understand the reach of impact things can have. We learned. We talked.”29

One participant talked about the proposed mine site beside her long-time family home, and having only recently learned about species of rare butterfly and bat that depend on this unique alvar habitat:30

“This is a beautiful little alvar that should be saved, part of a disappearing globally rare habitat. You would find at least as many alvar indicators to save it [as another protected area]…but nobody is looking. The rare species are there but nobody is looking.”31

In several cases this learning was, at least partially, the result of engaging with highly technical proponent data personally, and often through experts, and finding it lacking. One participant described the process of learning about the complex hydrogeology of the site:
“As we were looking it just became more and more gripping because of the fact that we found these species, that it was designated provincially significant…how precious and vulnerable this aquifer was…The fragility of the system became more and more apparent as we learned more.”

For many participants this complexity was not reflected in the complex modelling provided by proponent experts, abstracted from the day-to-day experience of a particular place. One member of an environmental group familiar with the detailed and time-consuming processes of ecological science noted that the ability to contest the expert reports was limited by little or no opportunity to collect alternative data about the physical and biological environment on proponent’s property:

“They won’t let you walk around in your rubber boots and eat some sandwiches and try to figure out what is going on … You are in there for three hours and then you get the hell out.”

Connection to place was also evident in participants’ descriptions of the impact of aggregate mining as fundamentally transformative, in marked contrast with its legal construction as an “interim use” in the PPS. The sense that a particular material place would be lost was evoked through the image of the “hole” or “crater” that would be left behind:

“…[Y]ou are taking a natural feature which is an escarpment and you are creating a hole which later becomes a lake which is not natural on the escarpment… There [are] no lakes on top. You are destroying wetlands, you are destroying creeks, you are destroying woodlands, habitats…and farmland.”

The loss of something was linked to the particularity of specific places through the rejection of highly technical adaptive management plans and environmental compensation mechanisms increasingly incorporated into licensing conditions in Ontario. Ambitious plans for rehabilitation of a quarry site to agricultural production were rejected based on experience with the particular ecosystems involved: “My experience is it can’t happen….Once it is disturbed it is never as good.” Another participant distinguished between the “synergistic” relationship between the current agricultural use on the site and its “ecologically pristine features” and spread of ecological degradation that results from the “wasteland” or “moonscape” created by the “dry, barren, dust” landscape of the aggregate mine. The legal emphasis on the interim nature of the use, and on the requirements for rehabilitation, was seen by many as obscuring the material impact of extraction as a loss not simply to a right to a particular use or activity, but of a complex and relational place (Graham 2010). This legal move reinforces the primacy of property-ownership at the expense of the range of more-than-ownership relations that might otherwise make such decisions even more complex.
Owners as Planners and Participation as Objection

“There is no other sector that has the … same type of preferential treatment as the aggregate sector.”

Legally the process of siting an aggregate mineral mine begins with the Aggregate Resources Act. However, the process of land assembly preparation likely begins many years before an application is filed. One participant described this pre-planning phase:

“I am confident that the quarry owners were planning this quarry years before knowledge of the application surfaced. Whether it is in acquiring the land or preparing the plans - the profit is such that the investment is very long term on the part of the industry. So they are light years ahead in their planning and their understanding of the citizens before the citizens become aware there is going to be a quarry in their back yard.”

The application is premised on the selection of a site by the project proponent, who also usually owns the land in question. Unlike other siting disputes, such as landfills, where alternative locations are considered through a public environmental assessment process, aggregate mine locations are generally fixed by virtue of private ownership. In the words of one planner, “the aggregate is where it is; and also, it is private sector owners [who] don’t really have the opportunity to look at alternatives.

The Act positions the private landowner as the primary actor who initiates the process at a time of their choosing through an application to the Ministry. The process is proponent-driven and as the Provincial Standards and Manual sets out, the Applicant has control of the knowledge base upon which the technical, legal and factual decisions are made. The licensing process is informed and driven by the information and expertise provided by the proponent, with the express purpose of having the application approved. Any subsequent litigation is based on this same data, subject only to any independent technical or legal expertise and documentation that may be provided by Indigenous governments, municipal actors or planning authorities, and third party groups or individuals, likely at their own expense. However, independent expert evidence and review of the Applicant’s documentation is both logistically and financially onerous, particularly for indigenous communities, small local governments and community groups. It is also risky, given that they may or may not be accepted by the Board at a hearing and that access to the proponent’s land may not be granted for direct investigation and data review. At least one participant noted difficulty retaining technical consultants due to expert firms’ relationships with the proponent companies.

The result is that the story about what is at stake and which relationships matter is effectively determined in advance of any adjudicative process. Once the proponent has established the narrative – politically, economically, and technically – it is very
difficult and onerous to change. In at least two of the six denied applications, the more-than-owner parties linked their success to having intervened at the early stages of the application by developing positive relationships with local planners and representatives and providing them with independent technical information and reviews of proponent data directly. In some cases they had provided expert reports before the proponent had even submitted data. Participants described this as “driving the agenda” and providing local decision makers with a “counter viewpoint.” In contrast, one participant in an approved quarry hearing noted that their community group was “considered hostile by everybody at [Township].” She noted that the company, who already had an existing quarry adjacent to the new site, had successfully positioned themselves as ‘local’ and ‘good citizens’: “[They] had all of their ducks in order. They invite the community to barbecues, they are the good people, they do things for the community centre.”

However, these parties also identified their success as related to a very specific framing and presentation that specifically excluded the affective dimensions of their relations with the places at stake. As one more-than-owner party noted, “We have to be as professional, frankly, if not more so than the proponent and that has to be our front in everything we do…” This was described by others participants as focusing on the “facts” or the “science.” One participant with past government experience linked a lack of success amongst community-based groups on environmental issues to a failure to adopt this frame: “many of them spoke simply by emotion and not enough by fact and substance.”

More-than-owner parties are characterized in Ministerial policy as “objectors” with no formal relationship with the land. Their relationship in the proponent-led process is with the private Applicant – the owner and holder of the rights related to the land. Despite the protection of aggregate resources as a matter of “provincial interest” for the benefit of the public, the consultations about aggregate application are conducted and controlled by the proponent. The Ministry has no role in addressing objections made by citizens and can therefore issue a license without formally addressing concerns expressed through either the ARA or the Environmental Registry process. There is no public assistance to interpret and assess the application information and little time to do so is provided, with a 45-day window for commentary. While the Provincial Standards require the proponent to host one public presentation in the local area during the notice period, neither the technical experts retained by the proponent nor Ministry representatives are required to be at the presentation to assist the public in interpreting the reports or to ensure compliance. In fact, the Policy Manual directs Ministry staff not to attend meetings unless there are “special circumstances”. One participant described the proponent-led process this way: “Aggregate has had its way forever and a day. They are firmly entrenched and implanted. They can do the things they do because they own the process.”

Multiple participants expressed frustration with the lack of access to Ministry experts and decision makers. Despite the designation of aggregate mineral extraction as a
matter of provincial interest in 1982 (Ontario Ministry of Municipal Affairs and Housing & Ontario Ministry of Natural Resources 1982), government agencies routinely decline to participate in hearings and in at least one case have refused to provide parties with relevant information about the application and assessment. A participant in that case characterized the Ministry as “in effect a facilitator for mining for quarry in Ontario. We don’t have enough agency resources to police the quarry companies.” One planner described the lack of transparency in the planning policy process, particularly the role of various provincial and local decision makers:

“[T]hey are making those trade-offs in the back rooms and not necessarily in an open forum. The thing is now that we have this one window planning act process that we have had for quite a while now, it doesn’t enable you to identify which ministry said what to government. So you don’t really know how these trade-offs were made.”

He expressed concerns that community groups were filling the gaps left by under-resourced or conflicted local governments: “Why is the municipality not protecting their own citizens? Why do they [citizens] have to spend thousands of dollars to bring their own consultants in?” He also noted the imbalance given that aggregate companies can “afford to get the kind of expertise they want.”

The proponent continues to set the terms and pace after the initial comment period. Within two years, they must “attempt to resolve” objections and submit a list of unresolved objections and documentation of attempts at resolution as well as recommendations for resolutions to the Ministry and to remaining objectors. A 20-day notice period is then triggered during which remaining objectors, including government agencies, must submit further “recommendations” or they are deemed to no longer object. While it is difficult to measure, it is possible that without the time, political support, and financial resources to obtain legal representation and technical expertise, parties with ongoing concerns may allow their objections to be deemed withdrawn. Conversely, one professional conservationist in an area of high aggregate development noted that once a proponent has triggered the process they have a great deal at stake and become much less likely to withdraw despite the need for ongoing consultation: “Once they start they start the licensing process then they become very attached to it and they have invested a lot of money, a lot of money.”

Where they do go forward, parties tend to focus on narrow grounds that have received some legal recognition in the past, limiting their ability to articulate what is really at stake, for example focusing on a specific endangered species habitat rather than a responsibility to respect the physical limits of particular ecological systems and obligations to future generations. Tribunal members routinely thank more-than-owner parties for sharing their “concerns” and for participation, while overwhelmingly accepting the “facts” provided by the proponent’s privately hired consultants and rarely challenging unsupported assertions about social and economic
benefits. In the words of one planner, “the boards tend to kind of fudge on the side of the proponent a lot of the time.”

Presumptive Development, Approvals, and Saying No

“[T]he issue was never about gravel or limestone, the issue was always about planning.”

Technically, in the context of aggregate extraction, if the land for which a quarry is proposed is not currently designated as a “mineral aggregate extraction area” under the applicable municipal Official Plan, the proponent will need to apply to local authorities for appropriate amendments under the Planning Act. However, the local planning requirements are constrained by provincial policy. The PPS serves as the guiding document for all land use decisions in the province and the Planning Act stipulates that all policy and decisions of municipal governments and land use tribunals, including the Ontario Municipal Board and the Environmental Review Tribunal, shall be consistent with the PPS. Since the first version was approved in the 1990s, the PPS has consistently prioritized aggregate resource “preservation” and development. This prioritization has been maintained through to the recently revised 2014 policy. In 2005, the PPS was revised to (a) explicitly exclude consideration of the need for the resource to be extracted (PPS, S. 2.5). The Board itself has noted the exceptional nature of this presumption: “[aggregate extraction is the only use in the wide ranging PPS where need is not required]” (Capital Paving Inc v. Wellington (County), 2010). Planning and urban studies scholars have drawn attention to the operation and control of specific discursive frames that influence land use and environmental governance. Patano and Sandberg specifically note the ‘need’ or ‘demand’ narrative as a frame used by the aggregate industry to appeal to decision makers (Patano & Sandberg 2005).

The effect is to limit the ability of local authorities to regulate exploration, extraction and operation, including the potential to prohibit extraction, to impose a needs-based analysis into the assessment of applications, and to protect features not deemed provincially “significant” (Bull & Estrela 2012). One participant described the surprise when community members learned about the lack of jurisdiction at the local level: “Whose jurisdiction is it? Why can’t our local council have a say in a potential industrial development that would totally change this community that has been built for five generations? How come we don’t have a say? This is not okay. What can you do about it to make it okay? Nothing.” One planner also expressed a concern that the Board often adopts lower ARA standards as compared to the more rigorous official plan requirements.

More-than-owner parties have found that there is no meaningful opportunity to say “no” within the licensing process. In the words of an individual involved in one highly contested dispute:
The industry often argues that companies need efficiency, transparency and certainty. What about efficiency transparency and certainty for communities…? Surely when all agencies and stakeholders are saying no, the process should be able to come to a “no” outcome. To us, it unfortunately seems that the philosophy of presumptive development and entitlement prevents this company from accepting a no position.66

Presumptive rights to transform and destroy the land at stake are embedded in the guiding policy, severing the “resource” from both human and other ecological communities. The PPS imposes mandatory protection of aggregate resources for long-term use, including the protection of areas with known deposits, areas adjacent to known deposits, and/or current operations, from development or activities that would “preclude or hinder” extraction.67 This protection extends even to operations that have ceased, despite the repeated and ongoing assertion by a range of parties that land containing aggregate deposits is of value for agricultural uses, subject to ongoing Indigenous claims and rights, and ecologically critical habitat. Indeed, some participants expressed frustration at the lack of recognition that the rock to be extracted was an integral part of the ecological system on which the agricultural and/or conservation values depend.68 The narratives of exclusivity and the inevitability of growth discipline the messy complexity of competing and overlapping claims to land and ecological relations.

A specific place with complex networks of relations is transformed into an abstract space to be ‘temporarily’ disappeared and then rehabilitated to some other form of ‘use’ when its extractive value has been exhausted. The aggregate regulatory regime specifically provides for greater exemptions from rehabilitation requirements where quarries are developed in ecologically or agriculturally valuable land, based on concerns about efficiency and technical feasibility. For example, 2013 amendments to the Endangered Species Act specifically exempted aggregate licenses from the permitting regime.69 The sense that approval is presumed lead to a feeling that the process was not getting to the ‘right’ decisions because the relations considered were so narrow. There is no space for an articulation of a loss of place, something different and more profound than the loss of an abstract right. The “public interest” protected by the Ministry of Natural Resources, which oversees the licensing process, is explicitly linked to economic growth.

“One of our big themes when we talked to the government was the idea of presumptive development. One of the things with Hamilton that we kept getting scared about over, particularly a city who is trying to encourage industrialization and get the corporate tax base up so that the tax pressures is off the resident, is all this theme about business is good. We hear it in our politicians all the time. It doesn't matter what it is, business is good.”70
While the land may be recognized as having natural, social and cultural features, and potentially as having an ongoing relationship with non-owner persons and communities for food production, its value as a commodity is clearly prioritized by the PPS. Participants expressed a view of aggregate sites as places with eco-social relations. But for the purposes of law, they are divided into different kinds of space - agricultural fields, ‘natural’ heritage, such as forests or wetlands, recreational sites such as trails, and subsurface resources such as mineral deposits and groundwater sources. The policy is currently constructed in such a way that even where recognized, these other types of relationship to place are trumped by the protection of the mineral resource value and economic relations.

**Mitigation, Prevention and Self-Regulation**

“This whole business of adaptive management plan is rooted in the approach by the aggregate industry that if I don’t do all my assessment work ahead of time to get an approval, then when I uncover a problem that I haven’t anticipated, I will solve it then. I don’t know what it is. I didn’t know how to approach it. But I will solve it. How ridiculous is that? That is what an adaptive management plan is about. It is a non-plan.”

Finally, the recent trend towards approvals on the basis of proponent-designed ‘Adaptive Management Plans’ also obscures the relationships of interconnection and dependence between the human and more-than-human communities in particular places. While not required by law or policy, proposals to mitigate rather than prevent potentially catastrophic harm, such as the depletion of the water table, through Adaptive Management Plans have been supported and even promoted by the Ministry and the Tribunal while they have largely rejected a precautionary approach (Van Wagner 2013). As critics have argued, this type reactive approach to risk in extractive contexts waits until problems reveal themselves and attempts to resolve them by trial and error (Randall 2012). Arguably, this voluntary and industry-led approach compounds the proponent-driven nature of the licensing process. While adaptive management plans have been incorporated into site plans and licensing conditions as “an additional layer of oversight,” (Bull & Estrela 2012:29), their enforceability has been questioned, as has the potentially improper delegation of the Board’s authority to the Ministry (James Dick Construction Ltd. v. Caledon (Town), 2010). However, this concern has also been dismissed by other decision makers (Jennison Construction, 2011).

The promotion of mitigation in place of precaution is further complicated by the almost universally recognized inability of the Ministry to enforce regulatory requirements and increasing reliance on self-monitoring (James Dick Construction and the dissenting opinion in Walker), concerns which are routinely dismissed as beyond the scope of the legal decision making process (majority in Walker). As noted above,
2013 amendments to the Ontario Endangered Species Act exempt pits and quarries from the requirements to obtain a permit for activities that would otherwise be prohibited, including damaging or destroying species habitat, instead requiring only mitigation measures and registration of activities with the Ministry and without independent monitoring requirements and enforcement capacity. Aggregate extraction operations are also exempt from other environmental legislation, including any regulations of a local conservation authority under the Conservation Authorities Act. Such agencies are empowered to regulate development impacts on wetlands, shorelines and watercourses; however, in the context of aggregate they play only an optional advisory role to municipalities on issues related to natural heritage and water. One participant recalled that potential lawyers they interviewed focused on mitigation rather than opposition by asking questions such as: “What did we want as our compensation? What did we want for a framework document for how the operation would operate?” However, to many of the participants the stakes were too high to settle for mitigation despite the risks and the costs.

Conclusion

As the above analysis above makes clear, the current land use regime in Ontario structures people-place relations to uphold the primacy of the landowner as planner in the context of aggregate extraction. In doing so, law obscures ‘more-than-ownership’ relations with the land. An ecological-relational perspective reveals this structural orientation as excluding the complex range of relationships in particular places from the decision making process. This limits the transformative potential of planning as alternative articulations of property relations are managed in the interests of a narrowly defined public interest in economic growth. By examining the use of planning tools and forums by more-than-owner parties in a specific setting, I argue that the legal rights to speak, write, appeal and contest land use decisions are not enough to reorient land use planning law away from abstract and anthropocentric property rights without the creation of space for performances of reciprocal relations with place.

NOTES

[1] I am indebted to the work of Nicole Graham (2010) for this concept of reciprocity with place. For a discussion of ownership and responsibility, see the work of Joseph Singer (Singer 2001).

[2] Indeed, Valverde (2012, 7) argues, the day-to-day operation of law has been neglected in scholarship about planning and urban studies. Tony Arnold similarly points to a neglect of land use regulation by both scholars and activists working on environmental justice issues (Arnold 2002). A 2014 Land Use Prof blog post by Canadian law professor Deborah Curran specifically noted the limited scholarly work on Canadian land use law, with Valvarde’s work as a notable exception: http://law-professors.typepad.com/land_use/2014/11/destined-to-be-classic-land-use-books-from-canada.html.
See for example *Batty v. Toronto (City)*, 2011 ONSC 6862, 108 OR (3d) 571.

In May 2012, an all-party review of the *Aggregate Resources Act* was initiated at the Standing Committee on General Government (Legislative Assembly of Ontario, Orders and Notice Paper, 1st session, 40th Parliament, March 22, 2012). The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.

For an example of efforts to empirically measure the benefits of planning, see Cheshire & Sheppard (2002). As Blais (2011) points out in the context of Ontario, we know very little about the actual costs and benefits of planning.

A review of wider land use debates is beyond the scope of this paper, but see examples such as strengthened environmental protections (Patano & Sandberg 2005; Sandberg et al. 2013; Whitelaw et al. 2008), human rights protection in zoning decisions (*Advocacy Centre for Tenants Ontario v. Kitchener (City)*) (2010), O.M.B.D. Case No. PL050611; *Alcoholism Foundation of Manitoba v. Winnipeg (City)*, [1990] M.J. No 212 (C.A.), and has resulted in unlikely alliances for social and political change (Cowell & Owens 2006; Sandberg et al. 2013; Sandercock & Lyssiotis 2003; Scotford & Walsh 2013).

While there is little scholarly commentary on land use law in Canada, see Curran’s 2014 blog post comparing the US and Canada and concluding that protections for property owners are similar in the two countries: http://lawprofessors.typepad.com/land_use/2014/11/land-use-in-canada-where-extensive-and-restrictive-land-use-regulation-is-the-norm-by-deborah-curran.html. For a discussion of the private owner as the “primary land use decision maker,” see (Platt 2014). At the time of writing a new volume on Canadian planning law was in press (Smit & Valiante 2015).

It is important to note that the privileging of ownership rights is not the only explanation for outcomes described in the case study below. Land use planning decisions are complex and the siting of extractive activity is situated within larger dynamics of extractivism as well as rapid sub/urbanization. While I would argue that these are related to the structure of land ownership through private property and an owner-driven planning system, they also present distinct issues and considerations that are not taken up here. However, I see examining law’s role in privileging a specific form of relationship to land as critical to understanding how law upholds particular values about the more-than-human world in order to transform people-place relations in land use law.

This visual representation is an adaptation of Valverde’s (2012, p. 21-28) “legal inventory of laws”, which aims to provide an overview of the “basic legal architecture” engaged by particular disputes.

*Canadian Constitution Act* 1867 (UK), 30 & 31 Victoria, c 3, s 92 (13).

While the application of Indigenous law and the constitutional duty to consult First Nations and Metis governments is not discussed in this paper, they are considered in the larger project. Indigenous and Aboriginal law present some unique legal challenges to the existing aggregate extraction regime that are worthy of extensive and specific consideration beyond the scope of this paper.

*Planning Act*, R.S.O. 1990, c. P. 13, s.22; *Provincial Policy Statement* (Ministry of Municipal Affairs and Housing 2014); Ministry of Natural Resources guidelines and standards (Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section 1996; Ministry of Natural Resources, Natural Resources Management Division 1997).
The majority of cases discussed here were decided under the 2005 Provincial Policy Statement, Ministry of Municipal Affairs and Housing, http://www.mah.gov.on.ca/Page215.aspx [the “2005 PPS”]. In April 2014 the Ministry of Municipal Affairs and Housing released the 2014 Policy Statement, which took effect on April 30, 2014. Applications filed subsequently will be determined under the 2014 PPS.

Notably the two quasi-judicial administrative bodies have recently been formally linked as part of the Environment and Land Tribunals cluster but it is too early to determine any substantive outcomes of the restructuring (Sossin & Baxter 2012). For certain appeals, particularly where hearings may be required from both tribunals, a joint-board is formed under the Consolidated Hearings Act (RSO 1990. c C.29), such as the high profile Nelson Aggregate Co., Re, (2012 CLB 29642), and, Re Walker Aggregates Inc. (Re) (2012 CLB 16274) cases.

St. Mary’s Cement proposed a large quarry below the water table, located near Hamilton, Ontario. It was opposed by multiple agencies and local governments and a community group and eventually resulted in a rare Ministerial Zoning Order under section 77 of the Planning Act prohibiting aggregate development. Members of the community group were interviewed for this project.

Consultant, interview, June 2014.

More-than-owner party, Interview, September 9, 2014.

For example, see the “Resident Comments, Questions and Responses by Key Topic” from the Nelson Quarry Joint Agency Review Team Report, available online: http://www.halton.ca/planning_sustainability/planning_applications/applications_under_review/nelson_aggregate_quarry/. Halton Region, in which the Nelson Quarry was proposed, has a unique Joint Agency Review Team (JART) process that brings local and regional planning authorities together to review proposals. The JART Reports attempt to provide an accessible summary of key elements of the proposal and reviews of the technical information to the public. The Nelson JART Report also breaks down public comments. In this case 70 comments were received and organized into the following categories: Natural Environment (22), Water (18), Noise and Air Quality (16), Blasting (22), Traffic (22), Existing Quarry (8), Rehabilitation (8), UNESCO Biosphere Reserve (10), JART Process (3), and, Other (24). While no thematic organized summary is available, the author’s assessment of the public comments of the 2012 legislative review reflects a similar mix of issues, although several additional concerns were raised in the province-wide hearings, such as First Nations jurisdiction and the constitutional Duty to Consult Indigenous communities.
An alvar is a rare biological landform caused by shallow exposed limestone or dolostone bedrock forming a plain with thin or no soil. Alvars support rare plants and animals, particularly mosses, lichens and birds, and are found mostly in northern Europe or in the Great Lakes region of North America. More than half of remaining alvars occur in Ontario. See the Conserving Great Lakes Alvars: Final Technical Report of the International Alvar Conservation Initiative (1999), online: http://lakehuron.ca/uploads/pdf/Conserving.Great.Lakes.Alvars.pdf.

Ontario, 1997, “Provincial Standards of Ontario – Category 2 – Class A Quarry Below Water”, at 10-11, s. 4.1.3.

Re Town of Richmond Hill, PL990303, r’d by Ontario (Ministry of Municipal Affairs and Housing) v Ontario (Municipal Board) 2001, 41 OMBR 257, 20 MPLR (3d) 93.

[49] One recent case indicates that the Minister can make decisions without formal consideration of EBR comments, and prior to the deadline for commentary, see *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826.


[51] A.R. A. 2.01.02.


[56] Manual, ss. 4.3.6, 4.3.3.1.

[57] Manual s. 4.3.3.3.


[59] See for example the majority decision in the Walker Brothers case; Van Wagner, 2013.

[60] Planner, Interview, March 7, 2014.


[62] ARA, ss. 12.1(1), 34(1); *Planning Act*, s.22.

[63] The PPS Aggregate Mineral Extraction section now reads as follows: “As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible. Demonstration of need for mineral aggregate resources, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of mineral aggregate resources locally or elsewhere.”


[65] Planner, Interview, March 7, 2014.


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PUBLIC INTEREST LITIGATION AS A SLUM DEMOLITION MACHINE*

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ABSTRACT

In the first decade of the 21st century, the Delhi High Court presided over the most comprehensive and ruthless slum removal campaign that the city had seen in a generation. In this paper, the author will examine how the procedural departures made possible by India’s unique Public Interest Litigation (PIL) jurisdiction enabled it to function as a slum demolition machine. While much of the critique of the Indian appellate courts’ interventions in urban governance has focused on its ideological predilections relying principally on a dissection of judgments, I argue that such discursive analysis serves only a limited purpose in helping us understand this phenomenon. I contend, on the other hand, that to understand this phenomenon of the court-led remaking of the city in its materiality, the procedural departures of Public Interest Litigation, which the Delhi High Court took to its limit in this period, have to be understood and foregrounded.

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In the first decade of the twenty first century, the Delhi High Court presided over the most comprehensive and ruthless campaign to remove informal 'slum' settlements that the city had seen in a generation. According to the official statistics, in 1998, Delhi had about three million people living in 1100 slum clusters. When the next such survey was conducted in March 2011, the official figure had fallen to 685 such clusters housing around two million people (Dupont 2015: 4).

The only other period when there was such a massive recorded fall in the slum population in Delhi was between 1973 and 1977, when it fell from about half a million to about a hundred thousand. This decline in 1973-77 is infamous because this was the period in which the Internal Emergency was in force (between 1975 and 77) and one of the most notorious ‘achievements’ of the Emergency was a massive program of forced relocation of slums -- a well-known aspect of Delhi’s contemporary history (Economic and Political Weekly, 24 June 1978, p. 1019; Tarlo 2003). But how did this other more recent decline in the slum population of Delhi take place? If the Emergency regime saw a breakdown of political negotiations as a technocratic elite ran amok, the period between 1998 and 2011 saw a very similar process unfold—only this time the vehicle was Delhi’s appellate judiciary, particularly the Delhi High Court, acting principally in its Public Interest Litigation (PIL) jurisdiction. In this paper, I will examine how the procedural departures made possible by India’s peculiar PIL jurisdiction enabled it to function as a slum demolition machine.

PIL is a jurisdiction unique to the Indian higher judiciary that arose in the late 1970s in the aftermath of the political Emergency of 1975-77. It has been hailed as the most dramatic democratizing move that the Indian judiciary had made in the post-independence period. A PIL is pursued by filing a writ petition either in one of the various state High Courts or the Supreme Court. Its distinctive characteristics include: “a) liberalization of the rules of standing; b) procedural flexibility; c) a creative and activist interpretation of legal and fundamental rights; d) remedial flexibility and ongoing judicial participation and supervision” (Cassels 1989: 495). Legal scholar Lavanya Rajamani explains the effect of these changes:

“The power of public interest litigation (PIL) in India lies in its freedom from the constraints of traditional judicial proceedings. PILs in India have come to be characterised by a collaborative approach, procedural flexibility, judicially supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stakeholders, form fact-finding, monitoring or policy-evolution committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in PILs, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders.
And, they are not hesitant to exercise this power in what they perceive as the public interest. Where there is a perceived ‘vacuum in governance, the Court rushes to fill it’” (Rajamani 2007: 294).

This phenomenon of the court led slum demolition drive in Delhi has already been analyzed in the scholarly literature (Ghertner 2008; 2011; Bhan 2014). However, the difficulty with the existing literature on this topic is that it treats PIL cases as if they are like any other. It tends to understate the specificities of the PIL jurisdiction which turned to be so uniquely well-suited to facilitate such an expansive and unconventional judicial role. The still common emphasis on the dilution of locus standi of the petitioner as the only significant attribute of a PIL case represses the other radical characteristics of such cases that in reality take it far beyond any understanding of an adjudicative proceeding. I argue, on the other hand, that to understand this phenomenon of the court-led remaking of the city in its materiality, the procedural departures of PIL, which the Delhi High Court took to its limit in this period, have to be understood and foregrounded.

Much of the critique of the Indian appellate courts’ interventions in urban governance has focused on its ideological predilections relying on a dissection of judgments. I argue that such discursive analysis, while useful, serves only a limited purpose in helping us understand this phenomenon. Perhaps the most persuasive of such analysis has come from Asher Ghertner, who discusses two key aspects of the early phase of the slum demolition cases (Ghertner 2008; 2011). First, he examines the language of PIL petitions and judgments to demonstrate a perceptible shift in nuisance law, which recast slums as nuisance per se. Second, he demonstrates that these cases are clearly based on aesthetic judgments, i.e. the apparently unsightly nature of slums makes them appear illegal to the judges, the photographs of these settlements often serving as the only evidence against them. Another argument, made by Gautam Bhan, suggests that claims based on poverty and vulnerability have a declining efficacy in the court during this period, suggesting shifts in judicial attitudes analogous to the shifts that Ghertner maps (Bhan 2014). These are important points, which help us decipher the shift in the substantive legal doctrine of nuisance, as well as account for the discursive context in which the courts were operating.

However, it is important to understand that a pure conceptual development in the law, like the change in legal interpretation of nuisance, can only go so far. It does not provide the apparatus to change the very nature of governance, to enforce their ideas via a takeover of the whole arena. PIL has made this possible in the arenas in which it has intervened. It provides the procedural framework to create a field for its operation and transform it. Secondly, I would argue that it is PIL with the kind of power it vests in judges which actually enables them to act on such biases (aesthetic, anti-poor or otherwise) and that too with a free hand in a most expansive manner, unconstrained by technicalities and rules of adjudication, and on such flimsy evidence as random photographs. The particular unaesthetic slum might not even appear in any case before them, but they can suo motu (i.e. by their own initiative)
invoke it in a PIL and make it the object of their judicial concern. And not just at the level of one slum, but at the level of the whole city, as we shall see. While I am sympathetic to the existing literature which maps the ideological shifts in judicial discourse and which usually explains such changing trends in PIL cases (relating to slum demolitions and otherwise) from 1980s to the 21st century in terms of political economy, I argue here that this still begs the question: why was the PIL court the principal agent of such radical urban transformation in Delhi?

Additionally, discursive analysis is inadequate to understand this process, as most of the city-related PIL cases of this era often did not end up in any ‘judgments’ at all but in an endless spiral of ‘orders,’ which are not reported in law reports. This is just another peculiarity of 21st century PIL, among its numerous other anomalous features, which enabled the Court to perform a role that can scarcely be called adjudication, as it is usually conceived. The distinction is important because while orders carry the force of law, they are generally not reasoned and do not provide an explanation of why that order has been given. Only if such an explanation is present, it becomes a judgment. Much of the scholarship on PIL has ignored such specificities of this jurisdiction and has continued to concentrate on the completed judicial process, i.e. judgments and other reported decisions of the courts, and the discursive charge they have. This is also the case because traditionally in a common law jurisdiction like India, only judgments act as precedent for future decisions, orders do not. As the Indian legal academic world is therefore primarily focused on an analysis of such judgments, it is ill-equipped to deal with the peculiar manifestations of 21st century PIL that we discuss here.

In this paper, my focus is on the emergence of a new legal juggernaut in this period, which I call ‘omnibus PIL’ that turns a PIL filed about a specific problem in a specific part of the city into a PIL that deals with that particular issue wherever it comes up in the city. The biggest departure in Omnibus PIL cases was that the city became the scale at which the court defined and addressed the problem. The optics through which the problem was framed and the city made legible was usually the Delhi Master Plan. The original petitioner in the PIL case with his or her specific concerns about a specific urban neighborhood would be either removed or made irrelevant or never have existed in the first place, and instead an amicus curiae or a monitoring committee would be appointed to guide the court on the issue on a city-wide basis. The whole city would then be made subject to judicial intervention and correction through this process steered by such a court-appointed figure. The informality of PIL procedure enabled the court to monitor and micro-manage key aspects of the city’s governance and make the whole city the direct object of its reformative attention. The court no longer needed the crutch of middle class Resident Welfare Associations as aggrieved PIL petitioners with concerns limited to a specific locality.

The ‘omnibus PIL’ enabled the court to legally extrapolate its own role in the widest possible manner, making it a powerful weapon that was repeatedly used to target the ‘illegal’ residents of the city negotiating their precarious lives at the edges of legality.
The Delhi High Court deployed such PILs to order a city-level ‘cleanup’ of Delhi’s street vendors, beggars and cycle-rickshaw drivers, but the principal and persistent object of the Court’s wrath were the city’s slums. In this article, I will rely on my fieldwork in the Delhi High Court during this period when I followed a series of such cases to examine the changing material practices of adjudication introduced by PIL. I shall argue that it was the unbearable lightness of PIL procedure, which provided the juridical conditions of possibility for it to function as a slum demolition machine.

**PIL cases against slums: The first phase**

In the years after the Emergency, the slum population had returned to a steady rate of growth, as no regime in Delhi dared a repeat of that experience. By 1981, in fact, the slum population had already reached pre-Emergency levels (Dupont 2008: 80). In the ’80s and ’90s, there were a few evictions, but at least since 1990-91 a policy was in place that officially guaranteed relocation in case of any slum demolition, stating that any “past encroachment which had been in existence prior to 31.01.1990 would not be removed without providing alternatives” (Dupont & Ramanathan 2008).

That political compact broke down from the late 1990s onwards, with the Courts presiding over a spectacular and largely gratuitous campaign against slums that led to almost a million people being evicted. The most infamous pronouncement that announced this new phase came from the Supreme Court in 2000, in a PIL which had no obvious connection with slums at all. Almitra Patel, an engineer with long-standing experience in solid waste management, filed a PIL in 1996 in the Supreme Court against the municipal garbage disposal practices in 300 of India’s largest cities. The court went on to appoint a committee in this case in 1998, to formulate the Municipal Solid Waste (Management and Handling) Rules for the country, which were then officially notified. But once this apparatus had been set in motion, the petitioner “was unable to steer the course of the petition” (Ramanathan 2004: 10) and the presiding judge Justice BN Kirpal turned the case towards the unrelated issue of slums in Delhi, through a bizarre logical jump: blaming the slums for the solid waste problem. I quote here a passage from Justice Kirpal’s infamous outburst in *Almitra H. Patel v. Union of India* (2000):

“14. Establishment or creating of slums, it seems, appears to be good business and is well organised... *The promise of free land, at the taxpayers cost, in place of a jhuggi [shack], is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority*” (emphasis added).
This is an instance of a trend in PIL cases since the late 1990s, where the petitioner is made redundant and the court steers the case in whatever direction it deems fit. The Court’s main grouse in these cases, of ‘public land’ being encroached upon, lacked any systemic understanding of the historical trajectory of land development in Delhi. These comments cited above, particularly the “reward to a pickpocket” analogy, revealed the Supreme Court of India’s contempt for any attempt at humane relocation, and soon became the basis of a ferocious slum removal campaign in the Delhi High Court. Emboldened by the ‘pickpocket’ remark of the Supreme Court, many middle-class Resident Welfare Associations began filing PILs in the Delhi High Court to remove ‘encroachments’ on public land in their vicinity. The trajectory of a typical PIL for slum clearance would be as follows: a Resident Welfare Association (RWA) would file a writ petition in the High Court, praying for the removal of a neighboring slum, alleging nuisance caused to them by its very existence. The court would grant the RWA’s prayer, and the matter would only end when the landowning agency of the encroached public land abided by the court’s direction of demolition and relocation of a slum (Ghertner 2008: 57).

The procedural departures that the Delhi High Court was making in its PIL jurisdiction in these RWA cases can be best gleaned from a comparison with another case from another time and another city, but in the same jurisdiction. A remarkably similar petition had been filed in Ahmedabad in 1984, complaining of “nuisance on account of emission of smoke, passing of urine on public street by the hutment dwellers who are residing in this area” (Mahesh R. Desai and others. v. Ahmedabad Municipal Corporation 1984). The case, however, was then dismissed by the Gujarat High Court – not because of the affluence of the PIL petitioners and the poverty of the slum-dwellers, or any similarly ideologically inflected arguments, but for good old-fashioned procedural reasons:

“(1) As to whether there is encroachment or not is a question of fact and it is difficult to ascertain in a petition under Art. 226 of the Constitution as to who has caused encroachment. This cannot be determined without recording evidence and without allowing the parties to lead evidence. Normally this Court would not adopt this course in a petition under Art. 226.

(2). The persons who are alleged to have made encroachment and who are alleged to be residing in hutments are not parties in this petition. Without hearing them no order which may adversely affect them can be passed” (ibid).

These kinds of legal arguments were given no play in the Delhi High Court of the 21st century. In hardly any of these RWA cases were the slum-dwellers to be evicted ever made parties to the case at the instance of the court and heard by it. In fact, ordinarily the name of the slum was not even mentioned by the Court in its orders in these cases, they were simply designated ‘encroachers’ and ordered to be removed.
In many instances, the first time they would only hear about the court order when the bulldozers would enter their colony. Omission of a ‘necessary party’ from civil proceedings, like the slum-dwellers here obviously are, would ordinarily be considered ‘non-joinder of parties.’ This is a fundamental rule of civil procedure, also applicable to writ jurisdiction, under which all PIL cases are filed. A judgment of the Supreme Court in 1984 had clearly laid down the law on this issue:

“A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non-joinder of necessary parties” (Prabodh Verma v. State of UP 1985).10

But such ‘technical’ or ‘legalistic’ arguments, which still had appeal in the early 1980s even in PIL cases, stopped enjoying the same valence by the early 21st century as the radiating effects of the ideological onslaught against procedural formalism by the votaries of PIL had by then infected the entire appellate judiciary. Justice P. N. Bhagwati had laid the foundation of such contempt for procedural norms by the Indian appellate judiciary in a judgment that first established the jurisdiction of PIL.

“[P]rocedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities… The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power…” (S. P. Gupta v. Union of India 1982).

Similarly, the other procedural issue here, the question of fact regarding the alleged ‘nuisance’ caused by ‘encroachers’ was never really examined and adjudicated by the Delhi High Court in these slum demolition PILs. The only ‘evidence’ that the Court would rely on to initiate such eviction were photographs showing the nuisance caused by the slum-dwellers, and such impressionistic ‘evidence’ was deemed to be adequate by the court in such cases (Ghertner 2008). Conventionally, the High Court is not supposed to adjudicate upon questions of fact under the writ jurisdiction of Article 226, as there are practical difficulties because the court normally just relies on affidavits. However, such a rigid position has been difficult to sustain as the Courts have inevitably needed to go into disputed questions of fact to adjudicate ‘public law litigation,’ as Abram Chayes famously called complex civil litigation on issues of public law (Chayes 1976). While this is inevitable perhaps, Chayes had warned that:

“the extended impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explicitly recognizes the complex
and continuous interplay between fact evaluation and legal consequence” (Chayes 1976: 1297).

Any such clarity on evidentiary procedure and standard of proof, however, has not been forthcoming from the Indian PIL courts. This situation is complicated further by the fact that the principle of not adjudicating on questions of fact in PIL cases continues to be paid lip service to, leading to its opportunistic deployment even in cases which are otherwise based on factual analysis.

By 2002, these RWA cases had reached such a scale that a High Court bench was constituted that heard 63 such combined petitions under the lead petition of Pitampura Sudhar Samiti v. Union of India (2002). The Court dealt with the problem of slums as ‘encroachments’ by dividing the issue into two aspects – one being the removal of slums and the other that of their rehabilitation as per government policies. What was deemed to be the second issue – the constitutionality of rehabilitation of these slum-dwellers – was relegated to another bench. Meanwhile, the Court accepted the RWAs’ contentions, reasoning that:

“humanitarianism must be distinguished from miscarriage of mercy… these residential colonies were developed first. The slums have been created afterwards which is the cause of nuisance and brooding ground of so many ills” (ibid).

The governmental failure to provide minimum facilities like public toilets for slum dwellers and the resulting nuisance caused by public defecation was to be solved by removing the slum itself, not by making the government provide those facilities (Ghertner 2008).

The government’s existing policy requiring the provision of alternative land before demolishing a slum was dealt with soon after in a most astonishing judgment given by a two-judge bench of the Delhi High Court on 29th November 2002. The judgment continued in the vein of Justice Kirpal’s ‘pickpocket’ remark, quoting it for support “against the grant of indulgence to such encroachers” and went a long way further to delegitimize any need for relocation of ‘encroachers’ as a pre-requisite for demolishing their houses. The judgment set the tone with its very first sentence: “Benevolence in administration … has to be balanced against the rights of the residents of a town” (Okhla Factory Owners’ Association v. Government of NCT of Delhi 2002). After having cast the issue as the ‘rights’ of some versus ‘benevolence’ towards others, the Court went on to not only do away with the requirement of relocation, it actually declared it illegal even where it was possible. Providing alternative sites, according to the Court, was self-defeating and “it has only created a mafia of property developers and builders who have utilised this policy to encourage squatting on public land, get alternative sites and purchase them to make further illegal constructions” (ibid).
The Court raised a statistical specter by spelling out the amount required for providing minimum housing to the estimated 3 million slum-dwellers of Delhi – more than 59 billion rupees (the largeness of the figure was subtly underlined by enunciating it in all its numerical splendor, with the requisite zeroes). Finally, after evaluating the speed at which rehabilitation had taken place in the past, the Court stated that at this rate it would take 272 years to resettle Delhi’s existing slum dwellers, thus making it seem impractical and impossible. The Court managed to reach the conclusion that any rehabilitation by the government under its slum policy would itself be illegal. The logic of the judgment followed what Pratap Bhanu Mehta later called “the jurisprudence of exasperation”. As Mehta explains,

“The function of law in this view is to express, both literally and figuratively, exasperation at the state of affairs…it expresses a certain impatience with reality…Much in our society would prompt us to tear our hair out in exasperation. Judges now see it as their job to give these sentiments expression in law” (Mehta 2005).

Where these millions of slum-dwelling people would go once evicted from their homes and why they were there in the first place was of no concern to the Division Bench of the Delhi High Court. Anticipating the catastrophic repercussions of such a change in policy, both the central and state governments in Delhi went on appeal to the Supreme Court, which stayed this High Court order and allowed the government’s slum policy and allotment of land for relocation to continue, provided it clearly specified “that the allotment would be subject to the result of the petitions.” Until 7 September 2010, when the Supreme Court set aside the High Court judgment, all schemes for allotment of land to slum-dwellers in Delhi carried this proviso.

The two judgments of the Delhi High Court discussed above – Pitampura Sudhar Samiti and Okhla Factory Owners Association – turned out to be the last real instances of reflection on moral and constitutional questions faced by the Court vis-a-vis slum demolitions, for the next seven years. What the Courts delivered after this were orders, not judgments; that is, no reasoned justifications were forthcoming, just pure assertions of power. Henceforth, the Court concentrated on creating a machinery for slum demolition and, as we shall see, to oversee the process directly. But already, in the Okhla judgment, the looseness of legal language and the glaring incoherence of public reason had moved law towards non-law. The judgment did not actually rely on legal principles, but was based on the premise that a policy which seemed impractical based on past experience can simply be declared unconstitutional. The reliance on legal norms and reasoning is minimal, and the decision appears to be no more than a pure assertion of sovereignty. Despite all this, such an ideological judgment was, strictly speaking, possible to envisage as part of a regular litigation challenging the legality of Delhi Government’s slum rehabilitation policy. What would soon follow it, I argue, would just not have been possible in a non-PIL judiciary.
The emergence of PIL as a slum demolition machine

After the judgment on the legality of slum rehabilitation as a general policy in the Okhla case, the High Court scheduled a hearing in the same case, ostensibly to give further directions in respect of individual grievances made in the two petitions relating to Wazirpur and Okhla, two specific industrial areas of Delhi. This hearing, which took place on 3rd March 2003, became the site of an awesome display of judicial power through the means of PIL, setting the pace for Court-led slum demolitions in Delhi over the next five years, on a scale for which the only precedent was the Emergency. It marked a new phase in the Courts’ relation with slums in Delhi.

The important departure here was one of geography. Although the relevant petitions were specific to two areas – Wazirpur and Okhla – the Court decided not to be limited by such constraints, and took the petition’s concerns regarding ‘encroachments’ to a new location altogether – to the banks of the river Yamuna, the site of what was then the largest slum in Delhi, Yamuna Pushta. There was no justification for this bizarre segue other than the judges’ own whims. To read Justice Vijender Jain’s order, it was as if the Supreme Court had never passed a stay order on the High Court judgment about the slum rehabilitation policy – the High Court carried on as if resettlement was no longer necessary before a slum was demolished. In this order of 3rd March 2003, after gleefully recounting the statistics based on which the Okhla judgment had been given, Jain suddenly moved into unconnected terrain:

“What is required to be done in the present situation in this never ending drama of illegal encroachment in this capital city of our Republic?... Yamuna Bed and both the sides of the river have been encroached by unscrupulous persons with the connivance of the authorities. Yamuna Bed as well as its embankment has to be cleared from such encroachments... In view of the encroachment and construction... in the Yamuna Bed and its embankment with no drainage facility, sewerage water and other filth are discharged in Yamuna water... We therefore direct all the authorities concerned... to forthwith remove all the unauthorized structures, jhuggies [shacks], places of worship and/or any other which are unauthorisedly put in Yamuna Bed and its embankment, within two months from today.”

The Court here made its own accusations, came up with its own facts and ordered its own remedy, without feeling the need to hear anybody else. Additionally, it made an unsubstantiated correlation between slums near the river and pollution caused to it by them. In fact, research by a reputed non-profit organization found that the slums near the Yamuna contributed less than 1% of the total sewage released into the river (Roy 2004). The PIL petition was just an excuse for the court to dwell on its own hobby horses.
In another key move that Justice Jain would repeatedly come to make in such PIL cases, he appointed an *amicus curiae* to assist the Court in this case. The petitioners may have had specific complaints for which they had come to court, but the Court had its own concerns, which it intended to go ahead and set right through the same petition, and for which it appointed its own lawyer. Finally, although the target of the court’s intervention was Delhi’s largest slum cluster, ‘Yamuna Pushta’, it was never referred to by name in its order. This refusal, too, became part of the judicial style of these PILs as patented by Justice Jain. Perhaps the judge did not wish to dignify the ‘encroachers’ by giving a name to their settlement. His decision also added to the opacity of the proceedings, and over the one year or so that it took for this order to be implemented, no resident or representative organization of the Yamuna settlements was ever made a party to the case.

When this case next came up for substantive hearing on 29 October, 2003, it was heard by a different bench of the High Court. Though this new bench was keen to implement the *Okhla* order of removing the slums mentioned in the petition without any need for relocation, it also noted with some apparent surprise that

“[w]hile hearing the matter on 3.3.2003, it appears that the Division Bench also took the cognizance of encroachers on Yamuna. The petition pertains to encroachment in Wazirpur area. Therefore, Registry is directed to give a separate number to the petition as the Court has taken cognizance on its own motion and to place the copy of the order passed by the Division Bench on 3.3.2003.”

Such departures from basic legal procedures still surprised other judges of the High Court, though with Justice Jain having taken the lead, such judicial improvisation would not be exceptional for very long.

The new petition of which the Court had taken cognizance was numbered Civil Writ Petition 689/2004 and was called *Court on its own Motion v. Union of India*. With Senior Advocate Amarjit Singh Chandhiok as the *amicus curiae*, this newly numbered writ petition came up before a new bench on 28th January 2004. The order on 3.3.03 which sparked off this new case was about removal of encroachments from Yamuna. Strangely enough, notice of this new case was accepted on behalf of the Central Government by the Tourism Ministry and not the Ministry of Urban Development, which is responsible for the lawful planned development of Delhi and ordinarily deals with such cases. This was because the Tourism Minister was Jagmohan, the architect of the infamous Emergency-era demolitions, who was now most keen to resume his reputation as ‘demolition man’ (*Times of India*, 10 January, 2004).

By the time the next hearing came round, in February 2004, Jagmohan had quickly manufactured a grand plan to develop the Yamuna riverfront after the anticipated removal of these slum clusters. The plan was to develop a 100-acre strip of land on the banks of the river Yamuna, “into a riverside promenade with parks and fountains
which would be marketed as a major tourist attraction” (Menon-Sen 2006: 1969). This was circulated as a brochure before the court and was called, ‘Yamuna River Front: Undoing a tragedy of governance and ushering in a new dawn’, with nine pages of glossy uncaptioned photographs of the Pushta showing industrial activities like ‘electro-plating units’ being carried on there, as well as photographs of homes with TV sets asking if these were homes of the ‘poor’ (Verma, n.d.). The Court was persuaded by Jagmohan’s rhetoric. In particular it was agitated by the photographs showing the presence of industries in the Pushta and ordered the immediate clearing of all legal hurdles for the demolition of Yamuna Pushta. Between February and May 2004 the Yamuna Pushta slums were finally destroyed under court orders.

Even after the demolitions in Yamuna Pushta, the suo motu case regarding encroachments on the river Yamuna continued. The Court kept ordering demolitions of other slums near the river. A few months later, Justice Vijender Jain took charge of this case. Dissatisfied with the authorities’ less than complete implementation of his original order on Yamuna encroachments (he would quote his original order in subsequent orders repeatedly), and in the absence of a “comprehensive policy,” Jain ordered the constitution of a Monitoring Committee chaired by a retired High Court Judge, Usha Mehra, “to remove such encroachment forthwith and to monitor such operations.” The Committee consisted of highly placed ex-officio members, the amicus Chandhiok and a retired district judge as Convener. The Committee was to submit a monthly report “with regard to action taken in terms of order passed” regarding demolitions of slums on the banks of the Yamuna.

This Committee, which came to be known as the ‘Yamuna – Removal of Encroachment Monitoring Committee’, was initially set up for a period of one year, but its tenure was later extended indefinitely (Dutta 2009: 55). Having already zeroed in on encroachments as the cause of pollution in the river Yamuna and without any further discussion on other possible causes of such pollution, Justice Jain ordered:

“We direct the Committee to take up in right earnestness and on day-to-day basis the task of removing encroachments upto 300 meters from both sides of River Yamuna in the first instance … We make it clear that the Committee will take up the task of removal of illegal encroachment on the basis of directions issued above and will not entertain any request for grant of any time for such removal on the pretext of relocation or any other alternative allotment.”

The Court did not provide any basis for arriving at the figure of 300 meters, but it became a benchmark of sorts, with government authorities soon turning it into some kind of a sacrosanct limit. (Dutta 2009: 59). The Court had effectively set up the machinery for efficient implementation of its commands. This PIL came up regularly before the Court for the next one year, and its orders discussed the monthly reports submitted by the Monitoring Committee to the Court, which contained an account of the progress made by the various government agencies in removing
encroachments from the river bed. The Committee made frequent inspection of the areas in question and reported to the Court. This improvisation by the Court ensured that all government agencies followed the directions of the Court and it could micro-manage the whole affair. The Court would direct a senior officer of the government to be present in court to make sure it performed, or recall the order requiring him to be present in court if there was a good progress report from the Committee (Dutta 2009: 56). Any further legal obstacles were removed by the Court when it ordered “all the courts subordinate to the Delhi High Court not to deal with any matter with regard to grant of stay against removal of illegal encroachers from the river embankment.” To further systematize the slum demolition campaign, the Court asked the Delhi Development Authority either to submit “area-wise sketch plans” or to arrange for “satellite mapping instrument and technology,” so as to facilitate enforcement and monitoring.

The Yamuna Monitoring Committee appointed by the Court, in the first year of its existence, was successful in removing 11,280 structures, including more than 130 ‘dhobi ghats’, from various places on both banks of the river Yamuna. This was hailed as “tremendous work” by Justice Jain and the Committee’s term was extended for another year. The single largest of its actions was the removal of 4,000 structures situated in Geeta Colony on the eastern embankment of the river Yamuna. Justice Jain would later tell me in an interview that he was particularly proud of having cleared this area, as a massive clover-leaf flyover and grade-separator came up there later, which he thought was one of his achievements and resented the fact that he was not invited for its inauguration a few years later. Indeed, throughout this period, all kinds of ambitious construction projects adjoining the river were given the green signal.

The Yamuna case is a perfect example of what became a new judicial trend of turning a PIL filed about a specific problem in a specific part of the city into what I call an omnibus PIL: a PIL that deals with a particular issue wherever it comes up in the city. The city was the level at which the court was thinking of the problem. The device of the omnibus PIL was deployed in particularly spectacular fashion by the High Court from 2003 onwards, with Justice Vijender Jain being its arch exponent. The whole city was thus made subject to judicial intervention and correction through this process. What was relatively new about this increasingly common and extremely powerful form of PIL was that the specific aggrieved party was removed, and a roving inquiry into the whole city conducted by the court through the amicus. To rely therefore on the language of the petitions to understand the nature of these PILs, as many commentators continue to do, is not particularly useful as the petitioners had little if any role to play in these cases by this point.

The means by which the city was made legible for this new optics of the court was usually the Delhi Master Plan that provided for strict zoning laws. Through this new maneuver, PIL became a means to target the ‘illegal’ residents of the city, who until then had been protected by their elected representatives. These ‘illegal’ citizens
were not even made party to the proceedings. All problems were blamed on the conspicuous urban poor, who were seen as obstructing the neat solutions proposed to make the city come up to scratch as a ‘global city’: they would simply have to go as collateral damage.

That the poor were there in the first place was a function of what Partha Chatterjee has called “political society” (Chatterjee 2004). These people had been accommodated, however precariously, by the everyday populist politics that depended on them for electoral support. These were the networks most drastically unraveled by this new phase of PIL. The omnibus PIL and its procedural improvisations enabled the court to monitor and micro-manage nearly every aspect of the city’s governance and make the whole city the direct object of its reformative attention. We have seen in the course of this article the move made by RWAs and other mediating actors as PIL petitioners asking the court to intervene and set the city right by cleaning up the excesses of political society. By 2003 it was as if the court no longer needed any external crutch to do this. It went about doing it on its own. Indeed, the effectiveness and thoroughness with which the Delhi High Court could pursue slum demolitions through its new machinery far exceeded the abilities of individual RWAs.

* * *

Another example of a Justice-Jain-style omnibus PIL that significantly changed the city is the case referred to as Hem Nalini Mehra v. Government of NCT of Delhi (2002). This was a PIL filed in 2002 by the residents of two group housing societies in East Delhi, complaining of the callousness of government authorities in not carrying out the requisite sewer repair work and laying of an arterial road. The Court managed to get the repairs done in a year’s time. But once this was done, at the hearing on 31st October 2003, the Court decided to expand the scope of the writ petition to road repair and road safety all over Delhi and made Pushkar Sood, the lawyer for the PIL petitioners, the *amicus curiae* in this omnibus PIL. Over the next three years, the Court in this PIL set up a centralized database of fatal accidents and a mechanism for cancelling driving licenses of people involved in such cases. It demolished slum clusters, removed street vendors and kiosks as encroachment on public roads and footpaths, closed down unregulated automobile repair shops, and passed a number of orders regarding the relocation of wholesale paper and chemical markets to peripheral areas, the construction of two new inter-state bus terminals in peripheral areas of the city, the construction of 14 multi-level parking lots for the decongestion of traffic in Delhi, the installation of bollards (concrete separators) on roads, and supervised the construction of overpasses, underpasses, etc.

Another omnibus PIL championed by Justice Jain was the case of Hemraj v. Commissioner of Police. The PIL was originally filed in 1999 to curtail goods traffic on the roads in and around the Chattarpur temple in South Delhi. But soon after this complaint was dealt with, the PIL was expanded to deal with “proper handling of traffic and related problems in the entire city of Delhi” and a committee with ex-
officio members and two amicus curiae appointed by the Court. By the time it was folded up by a new bench in 2008, this PIL and its committee had been handling the issue of traffic congestion in the entire city for almost a decade. It acted much as the Hem Nalini Mehra PIL did, and ordered its share of slum demolitions. The most well-known among the slum settlements demolished in this case was Nangla Machi, comprising about 2800 houses in Central Delhi (The Hindu, 31 August 2006). Among other reasons, this settlement irked the court because “the unauthorised occupants also have buffaloes and other animals which not only give way to unhygienic conditions but also create hindrance on the smooth flow of commuters on the ring road of Delhi which are in thousands.” At no point during these court proceedings were the residents of Nangla Machi given a chance to be heard in the case.

The Kalyan Sanstha case: The slum demolition machine perfected

“The Kalyan Sanstha case: The slum demolition machine perfected”

Looking back now, it’s hard to map out everything that happened after the 14 December 2005 Delhi High Court order that called for the demolition of all unauthorized constructions in Delhi. The todh-phodh spread rapidly across the city as the Municipal Corporation’s demolition teams fanned out into markets and residential colonies…” (Sethi, 2012: 166-67).

The next giant move in this logical progression of the Delhi High Court presiding over the remaking of the city was to combine all the PIL cases relating to illegal occupation of land or illegal construction into one master case, eventually dealing with the entire city. The history of this case tells us something about the trajectory of PIL in Delhi.

In 1989, in the middle class neighborhood of West Patel Nagar, there was a dispute between two neighbors living in adjacent plots. One of the neighbors, Sarla Sabharwal, filed a writ petition in the Delhi High Court alleging that her neighbor was constructing extra floors on his property, which would exceed the municipal building by-laws and therefore asking the Court to order the Municipal Corporation of Delhi (MCD) to take action against him. The respondent neighbor promptly countered the charge by submitting a list of 32 buildings in the same neighborhood that were also violating municipal rules -- either by building more floors than permitted, or using the residential premises for commercial purposes, or extending the building on land beyond that allotted to them, and thus encroaching on public land, i.e. on the road. In 1990, a bench headed by Justice Kirpal declared that this was a “fit issue… in which public is interested” and decided to regard this case as a PIL. In 1991, the Court disposed of the case with orders to the MCD vis-a-vis 27 buildings in the area that were found to contain illegal violations, to either ‘regularize’ illegalities which were compoundable and demolish those which were not compoundable. This order, and indeed the whole PIL, was restricted to middle class houses in Patel Nagar and Rajinder Nagar areas of Karol Bagh zone of the MCD in West Delhi.
Twelve years later, the husband of the petitioner in the earlier writ filed a PIL in the Delhi High Court in the name of a “social welfare organization” called ‘Kalyan Sanstha.’ The petition alleged that the punitive actions for the West Delhi neighborhoods ordered by the High Court in the earlier petition filed by his wife had not been implemented by the MCD, and the unauthorized constructions there had gone from bad to worse (ibid). The case plodded along for its first two years. On 30th November 2005, it suddenly acquired a completely different valence, when it got listed before a bench headed by Justice Vijender Jain. Jain decided to deploy this case to start a demolition drive in Delhi. He summoned official figures of unauthorized construction for all of Delhi: there were a total of 18,299 recorded cases of unauthorized construction in the city over a period of five years. “To check the mushrooming of unauthorized construction” he wanted these demolished forthwith “in right earnest.” On 14th December, the Court issued a clarification:

“We are making it clear that MCD has to launch a drive throughout Delhi in terms of our directions passed in this matter. There are other writ petitions… which relate to other areas. A copy of this order shall be placed on all the files … We are further making it clear that if there is any other area or locality in which there are buildings which do not conform to the parameters of building by-laws… the same shall be covered by order passed.”

The demolition drive was on. From this date onwards, all other cases pending in the Delhi High Court relating to “Unauthorized construction, Misuse of Properties and encroachments on Public Land” were to be heard under this omnibus PIL of Kalyan Sanstha Social Welfare Organization Versus Union of India & Ors. The MCD panicked at the enormity of the task before it and stated in a sworn affidavit that out of the approximately 4 million properties in Delhi, 3 million are “in violation of law,” i.e., 70-80 percent of buildings constructed in Delhi are unauthorized. The Court was livid, and called this “an attempt to create fear psychosis in the mind of honest citizens” (ibid) and made the government “delete” the statement saying it was not based on any exact survey.

After 18th January 2006, when its order noted that the “demolition drive has been undertaken in Delhi but it has been far from satisfactory,” the Court started thinking of alternatives. Observing that “[i]t seems that the MCD lacks the desire to check the rampant corruption and unauthorized construction” the High Court took the first step towards forging its own tools to oversee the implementation machinery of the demolition drive on 23rd March. It appointed four lawyers of the Delhi High Court as ‘Court Commissioners’ for four of the twelve municipal zones of the city. The Court Commissioners were supposed to act as the “eyes and ears of the court” and were directed “to keep a vigil in these zones and take periodical inspections and wherever unauthorized construction is going on, they may note the number of the property and immediately inform the Commissioner of MCD.” The Court also authorized the Court Commissioners “to inspect the premises at the localities in their
respective zones and to see whether in a residential area any commercial activity is being carried out” and if so, to inform the Commissioner of Police “for immediate action” (ibid). The Commissioner of the MCD was to accordingly file an “action taken report” before the Court stating that the unauthorized construction/misuse reported by the Court Commissioner has been removed. The names of these Court Commissioners along with their telephone numbers and addresses were published in the newspapers on the orders of the court “so that any citizen or resident welfare association if they want to contact the Court Commissioners can contact them and the Court Commissioners can take cognizance of such complaints” (ibid). An apparatus was thus set up whereby the RWAs need no longer approach the Court to lodge complaints but could just go to its agents, the Court Commissioners, who would inform the MCD and/or the police, who would then file an “Action Taken Report” before the Court.

When the first ‘public notice’ regarding the “Appointment of Court Commissioners” appeared in the newspapers on 5th April 2006, there was interestingly no mention of “illegal encroachments on public land”. It was limited to “unauthorized constructions” and “commercialization of residential premises.” This was soon to change. Like Justice Jain’s other omnibus PILs, this too, the largest of them all, would also keenly pursue slum demolitions. Such a choice was particularly glaring in this case, as the whole history of the PIL was about rampant middle class illegality and its peculiar manifestations, but as always the slums were the easiest target. The cross-mediation that was observable in most instances of slum-demolition at this time – the Court ordering demolition, the media egging it on and the RWAs acting as the local agents of the Court – was perhaps at its most developed in this case.44 The court had acquired the means to find the illegalities in the city and set them right. The RWA as the PIL petitioner at the demand end and the MCD at the supply end were just nodes for the Court to do the right thing and clean the city up.

The Monitoring Committee was officially advertised in the newspapers as “constituted by Hon’ble High Court, Delhi, regarding Unauthorised Construction, Misuse of Properties & Encroachment on Public land.”45 The Monitoring Committee started submitting monthly reports to the Court, on which basis the Court passed orders. ‘Illegal encroachments on public land’ soon became the focus, and “public land” was increasingly understood in terms of its real estate value. This perspective is evident from the Court’s order dated 25th August 2006, when the Monitoring Committee was still in its early days:

“The report of the Monitoring Committee has been placed before us. It has been stated in the report that because of the relentless efforts of the Court Commissioners, encroachment on public land measuring more than 7,96,200 square yards having market value of more than Rs.500 crores46 on the basis of a very conservative estimate have been retrieved by the MCD/DDA from the encroachers and unauthorized occupants. The Monitoring Committee has advised to the Commissioner, MCD
The court would periodically give itself and its agents these self-congratulatory pats on the back, and the media would join the celebratory chorus. On 22nd March, 2007, the *Hindustan Times* carried a full page story to celebrate the first anniversary of the appointments of the first four Court Commissioners and quoted a figure from a Monitoring Committee report: “In a joint effort under the guidance of the court-appointed Monitoring Committee, the commissioners have helped the government reclaim public land worth around Rs. 7,000 crore from the encroachers over the past one year” (*Hindustan Times*, 22 March 2007).

Much of the time during the court hearings went in the sparring between the Court-appointed authorities and the governmental authorities. The Monitoring Committee would place its report, present its achievements and point out persistent obstacles to demolition in various areas. The Court would pull up the respective governmental authority. The state would appear as the wrong-doer, on the other side of the law. Both sides would be trying to speak for the public. The state would be seen as speaking for ‘political society’ and therefore characterized by the court and its agents as enmeshed in the toleration of illegality. Meanwhile the court and its officials would represent themselves as speaking for civil society. The lawyers for the parties affected would barely get time to have their concerns heard. High-profile lawyers ordinarily representing some cases of ‘unauthorized construction’ and other elite illegalities would be the only ones who had any chance of getting relief. Cases of subaltern illegalities cast as ‘encroachments on public land’ would have little or no chance even to be heard. In the rare situations when they did appear because of some pro bono lawyer’s initiative, the court would improvise new legal arguments to ensure they enjoyed no legal protection. On 12th October 2006, for instance, the Court gave some new insights regarding slums in Delhi:

“The Monitoring Committee has also pointed out that [slum] clusters have undergone sea change inasmuch as three to four storey buildings have come up in place of Jhuggies [shacks] and several industrial and commercial establishments are running therefrom. Time has come for the authorities in Delhi to formulate a policy so as not only to stop these unauthorized trade activities being run from these Jhuggi Jhopri [slum] clusters but also in view of the fact that the occupants who are themselves unauthorized cannot be permitted to raise unauthorized, unplanned and hazardous structures thereby making Delhi a complete slum.”

The Court deemed a slum to no longer be a slum because it had grown vertically – but blamed the proliferation of these very ‘non-slums’ for making the city look like a slum!
The emergence of upward mobility (pun unintended) in Delhi slums was used as a bogey to aid their demolition. By this time, Parliament had introduced a moratorium on court-ordered sealing and demolitions through the *Delhi Laws (Special Provisions) Act*, 2006. But the *Kalyan Sanstha* bench led by Justice Jain found ingenious ways to continue its slum demolition drive. On 16th November 2006, it provided a bizarre reading of the new Act. Stating that “the intention of the Parliament is clearly discernible,” it held that the moratorium could not be extended to unauthorized *pucca* structures built on government land. There were very few slums in the harsh environs of Delhi that did not have features that could be considered *pucca*. Just as Jagmohan had used photographs of slum houses with television sets to delegitimize them as not being poor enough, Justice Jain’s court, too, found that the slums were not wretched enough and therefore did not deserve the sympathy of the law. The Monitoring Committee soon sent out a circular to the municipal authorities that

“those of the Jhuggi Jhopri [slum] clusters which have undergone a change in character and have been replaced by 2/3 storey tenements come under this ruling and can no longer be entitled to the moratorium. They are, therefore, liable to be demolished as has already been done in a few places in Delhi.”

This was Justice Jain’s last order in this case before he was transferred to Chandigarh High Court as its chief justice. The new judge who arrived to head the *Kalyan Sanstha* bench, Chief Justice MK Sharma, continued the case in the same vein. The enormity of the scale of this case soon meant it got listed every week, eventually acquiring a fixed two-hour time slot on Wednesday afternoons between 2 and 4 pm. The Court was by then finding it difficult to control the size of the case. Its orders became increasingly opaque and difficult to decipher. The orders would often read as some variation of: “The xx Report of the Monitoring Committee is filed. xx acres of public land is encroached in xx area. Action taken report to be filed by the Municipal authorities on xx date.”

Perhaps the court was being euphemistic, but since the relevant Report itself was not in the public domain, it was impossible to know from the order itself which precise areas of these large neighborhoods were the demolitions to take place in. There was no possibility of availing data from the Monitoring Committee regarding its proceedings and recommendations, even if one was directly affected, making it very difficult for them to contest the Committee’s findings. Police officers had been appointed to man the Committee and they ran it with as little transparency as any police department. The illegibility of this process was conducive to widespread rumor-mongering and an atmosphere of fear prevailed as the demolitions could at any time strike any of the numerous settlements in the city living at the edges of legality.

Having subsumed all other cases against encroachment on public land and unauthorized colonies in Delhi as per the orders of the Court, *Kalyan Sanstha* had become a mammoth case, with literally hundreds of Civil Miscellaneous Petitions...
(CMs) being made part of it. Every person or organization affected by the case would have to file a CM to be heard by the Court. The scope of the case was so large that parties affected in each hearing would be in the hundreds. But it was impossible for everybody to be heard, as two hours a week was not enough for the scale of the case. It became difficult to physically enter these courtrooms even for lawyers appearing in the case. The Kalyan Sanstha hearings were held in courtrooms of enormous size – rooms which had proper seating for more than a 100 people – and there still would not be even standing room. The journalists who ordinarily sat in the fourth or fifth row of upholstered chairs behind the lawyers would in this case actually sit in front of the lawyers, often right below the judges, next to the court-clerk – as if to underline how major a role they played in acting as cheerleaders for this case. One journalist would later tell me how judges would often look at them when making particularly volatile remarks like “Catch the big fish”, “Close down the municipal corporation”, or “We don’t bother about (municipal) councillors”. These provocative pronouncements were made to be picked up by the media. And sure enough, they would often be reported as big headlines on the front pages of major newspapers the next day.

Under Vijender Jain, the possibilities of PIL were explored to the fullest, most gargantuan scale. As Pushkar Sood, one of the Court Commissioners in this case, said admiringly to me in an interview, “Vijender Jain’s was the golden period of PIL.”

The slum demolition machine dismantled

In 2008, the Delhi High Court got a new Chief Justice, AP Shah. Shah was renowned as a left-liberal judge, and with the powers that accrued to his position, he started cleaning the Augean stables. As the Chief Justice, he could completely reset the tone of the Delhi High Court on PIL. Most of Justice Vijender Jain’s omnibus PILs, which had remained active under Chief Justice MK Sharma, were finally terminated during Chief Justice Shah’s benevolent reign. Hemraj, Hem Nalini Mehra, the Yamuna encroachments case – all were disposed of by the High Court during this period. Kalyan Sanstha was not fully disposed of under Shah, but was defanged with the disbanding of the Monitoring Committee and the Court Commissioners in 2008. It was finally disposed of in 2011. In the omnibus PIL system, these cases were never meant to be closed. They were to be kept perpetually pending so that the court could govern the city on a continual basis – whether it be unauthorized constructions, traffic congestion or road safety.

Some of Justice Jain’s most egregious decisions, like the ban on cycle-rickshaws, were reviewed and set aside. The constituency which had had a field day during Justice Jain’s and Justice Sharma’s time was despondent at this turn of events. As a journalist who covered the High Court ‘beat’ for an English newspaper told me, “After this bench, [I have had] nothing newsworthy in last three weeks. Shah makes no off the cuff remarks. When PILs like Hemraj of 10-15 years vintage were disposed
by him, even the lawyers were shocked."58 Another journalist compared the new judges on the PIL bench to eunuchs.59 Such language reeking of machismo in which PIL-watchers speak of PIL judges tells its own story.

There were other important developments. Some of the excesses committed during Justice Jain’s time finally came to light, and could be legally recognized. The sinister possibilities of Kalyan Sanstha's Monitoring Committee were exposed in a writ filed by displaced street vendors in a market in south Delhi.60 In this case, it was proved that an oral order was passed by the Monitoring Committee in 2006 and communicated telephonically to the concerned MCD official for removing ‘unauthorized encroachers’ in Ramji Lal Market, without any order in writing being given. This would pre-empt any legal action against the evictions, as no paper trail would exist at all. Such kind of arbitrary functioning of the Monitoring Committee had been speculated upon earlier, but it was now confirmed by the High Court itself that the Court-appointed Committee had been issuing oral orders for evicting and demolishing ‘unauthorized encroachers.’ The only reason it was found out was because the coordinator of the Monitoring Committee had written to the MCD official reminding him about the earlier telephonic communication and asking him for an Action Taken Report regarding the encroachments.

In August 2009, when I spoke to a court commissioner appointed in Kalyan Sanstha, he drew a direct connection between his role in this case and a 1983 precedent laid down by Justice P.N. Bhagwati in Bandhua Mukti Morcha v. Union of India (1984). The Supreme Court had held in this case that rules of civil procedure which regulate the appointment of court commissioners need not apply to PIL cases, either in Supreme Court or High Court.61 This would mean that cross-examination of evidence collected by commissioners would not be necessary. This would lead to fundamental departures from principles of adjudication, as Desai and Muralidhar argued,

“the reports given by court-appointed commissioners raise problems regarding their evidentiary value. No court can find its decision on facts unless they are proved according to law. This implies the right of an adversary to test them by cross-examination or at least counter affidavits” (Muralidhar & Desai 2001: 159).

Justice R.S. Pathak in an important concurring opinion in Bandhua Mukti Morcha (1984) had tried to introduce this minimum idea of natural justice, so that if evidence was collected by court-appointed commissioners in a PIL, at least a chance to hear the other side and contradict it be given to the affected party. But Justice Bhagwati did not want to encumber PIL with any such procedural safeguards. His radical ideas had now come home to roost.

In a prescient suggestion that anticipated Justice Vijender Jain’s court commissioners in Kalyan Sanstha, legal scholar S. K. Agrawala had pointed out in 1985 the problems that would emerge with Justice Bhagwati’s blithe disregard for procedure:
“A judge who appoints commissioners would be inclined to appoint those, whom or about whom he knows personally. It is human nature. Such commissioners are likely to be at least as biased as the judges who have been enthusiastic about PIL litigation. Bias even for a good cause, is bias all the same. Secondly, they may not be adequately trained for the job that may be entrusted to them... Fact finding, investigation and reporting are not something that everybody and anybody can be entrusted with” (Agrawala 1985: 26-27).

During the proceedings of one of the applications filed in Kalyan Sanstha, I watched as the lawyer for a slum ordered to be demolished by the Court, tried to make the factual point that these were *kaccha* houses (i.e. not made of durable materials) which would be saved by the Delhi Special Provisions Act. Chief Justice M. K. Sharma sniggered at him, “But this is a question of fact. We can’t go into a factual question in writ jurisdiction.” In general, all the alleged facts (on the basis of which the commissioners were pushing the demolition apparatus into action) were deemed incontestable, thanks to the supposedly non-adversarial nature of PIL. The comment, “this is not an adversarial proceeding” would be used repeatedly by the bench to effectively deflect any inconvenient questions of fact. This was the exact phrase that Justice Bhagwati had used more than a dozen times in the Moreba judgment, one of the most celebrated cases in the early history of Public Interest Litigation.

**Conclusion**

In an interview conducted in January 2010, Justice Vijender Jain modestly explained to me that a new dimension to judicial authority had emerged in the period between 2003 and 2006, during his heyday. Just how right he was would be evident by now. Judicial charisma has been an important genre in the historiography of common law and the phenomena of heroic/diabolical judges have long been central to its institutional histories. Judicial power however is elevated to a whole different level thanks to the enormous powers that PIL vests in a judge, making such a narrative even more apposite. While judges have predilections like the rest of us, the rules of adjudication and court procedure act as constraints they have to work within. PIL removes any such limitation. In non-PIL individual cases, judges can decide between affected parties based on their opinions but that can go only so far, and can hardly translate into the kind of demolition drive that we see here. Because it is an entirely malleable jurisdiction, PIL enables a judge like Vijender Jain to act programmatically and go to whatever extent he might want to.

My principal aim here has been to display how effective the non-procedural and arbitrary nature of PIL makes it to systematically bulldoze its way through the lives of the urban poor, literally in this case. In the PIL cases I have discussed, the court can initiate a case on any public issue on its own, appoint its own lawyer, introduce its own machinery to investigate the issue and then order its own solutions to the
issue at the level of the entire state. My interest here is to demonstrate how the court can effectively take over urban governance through PIL, rather than merely expose the ideologically slanted nature of such judicial urban governance. The latter is clear enough and its easy to look at judicial discourse and expose their biases, which are writ large in their pronouncements. The real issue is the unprecedented efficacy of PIL in pursuing such an agenda, thanks to its fundamentally protean nature. As a weapon of civil society, PIL prima facie appears to be a mere legal tool and therefore a classic example of associational activity. But it is really a mirror image of the populist contemporary politics it assails without any of the protections that populist political mobilization regularly requires in a liberal democracy like India. Just as the practices of illegality rampant among India’s white-collar denizens make its civil society uncontainable within any conventional notions of civic behavior, its favorite weapon, PIL, too, has only a thin veneer of legality. The judicial populism of PIL allows for a radical instability that continually pushes the limits of what a court can do.

Delhi in the 2000s went through dramatic transformations that are recognizable in cities all over the Global South. What marks Delhi’s dislocations as distinct is their source and their basis — they are based not, as in the past, on administrative or municipal policy or executive directions, but on judicial directions in a series of PILs concerning the city. The question worth asking is how and why did PIL emerge as the primary agent of such transformations in Delhi. Or in other words, why did these phenomena in Delhi take the PIL route? This is what I have explored in this paper.

NOTES


[2] I will use the term ‘slum’ here, as it is colloquially understood and used even by courts, to refer to a type of settlement locally known as ‘Jhuggi Jhopdi clusters’ or more often, ‘JJ Clusters.’ Interestingly, the term ‘slum’ is not popularly deployed in Delhi for a settlement that has the legal status of a ‘slum area’ under the Slum Areas (Improvement and Clearance) Act 1956. The latter legally notified ‘slum areas’ are on privately owned land and enjoy certain statutory rights. On the other hand, JJ clusters are on ‘public land’, i.e., land owned by government agencies. For the various uses of the term ‘slum’ in legal and non-legal discourses, see Ramanathan (2005). Throughout this chapter I will use the term ‘slum’ to refer to ‘JJ clusters.’ The term ‘slum,’ of course, comes with a train of over-determined meanings. But precisely such meanings influenced the way the protagonists of this paper, the appellate judges of Delhi, viewed these settlements.

[3] For an extended discussion of the ideological context in which PIL was born and has developed since then, see Bhuwania (2014).

[4] Way back in 1993, when he was a judge in the Delhi High Court, Justice Kirpal had bemoaned the very existence of the relocation policy in Delhi in another PIL: “It appears that the public exchequer has to be burdened with crores of rupees for providing alternative accommodation to jhuggi [slum] dwellers who are trespassers on public land.” He had also directed that where resettlement was done, the resettled should not be given the land on a lease-hold basis, as was the practice, but on licence – “with no right in the licensee to transfer or part with possession of the
land in question” – the idea being to deprive the resettled of property rights (*Lawyers’ Cooperative Group Housing Society v. Union of India* 1993).

[5] “Per capita waste generation per day in Delhi is 420g for those in the high income group, 240g for those in the middle income group, 150g for those in the lower middle income group, and only 80g for those in the JJ clusters” (Rajamani 2007: 302-303). The petitioner Almitra Patel later observed in an interview that the Court was trying to play ‘Municipal Commissioner’ and took the case on a tangent for over two years, for reasons unclear to her. She also said that Supreme Court judges “tend to focus first on cleaning up Delhi where they live and only then on other cities” (Rajamani 2007: 303).


[7] In such a situation, conventional modes of legal analysis distinguishing between the ‘Ratio Decidendi’ (literally “the reason for a decision”) and ‘Obiter Dicta’ (“by the way” remarks) of a judgment based on the issues around which the parties in the case actually fought, have no relevance because the whole judgment has nothing to do with the ‘lis’ (dispute) in the case at all. On the increasing redundancy of the petitioner in PIL cases, see Bhuwania (2014).

[8] ‘Public land’ was land that had been acquired by the government, especially the Delhi Development Authority (DDA), which was designated the sole developer of all the land in Delhi in 1957. Land was acquired and socialized in the ’50s and ’60s, and was to be developed according to terms laid down in the Master Plan. Almost all slums in Delhi are located on such public land, most of them on land owned by DDA. According to Usha Ramanathan, “[t]he cause of the “illegal” occupation of public lands is… directly attributable to the non-performance of state agencies” (Ramanathan 2006, p. 3195). The courts, throughout this period, ignored any attempt to bring its notice to any such systemic analysis.

[9] In some of these cases, the court did grant a stay order on eviction for short periods at the behest of the slum-dwellers, but even this became increasingly rare.

[10] For a more recent restatement of this position by the Supreme Court, see *Suresh v. Yeotmal District Central Co-Operative Bank* (2008).

[11] As legal scholar Sudhir Krishnaswamy has argued in the context of another PIL that relied on scanty evidence, “the broader the factual claims sought to be relied on by a public law court, the greater the burden of proof that will need to be discharged” (Krishnaswamy 2013: 32).

[12] Ironically, such manifest double standards ends up further empowering the courts. As Pratap Bhanu Mehta argues, “the legitimacy and power that India’s judiciary does enjoy most likely flow not from a clear and consistent constitutional vision, but rather from its opposite” (Mehta 2007: 76).

[13] The judgment summed up the petitions as “filed by various resident associations of colonies alleging that after encroaching the public land, these JJ Clusters have been constructed in an illegal manner and they are causing nuisance of varied kind for the residents of those areas.” Interestingly, these petitions were combined with another “set of petitions filed by or on behalf of JJ Clusters who either want to continue in the same clusters and demand better facilities or are claiming their rehabilitation.”
Civil Writ Petition Nos. 4125/95 and 531/90 decided on 27.9.2002.

The other petition which it was combined with was also filed by a factory owners’ association (Wazirpur Bartan Nirmata Sangh v. Union of India 2002).

SLP Civil No. 3166-3167/2003, Order Dated 03.03.03.

Union of India v. Okhla Factory Owners’ Assn. & Ors, Civil Appeal No. 1688/2007 (Judgment delivered 7 September 2010); Special Leave Petition No. 3166-3167/2003. Faced with a hostile Bench in the Supreme Court, the original petitioners in the case actually withdrew their petitions at such a belated stage after almost a decade of adjudication.

Even after the judgment, the DUSIB website displays its policy dated 3rd February 2010 for rehabilitation/relocation and allotment of flats to slum dwellers, which carries this as eligibility condition no. (xi): “The allotment of flat will be subject to the result of pending decision and outcome of the SLP (Civil No. 3166-3167/2003) in the Hon’ble Supreme Court of India and all other similar cases relating to Slums relocation pending in the various courts.” http://delhishelterboard.in/main/?page_id=128 (Accessed on 12 June, 2015). Such a condition hung like the sword of Damocles over the allottees for more than seven years.

This phase could be bookended by the February 2010 Division Bench decision of Justices A. P. Shah and Muralidhar in Sudama Singh v. Government of Delhi (2010).


The amicus curiae in this case was Mr Amarjit Singh Chandhiok, Senior Advocate.

‘Yamuna Pushta,’ meaning ‘embankment on the river Yamuna’ was actually a series of slum colonies on the banks of the river behind Old Delhi. The colonies had different names, such as Gautampuri-I, Gautampuri-II, Kanchanpuri, Indira Colony and Sanjay Amar Colony, and altogether housed about 150,000 people (Bhan 2006).


Interestingly, a month later, the same bench of Chief Justice BC Patel and Justice BD Ahmed reserved its judgment on two separate PILs urging the Court to decide the status of South Delhi’s ‘poshest’ unauthorized colony, Sainik Farms. However, the Chief Justice retired 16 months later without passing any judgment in the case. The case had to be heard all over again and was pending till 2011 when it was disposed off, without taking any action against Sainik Farms (The Hindu, 20 March 2004).

For an account of the demolitions, see People’s Union for Democratic Rights (2004). About 6000 of the 35,000 families displaced were resettled by the government 25 miles away in Bawana, at the extreme Northern edge of the National Capital Territory of Delhi. For an account of this resettlement process, see Menon-Sen & Bhan (2007). In light of the history of previous large-scale forced demolitions and resettlement in Delhi, it is not insignificant that about 70 per cent of the population evicted from Yamuna Pushta was Muslim (Menon-Sen 2006).

These included, according to Jain's order, “Mr. V N Singh, a former Commissioner of Police, Vice-Chairman, DDA, Commissioner, MCD, Chief Engineer, UP State Irrigation Department, who has got his office at Okhla Barrage.”

Its members were given office space in the India Habitat Centre. The Monitoring Committee appointed soon after by the Supreme Court in the so-called 'sealing case' (whose task was to monitor the closure of commercial establishments which had come up in violation of Delhi’s zoning laws) functioned from the adjoining office.


Paved or stepped portions of river banks used for washing clothes by members of the dhobi (washerman) caste.

Interview conducted by author in January 2010.

After Justice Jain left the Delhi High Court in November 2006, this PIL took a completely different and unanticipated direction. The Commonwealth Games was to be held in Delhi in 2010, for which purpose a massive Games Village was planned right on the floodplains of the river Yamuna. As this would violate the blanket directions that the Court had previously given in this case against any and all construction near the river, a different PIL filed against the Games Village was referred to the same Committee. The Convenor of the Committee, perhaps naively believing in the blanket mandate of the Committee to actually cover all illegal structures, and not just slums and such sub-standard constructions, actually interceded with the High Court against the Commonwealth Games Village. The High Court bench in 2008 found grave illegalities in the process of granting permissions for the Games Village and ordered a committee to examine this issue, without stopping its construction, which was going full steam ahead. But even this committee was declared unnecessary by the Supreme Court when it came up for appeal. The Supreme Court cleared the Games Village Project: the PIL against it, said the judges, had been filed too late in the day.


These were Vijay Panjwani and Amarjit Singh Chandhiok. The latter was also the amicus in the Yamuna case. The committee came to be called “the Hemraj Amicus Curiae Committee”.


See the appeal filed against the High Court order in the Supreme Court - http://nangla.freetlux.net/blog/archive/2006/05/10/synopsis-of-slp-filed-in-the-supreme-court.html#post_content_extended (Accessed on 10th June 2015). The appeal was summarily dismissed.

'Todh-phodh' is a colloquial Hindi phrase that might be loosely (and somewhat inadequately) translated as 'breaking and destroying'.

This was the same judge who ten years later in the Supreme Court gave the ‘encroacher as pickpocket’ judgment.

Civil Writ Petition 4582/2003. ‘Kalyan Sanstha’ literally means ‘Welfare Organisation. The filing of this PIL seems to have been the only activity this organisation ever undertook.
Indeed, the court kept refining the monitoring mechanism during this period. On 18th May 2006, selected lawyers were appointed as Court Commissioners for all the twelve municipal zones of Delhi. Finding it “difficult to monitor day-to-day activities of this magnitude”, the Court appointed a Monitoring Committee consisting of two retired senior policemen and another ex-officio senior policeman still in service, “to monitor all the directions which have been given in this writ petition by this Court and also to carry out, implement and execute the directions passed by this Court.”

The Monitoring Committee members were allotted a monthly salary of Rs 50,000 and the Court Commissioners, all practicing advocates in the Delhi High Court, were given monthly salaries of Rs 45000 each by orders of the Court.

Rupees 5 billion.

A structure whose walls and roof at least are made of ‘pucca’ materials such as oven-burnt bricks, stone, stone-blocks, cement, concrete, jack-board (cement plastered reed), tiles and timber and corrugated iron or asbestos sheets for the roof.

Four years after Justice Jain’s last Kalyan Sanstha order, a series of taped conversations between the corporate lobbyist Niira Radia and various well-known politicians, bureaucrats, industrialists and mediapersons were leaked to the press. The Radia tapes became one of the biggest political scandals in contemporary India. One of the lesser-known conversations leaked in these tapes is between Radia and a prominent bureaucrat named Sunil Arora, in which he informs Radia that a Delhi High Court judge, Justice Vijender Jain, was paid off 90 million rupees at his residence in a sealing case related to real estate by a middleman. The favorable judgement, according to Arora, was written one month before it was delivered in court; the middleman was even given an advance copy (Outlook India, 27 December 2010). However, none of these allegations have yet been acted upon legally. Justice Jain was appointed chairman of the Human Rights Commission of the North Indian state of Haryana in October 2012.

For example, consider this extract from the 14th February 2007 order in Kalyan Sanstha:

“The Monitoring Committee has submitted its 8th Report wherein reference has been made to encroachments made on government land. Reference is made to INA Market in Central Zone where there are encroachments by the shop keepers on the verandas and open passages. It is also stated that at Timarpur in the Civil Line Zone, land belonging to CPWD has been encroached upon while at Raja Pur village in Rohini Zone, eight acres of government land has been encroached upon by shop keepers and others. Our attention has also been drawn to Wazirpur Industrial Area where there are huge encroachments on DDA land measuring about 17 acres spread in nine pockets where pucca residential structures, including 2-3 storeyed building are existing and
even factories are being run apart from other commercial use. Orders were passed by this Court directing removal of such unauthorized encroachments/constructions. All the concerned authorities namely, DDA, MCD, NDMC, LandDO and CPWD shall file action taken reports in respect of the above areas, particularly with respect to the observations made by the Monitoring Committee in its report. Copies of the report have already been furnished to the concerned authorities.”

[52] Crucially, rules of disclosure under India’s Right to Information Act (2005) did not apply to it.

[53] Interview conducted by author, March 2009.

[54] For examples of such headlines in this period, see “Take Action against ‘Big Fish’: HC to MCD,” Times of India, 18th January 2006; “Catch monkeys or shut down, HC tells MCD,” Times of India, 18th January, 2006; “Stop farmhouse weddings or we will shut MCD: HC,” Indian Express, 14th January, 2006; “Squatters must go from public land: High Court,” Indian Express, 22 October 2005, in which Justice Jain is reported to have said, “We don’t bother about councillors.”

[55] Interview conducted by author, August 2009.

[56] The importance of the position of the Chief Justice has been noted by Nick Robinson who argues that “the power to set benches is also given to High Court Chief Justices. Like their counter-part in the Supreme Court, they have a strong say in controlling their court's agenda. For example, in most High Courts, it's the Chief Justice's bench that first hears public interest litigation (PIL). Consequently, High Courts gain a reputation either as sympathetic or unsympathetic to PILs based largely on the Chief Justice alone” (Robinson 2010).

[57] For example, see Manushi Sangthan v. Govt of Delhi (2010).

[58] Interview conducted by author, November 2008.

[59] Interview conducted by author, November 2008.


[61] These rules are normally made applicable in a modified form to all Supreme Court cases through the Supreme Court Rules. The Supreme Court Rules are the procedural laws that govern the working of the Supreme Court of India, and in effect function like any other statute, except that they are enacted by the Supreme Court itself.

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DEPENDENT DEVELOPMENT: LAW AND SOVEREIGNTY IN SOPORE, KASHMIR*

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ABSTRACT

This paper examines the role of law and sovereignty in the processes of ‘dependent development’ that continue to plague many regions of the world, including India-occupied Kashmir. We use a case study of the political economy of the apple farming of Sopore in the state of Jammu & Kashmir to examine the consequences of constitutional provisions regarding inter-governmental distribution of powers on the economic relationships between Kashmir and the Indian mainland. While the state of Jammu & Kashmir formally enjoys an autonomous status under Article 370 of the Indian constitution, we argue that not only has this constitutional provision failed to promote autonomy, it has also lent itself to discourses meant to justify, obfuscate and legitimize economic dependence to the Indian mainland.

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Introduction

The state of Jammu & Kashmir formally enjoys an autonomous status under Article 370 of the Indian constitution, as per which the powers of the government of the Indian Union are limited to defense, communications, and foreign affairs. Within this politico-constitutional arrangement, economic development was the meant to be the primarily the prerogative of the government of Jammu and Kashmir. However, the apple-growing town of Sopore has seen an accelerated process of dependent development in relation to the Indian mainland, especially after the rise of the militant separatist movement in the Kashmir valley in the late 1980s. In this paper, we argue that constitutional provisions regarding inter-governmental distribution of powers serve as alibi for the perpetuation of highly asymmetric relationships between Kashmir and the Indian mainland. While Article 370 proposes special autonomy of the state of Jammu and Kashmir, we argue that not only does this constitutional provision fail to secure regional autonomy, it has also lent itself to discourses meant to justify, obfuscate and legitimize economic dependence and erosion of autonomy. The emergence and perpetuation of trade monopolies, control of credit, opaque price mechanisms and unfair marketing practices represent a particularly visible failure to promote autonomy and self-reliance in Sopore, and Kashmir more broadly. The economic dependence of Sopore is in sharp contrast with other apple growing regions in India such as the Kullu valley in Himachal Pradesh. As the conditions of dependent development mature and persist, they institutionalize a profound set of informal and unfair practices in governance, control of economic and political resources and access to social goods.

This is one of the first attempts to examine and theorize the economic aspects of India’s relationship with Kashmir which is often overlooked due to an emphasis on the ethnic, cultural, and religious aspects of the Kashmir conflict. The literature on the Kashmir conflict has documented violations of civil liberties by the occupying Indian army, its local collaborators, and those resisting the Indian state (Independent Peoples’ Tribunal 2010; J&K Coalition of Civil Society 2007; South Asia Human Rights Documentation Centre 1993). To the extent that economic issues have been debated, criticism focuses on the inability of the sub-national government to control corruption and finance the credit-starved apple economy of Sopore, either due to its own inefficacy, or due to the weakening of the state at both municipal and state levels by separatist militancy (Baruah 2009; Bose 2007; 2003; Skidmore & Lawrence 2007; Schofield 2010). The prevailing perception of the restricted nature of mainland India’s involvement in the valley’s economy and politics (owing to Article 370) adds credence to the above critique. This interpretation of Sopore’s economic development trajectory makes it possible to call for a revocation of article 370 in order for Sopore’s apple economy to benefit from central government policies, like the other states of Himachal Pradesh and Uttarakhand (Naqshbandi 2014; Times of India, 28 May 2014; The Pioneer, 3 December 2013). For instance, Nitish Gadkari (a mainland politician) recently argued that “[t]he development of Jammu & Kashmir could not take off due to Article 370” (Times of India, 28 May 2014).
We challenge this benign view of Indian involvement in the stunting of capitalist development in Sopore by demonstrating that economic and political dependence mutually reinforce each other and are systematically produced by Indian military occupation, by the stifling of democratic accountability, and the incorporation of local elites in a subordinate position. According to scholars of the dependency school (Amin 1974; Cardoso & Faletto 1979; Frank 1969), ‘dependent development’ is the process by which economic transformation in a subordinate economy is shaped by the needs and interests of the dominating economy. For Cardoso and Faletto (1979), the concept highlights the ability of the periphery to industrialize and accumulate capital and the emergence of asymmetrical political and economic alliances between elites in the center and the periphery.

The erosion of Sopore apple industry’s own economic base and its inability to generate and accumulate surplus has become the distinguishing feature of its development. This pattern while fulfilling the criteria of dependency theorists must also be analyzed in the larger context of a large scale military deployment and the lack of democratic accountability. In this sense, the idea of dependent development in Sopore animates not just the center-periphery relations, but also the politics of nation-building in a frontier region while engaging, to some extent, with the legal-constitutional framework that seeks to define this relationship. We argue that Article 370 plays a role in legitimizing this unequal and exploitative relationship, because it maintains the façade of local autonomy even as the Indian state strengthens its hold over the Kashmiri economy, of which Sopore’s apple-growing economy is an important case.

Research Setting and Methodology

Kashmir’s horticulture is one of the mainstays of its largely agricultural economy, and Baramulla district is the largest contributor to Kashmir’s entire apple production (60 per cent). Within Baramulla district, the villages surrounding Sopore town (sub-district population ~220,000), were among the first places selected for apple farming in the 1930s. Apple farming was quickly taken to by the farmers and Kashmir started trading with mainland India in the 1950s. The sub-district of Sopore now has the highest production of apples in the district and has the largest land area under apple orchards (23,595 hectares out of a total of 24,759 hectares) (Government of Jammu and Kashmir 2014). After the signing of the instrument of accession with India in 1947 and the institution of Article 370, trade routes connecting Kashmir to central Asia and beyond were permanently blocked. Since then, traders and middle men from India (mainly Delhi) have established themselves as an integral part of the apple industry, facilitating transport, trade and credit over time. Our research therefore focuses on the institutional relations that operate as part of the circulation of commodities, resources, and money between Sopore, Kashmir, and India.
As part of the fieldwork in December 2014, our team conducted forty five semi-structured, in-depth interviews with apple growers in the Rafiabad area of Sopore, where 80% of the workforce is engaged in the apple business. To ensure that our sample reflected the class diversity within apple farmers, we included thirteen small farmers, eighteen medium farmers, and fourteen large-scale farmers (See table 1). Four apple-growers with orchards in a hilly terrain were also interviewed, along with five local pre-harvest contractors, four commission agents from Delhi and the president of the Sopore Apple Growers’ Association. During the interviews, we invited respondents to comment on the problems and prospects of Kashmiri apple farming, and used probing questions to understand the political and social linkages and to substantiate/corroborate the names and connections between businessmen-politicians, army and the trading houses that interviewees had mentioned. Our data also includes participant observation of price negotiations and other trading practices at the apple market in Sopore.

<table>
<thead>
<tr>
<th>Type of Producer</th>
<th>Size of Farm (in hectares)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small</td>
<td>0 - 2.5</td>
</tr>
<tr>
<td>Medium</td>
<td>2.5 - 5.0</td>
</tr>
<tr>
<td>Large</td>
<td>5.0 and above</td>
</tr>
</tbody>
</table>

Table 1: Classification of Growers (based on farm size)

The first part of the paper provides a descriptive account of the apple economy and the multiple processes by which dependent development in Sopore is reproduced. The manner in which apple farming organizes the family, labor relations, socio-political interactions with the moneylenders (pre-harvest contractors and commission agents) are the issues in focus. The crucial role of trading houses and banks, and the unique marketing practices of the area are discussed in order to identify the socio-economic links that render independent capitalist development impossible. We use directed comparisons with the apple economy in Kullu to identify the exceptional nature of these relationships in Sopore. Building on the specifics of the discussion, the latter half of the paper identifies the politico-legal processes that are implicated in this account of dependent development. The erosion of autonomy is understood to be a complex political process involving the creation and empowerment of a rentier class in the region. This section examines the formation of such a rentier class and the mechanism by which a supposedly autonomous sub-national unit enters into a deeply exploitative relationship with the mainland economy.

**Dependent Development: Economic and Social Relations in Sopore**

The discussion in this section is divided into six parts which reflect various aspects of the production chain (see Figure 1): family and labor relations; credit; contractors
and middlemen; price determination; pesticides and fertilizers; infrastructure; and growers’ cooperatives.

**Family and Labor relations**

Out of the 45 interviews conducted with the growers, 39 lived in a joint family arrangement and the orchards were collectively owned by the members of the family. Because of the intermittent need for skilled labor throughout the year coupled with the loss of farm incomes over the years, families preferred to stay together in order to cut costs. It is only the men of the family that are involved in the on-farm activities. Women are conspicuously absent from the farm and business spaces including the markets. The farmers attribute the cause to the large army presence and rise in militant activities in the valley. They spoke about the time when women were active
participants and worked on the farms. Sopore, like other parts of the Kashmir valley, witnessed large number of rape and harassment incidents perpetrated by the Indian army, the police militia, as well as by separatist militants (Amnesty International 1992). This has forced the women to remain within the confines of the house, thereby restricting their contribution to supplying food to family members and other laborers working in the orchards.

The labor contract in Sopore includes a daily supply of food, tea, snacks, and bread by the contractor and this is generally provided for by the women in the house. Local Kashmiri laborers are typically employed for tasks demanding skill and experience while the demand for unskilled labor is fulfilled by migrant labor mainly consisting of Muslims from Uttar Pradesh, Bihar, West Bengal and Orissa. Activities like spraying pesticides, tilling the land, loading cartons for transportation, etc., are carried out by unskilled workers, living in rented rooms in the area. At the time of fieldwork, the daily wage for the skilled labor varied between Rs.500-1000, while for the unskilled it was typically fixed at Rs.300. An apple grower works on the orchard throughout the year. After the winter snow, activities on the farm gain momentum, beginning with pruning (locally called Shakh Tarashi) and chemical treatments. Plucking, sorting, packing, loading-unloading, transport etc. are some of the other activities involved.

Credit

Over the years, the costs of production have been steadily rising due to the lack of irrigation facilities, the increase in the required number of pesticide treatments, transportation costs, and the prices of wooden boxes and paper cartons. The banks lend at rate of interest varying between 9-15% per annum with the upper limit on agricultural credit being just 100,000 rupees. The Kisan Credit Card scheme sponsored by the central government lends at 7% rate of interest and does not require mortgaging the orchards. But it requires the growers to submit all the legal papers related to the land. Moreover, under the Kisan Credit Card scheme only Rs.36,000 per kanal (1/8 acres) of land are available to the growers, which is insufficient to meet the costs of production. All of the growers interviewed had availed of institutional credit (from J&K bank, government of India’s Kisan Credit Card scheme, etc.), all of them had mortgaged their orchards to the banks, and out of 45 farmers interviewed, 41 farmers had defaulted on their loans. Although their orchards have not been acquired, this dire situation makes them turn to the pre-harvest contractors (PHCs) who loan double the amount compared to the banks without asking for mortgage but at 12% rate of interest. They also demand a commitment from borrowers to give their produce (which must be three times the value of the borrowed amount) to the lender for selling in Indian markets. The agent charges 3-4% commission charges from the grower and 1% from the buyer for brokering the deal.
Moneylending has proliferated in the region, because informal money-lenders typically extend loans up to Rs.2,00,000. Residents with access to loans from the banks borrow for the purpose of onward lending. Some residents with a government job, who have some money to spare, have also entered the money-lending business. The most common money-lenders, however, are the Kashmiri PHCs who receive money both from the banks and from Delhi-based traders. There are Indian commission agents (called Aareth in Kashmiri) mostly based in the regional capital, Srinagar, but most Kashmiri growers prefer borrowing from local PHCs because they are known to them and have social relations with them and their families.

Pointing to the role of the banks, a report by NABARD highlighted out that during 2010-11, loans worth Rs.1200 crore were provided to the apple growers in Jammu and Kashmir, of which the share of formal credit was merely Rs.200 crore (Fayyaz 2013). Paradoxically, banks have been providing credit to the commission agents who indulge in onward lending to the cash starved growers. The report criticizes the J&K bank for encouraging usurious lending by commission agents. Traders and wholesalers enjoy a higher credit limit of ten or twenty million rupees whereas the credit limit for growers is much lower. Moreover, the high rates of interest charged cannot be attributed to the risk burden carried by lenders. At the Azadpur market, most of the commission agents we interviewed suggested that compared to apple-growers in Kullu, cases of default and fraud by the growers are very few in Sopore. Despite their inferior financial status, apple-growers in Sopore bear all of the risk associated with apple-growing, and defaulting on loans is not an option as those lending money have significantly high social and political status in Sopore.

**Contractors and Middlemen**

A network of middle order market functionaries is prominent in Sopore, just like in most other agricultural markets. This network typically comprises of the pre-harvest contractors (PHCs), commission agents, and wholesalers which deny farmers the full value of their apple harvest. In the absence of institutional financing mechanism in Sopore, informal credit and output markets are interlocked in such a way that Commission agents (Delhi-based and others) take undue advantage of the cash starved growers. The pre-harvest contractors turn the growers into captive suppliers of apples.

Each one of the forty five apple growers we spoke to was dependent on the pre-harvest contractors (PHCs) and other middlemen for the entire cycle of apple production and marketing. Most of those PHCs have ties with Delhi-based “commission agents”. A commission agent acts as a middleman brokering a transaction between a buyer and a seller, rather than actually participating in the transaction by buying from the farmer and selling to a wholesaler in Delhi or some other market. There are around 3000 commission agents in entire Kashmir and though the fruit market in Sopore (considered Asia’s largest fruit market) is officially a non-commission
market, it has over 500 commission agents (Fayyaz 2013). The commission agents usually work for the traders based in Delhi and set up permanent offices (locally called *fadi*) in the Sopore market. As mentioned earlier, the grower is bound to sell his produce through the commission agent from whom he borrowed money and to a final buyer identified by the commission agents. The pre-harvest contractors are typically locals (employed by the Delhi based trading companies) who have amiable relations with the growers and their families. They lend not only for apple farming but also for buying livestock and for private expenditures including marriages, functions and festivals. As a result, these individuals have emerged as powerful actors in the local political landscape.

A brief comparison with Kullu in Himachal Pradesh shows that Sopore’s apple-growers face a higher level of exploitation. In Kullu, many of the growers (especially the owners of smaller orchards) do borrow money from the PHCs but the nature of the contract obligates the contractor to perform a host of activities for ensuring crop protection and quality of the produce. After entering into agreements with the farmers, he ensures proper irrigation, hires skilled harvesters and packers for the produce, supervises wrapping of poly ethylene sheets around apple bunches and makes arrangements for theft protection (Pandey et al. 2009). We found no evidence of such services being offered by PHCs in Sopore.

**Price Determination**

Due to a variety of collusive and opaque practices, apple-growers in Sopore often receive much less than the market price. Commission agents also impose a great degree of price uncertainty and risk on apple-growers. Price negotiations between apple growers and commission agents follow a quaint practice, locally known as the *Hatha* or the *Aath Deu* system. Under this system, prices are negotiated through a handshake under a piece of cloth, and under the veil of secrecy (see Figure 2 below). This method of quoting and negotiating the price for Kashmiri apple-growers prevails in markets in Kashmir as well as in Delhi and other Indian markets. As a result, Kashmiri apple-growers experience a great degree of uncertainty and rumor-mongering regarding prices being offered by different buyers.

The setting up of a number of cold storage facilities in and around Azadpur market in Delhi by the traders and agents has increased the practice of hoarding of the produce, which aids price manipulation at the markets. Controlled Atmosphere Storage (CAS) is becoming very popular among commission agents. There are seven cold storages within Azadpur market yard of Delhi and more than one hundred in Kundli (Sonipat, Haryana). Unlike the J&K government, the governments of Delhi and Haryana provide subsidies for setting up cold storages. When the agents finally pay the growers the proceeds of the sale, they deduct the advance, the transportation cost, taxes, labor charges for loading and unloading the boxes, bribes to army personnel at the tax barrier in order to avoid frisking and unloading of apple crates.
for inspection, and other hidden charges popularly known as Watak in Kashmiri. These deductions are extremely arbitrary and exploitative. These practices have been continuing since 1950s, and perpetuate the debt bondage and strengthen the position of the pre harvest contractors in the region.

A comparison with the experience of apple-growers in Kullu demonstrates that the price uncertainties forced upon Kashmiri apple-growers through policy failure. Though Kullu growers also suffer from the uncertainties of the Hatha method of price determination at the Azadpur market in Delhi, the practice has been brought to an end in the markets in Shimla and Chandigarh through government regulation (Pandey et al. 2009). Apple growers of Himachal Pradesh also enjoy a minimum support price fixed by the government each year. Kullu growers tend to sell A-grade apples to the private traders in Chandigarh and Delhi, and B and C grade apples to the state-owned Horticultural Produce Marketing and Processing Corporation (HPMC) since it does not differentiate in support price for different grades of apples. As a result, they receive a good price for the lower grade apples. Moreover, Himachal Pradesh implemented marketing reforms in 2005 allowing apple growers easy access to wholesalers and direct trade with the consumers. The state has also introduced public-private partnerships in the financing, marketing, operation and management of agricultural markets. None of these reforms have been replicated in Kashmir.
**Pesticides and Fertilizers**

Sopore’s apple economy relies heavily on certain local producers and distributors of pesticides and fertilizers, who enjoy a de facto monopoly in the business and produce low-grade pesticides and fertilizers. This not only escalates the production costs but also severely damages apple trees and their capacity to bear fruits in future seasons. Growers invariably compared their situation to those of the apple growers in Himachal while making a case for deliberate discrimination against Kashmir. In Himachal, pesticides and fertilizers are supplied by the HPMC at subsidized rates and are easily available to the growers at the local HPMC centers (Sahu et al. 2014). While Himachal apples require only 2-3 rounds of pesticide spray since the pesticides are better in quality compared to the ones available to the Kashmiri growers, the Kashmiri apple requires around 12-13 rounds of the same. They pointed out that almost each year, the government notifies that some pesticides being sold to the farmers are unfit for use after the farmers have already bought and used them. **Most of the pesticides producing units belong to one or two individuals in Kashmir who use their political and economic clout to prevent any other pesticide from entering the market till such time as they finish their stocks. Those individuals have been ministers and members of state assembly for many successive governments.**

**Infrastructure**

Levels of public investment in local economy continues to be extremely low. Infrastructure development, which is fundamental to the growth of the economy, is minimal. The horticulture market in Sopore, which was opened in 2000 after consistent efforts of local growers despite tough resistance from Delhi traders, while being the largest in Asia, lacks much of the infrastructure necessary for a market of its size. Apple is a perishable product and the lack of cold storage facilities makes their produce vulnerable. The Sopore market has no cold storage – the only such private facility is in Srinagar and is operated by the same family that manages the pesticide business. In contrast, Himachal Pradesh has about nearly ten Compressed Atmospheric Stores (CASs), and is set to establish 12 more units of this type (Bodh 2015). As compared to Himachal Pradesh, which has over 85 food processing units, value addition and apple processing industries are completely absent in Kashmir (Pandey 2015).

**Growers’ Cooperatives**

The Jammu and Kashmir Horticultural Produce Marketing and Processing Corporation Limited (JKHPMC) used to make cartons, trays and crates to be sold at reasonable prices to farmers. The state government has been cutting down subsidies to the institution each year (Government of Jammu and Kashmir, 2014: 264) and as a result growers now have to purchase these inputs at a costlier rate in the black market.
during the peak harvesting season. Barring two growers with big orchards, all other growers used wooden boxes with paddy straw (a costly and inefficient method) to pack and transport apples. Deinstitutionalization stands out as an important feature of Kashmir’s apple industry. It is telling that out of the total of 256 growers’ cooperative societies set up by the state government since 1971, only two have survived (Siddiqui, 2013).

In stark contrast, apple growers in Himachal Pradesh are a formidable political force and have a number of growers’ cooperatives like the Himalayan apple Growers’ Society (HAGS), Himachal Pradesh Cooperative Farming and Consumer Federation (HIMFED), Himachal Pradesh Fruit Growers’ Marketing and Processing Cooperative Society (HIMPROCESS), Karsog Valley Farmers’ Cooperative Society, to name just a few. These societies are instrumental in demanding basic facilities for the growers, including cheaper cartons for packing, better transport facilities, building of roads to the more inaccessible orchards in the hills, etc. In Himachal Pradesh, the government has banned the use of wooden boxes and established a state owned factory to produce corrugated fiber board (CFB) cartons and fixed its selling price at a level lower than the cost price of wooden boxes.

* * *

This descriptive account of the apple economy in Sopore would not come as a surprise to scholars of petty commodity production in India. Barbara Harriss-White writes that “agricultural commodity transactions are interlocked with credit contracts in ways which can sometimes be shown to depress commodity prices below levels resulting from unconstrained transactions and to raise interest above ‘market’ rates” (Harriss-White, 1995: 93). She refers to common practices of resource appropriation through ‘misinformation, fraud, arbitrary deductions as well as the subversion of regulatory interventions of the state’ (Harriss-White, 1995: 93). Pointing to the role of oligopolies, Harriss-White further argues that mercantile oligopolies most often function by creating dependence within the smaller firms for information and physical facilities. They “strive to set the terms and conditions of accumulation of the petty sector by relations of finance” (Harriss-White 1995: 94).

Although much of the credit and market landscapes in Sopore are comparable with those present elsewhere in India, the political relations that create and reproduce the social conditions of what Harriss-White calls ‘mercantile oligopolies’ in Kashmir are by no means common. Our comparison with the apple economy in Kullu suggests that Kashmir’s special political status has significant economic implications as well. Near absence of government regulations and persistence of exploitative practices as the norm in crucial areas of the apple economy points towards the political imperatives that create the conditions of dependent development in Sopore, thereby rendering impossible its autonomous growth. It is to these political imperatives that we now turn.
Kashmir’s Rentier Class and the Politics of Dependence

In May 2008, the government of Jammu and Kashmir and the government of India reached an agreement to transfer 99 acres of forest land to the management of the Amarnath shrine, a popular Hindu pilgrim destination. This land lay mainly in the Kashmir valley and was proposed to be used for building shelters for Hindu pilgrims, which caused a great deal of anxiety in the Muslim-dominated Kashmir valley. Both the Muslim-dominated Kashmir valley and the Hindu-dominated Jammu region witnessed large scale protests and polarization. The decision was revoked by the Jammu and Kashmir government in July 2008 but the protests in Jammu continued. The protests were led by a group of organizations rallying around the Bhartiya Janata Party (BJP) under the banner of Amarnath Shrine Sangharsh Samiti, which blocked traffic on the Srinagar-Jammu highway, the only land link between Kashmir valley and Indian mainland. As a result of the de-facto economic blockade, Kashmir’s apple industry (among others) suffered immensely. The losses were compounded by the lack of adequate cold-storage facilities. Sopore’s apple growers went on a month long strike to demand opening up alternate channels of trade (including Attari, Wagah, Muzaffarabad road links) with India, but the blockade continued. Tonnes of apples perished and thrust the growers under enormous debt, strengthening further the hold of the middlemen on the growers. This blockade stands out as a stark reminder and example of the extent of Sopore’s (and Kashmir’s) economic dependence on India.

Local self-governance institutions in Sopore, like many other parts of Kashmir, have not been in existence since the 1990s, when militancy picked up, with representative institutions within local bodies being kept in abeyance. Since the 2000s, Sopore has not seen much change in the elected representatives for the state legislature from the area. Dilawar Mir had been the representative from Rafiabad, Sopore till he was barred from contesting elections and imprisoned on charges of corruption. Now, his son Yawar Mir represents the constituency in the state legislature. Dilawar Mir is also the owner of the dominant pesticide company in the area. Growers mentioned that due to the political influence of these politicians, they are able to control the market to an extent where no other pesticide enters the market till the time their products get sold. The growers spoke about the powerful lobby of Delhi-based traders wielding a strong influence in the local electoral politics. During the recent elections to the state legislative assembly, a candidate supported by Delhi-based traders defeated the president of the J&K Apples Growers Association who contested as an independent candidate.

Other than Mir, growers spoke of Iqbal Bukhari or Iqbal ‘Dythene’ (named after the pesticide manufactured by a large company he owns and manages). His son Syed Altaf Bukhari is the elected representative from Amira Kadal constituency, Srinagar. Mir and Bukhari control between them almost the entire pesticide and fertilizer supply to Sopore. Bukhari also owns the only cold storage facility in the entire area of Sopore and Srinagar. Apart from the Jammu and Kashmir Horticultural Produce
Marketing and Processing Corporation (JKHPMC), Kohinoor is the only other company which makes apple juice concentrates, and it belongs to Iqbal ‘Dythene’. Because of lack of funds, the JKHPMC is not able to pay the farmers for months after procuring C-grade apples from them for the juice concentrates, but Kohinoor pays up front and thereby controls this business. This near total monopolization of the various businesses associated with apple production by just a small number of powerful families is a pattern that has existed for long in Sopore. Neither of the two dominant mainstream parties in the region – the National Conference and the Peoples’ Democratic Party – have sought to break this monopoly over the market. We often heard in our interviews the opinion that these individuals contribute monetarily to both the parties.15

Almost all of the growers admitted to participating in vote-buying by the two major Kashmiri parties before elections. They argued that the traders in Delhi and the pesticide companies funded particular candidates and enabled the defeat the president of the Sopore apple market who contested assembly elections in 2014. The political and economic dominance of these interests is safeguarded by both the central government in India and the army. This is characteristic of the kind of political leadership that has emerged in Jammu and Kashmir over the past sixty years. Wajahat Habibullah (2004) writes about the corrupt practices instituted by the Indian government in 1950s when it advanced loans to buy off political allegiance of a section of Kashmiri population. Bakshi Ghulam Mohammed, the prime minister of Jammu and Kashmir after the arrest of Sheikh Abdullah, was instrumental in granting contracts for exploiting the forests, licenses for establishing transport, tourism infrastructure, etc. In this way, he quickly controlled the agitation stemming from Abdullah’s arrest. His own business was based on forest leases and military contracts (Habibullah 2004).

The funds given by the central government to Jammu and Kashmir were enormous and many individuals reaped the benefits of such state sponsored extraction of resources. Habibullah (2004) writes that other states in India receive approximately 20% of the funds for development from the central government, but Kashmir, until 1990, received 80% of its development funds from the Central government. Post 1990s, 100% of the funds came from the Central government and only 20% was repayable. Kashmir is the largest recipient of Central government grants worth 812 million dollars per year (Development Commissioner, MSME 2012). The rentier class in Kashmir has sought to appropriate these funds and the right to extract the resources of the valley. Many of the beneficiaries contested elections and became the elected representatives, including Bukhari and Mir. The perceived autonomy of Jammu and Kashmir sanctioned through Article 370 of the Indian constitution has diverted attention from the structural debilitation of the Kashmiri economy and substantial erosion of its autonomous status. To the extent that economic dependence is debated, Article 370 allows the Indian government to shun accountability and responsibility for the anemic state of Kashmiri apple
sector, as well as the economy at large. It has therefore become an instrument that sanctions state impunity in Jammu and Kashmir.

**Law/Exception and Sovereignty: The Case of Article 370**

In 1964, the Union Home Minister Gulzarilal Nanda explained in the Lok Sabha that “the only way of taking the constitution (of India) into Jammu and Kashmir is through the application of Article 370...It is a tunnel. It is through this tunnel that a good deal of traffic has already passed and more will” (Noorani 2011: 2). Article 370 of the constitution of India is a unique provision that was the outcome of the negotiation between Jammu and Kashmir and India, and it could not be amended or abrogated unilaterally. It mainly embodies six special provisions that allow Jammu and Kashmir its own constitution and restrict India’s legislative control to defense, foreign affairs, and communications.

However, since then, 120 of the 144 subjects on which the central government can legislate for the rest of India have been extended to the state of Jammu and Kashmir, along with 260 of the 395 articles of the constitution of India (Noorani 2015). The erosion of autonomy sought to be guaranteed by Article 370 was formally acknowledged by the Indian leadership as early as in 1963. The then union home minister Mr. Nanda noted that “...only the shell is there. Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it.” (Noorani 2011: 2) In fact, it is legislatively much easier to amend Article 370, compared to interference with the rights of other states of India. With regard to the rest of India, if the state’s powers are to be curbed, the procedure laid down in article 368 will have to be followed. With regard to the state of Jammu and Kashmir, a mere executive order made by the President under Article 370 would suffice (Noorani 2011: 2).

It is significant to note that despite the political and administrative clarity on the emptiness of Article 370 and its clear inability to be an instrument of Kashmir’s autonomy, it continues to be a metaphor for whipping up passions, both in India and in Kashmir, with regard to the demand for its abrogation. This particular perception of Jammu and Kashmir’s autonomy helps further the processes of dependent development by granting impunity and rendering accountability unnecessary. Sopore is one of the leading centers of resistance against the Indian occupation. The separatist leader SAS Geelani, among others, hails from Sopore. Observations from many growers pointed towards the fact that their economic dependence on India has increased over the years and they believed that there were deliberate attempts being made by successive Indian governments to create and further this economic dependence through an effective control of credit, marketing, pricing, etc. By reducing the profits to be made from apple cultivation, some of them observed, the Indian State attempts to weaken resistance against its occupation of Kashmir.
Such a response to resistance movements against the State operates by perpetuating a state of exception. Giorgio Agamben describes the state of exception as “a zone of indistinction, between the outside and the inside,” such that “there is no difference between law and force, wherein individuals are subjects to the law but not subjects in the law” (Agamben 1995: 19). One of the foundational powers of a sovereign is the ability to decide if the law applies to a situation or if the law is held in abeyance due to an emergency or crisis. Agamben’s description of the ‘state of exception’ provides the philosophical grounds for critical scholarship on meanings of sovereignty, law and the accrual of emergency powers to the executive. He argues that the “state of exception which was essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement, which as such never remains outside the normal order” (Agamben 2005). Article 370 creates that permanent state of exception which makes the ‘normal’ biopolitical control of the government inside the territorial frontier of the state possible.

Lack of state sponsored development initiatives for the apple growers of Sopore, widespread black marketing of essential goods, trade distorting private monopoly over pesticides and fertilizers, institutional decline of government agencies like JKHPMC, proliferation of informal, usurious lending present a poignant story of neglect, corruption, apathy and misuse of political powers. This informality has been the norm for the apple industry in Sopore over the past five decades. This impunity in many ways is sanctioned by the constitutional provisions under Article 370. This unique legal-constitutional provision institutionalizes the state of exception in Jammu and Kashmir and furthers the processes of dependent development through informalized practices of governance, which becomes the dominant motif of the contemporary discourse on development in the region.

While Article 370 creates a semblance of autonomy for the region, it is mostly inconsequential since almost all of the basic/fundamental rights of Kashmiri citizens are denied under the Disturbed Areas Act and Armed Forces Special Powers Act. The exceptional is overdetermined through multiple legal-constitutional frameworks and sovereignty is expressed through the governmentality of discretion. The case of apple growers of Sopore brings into focus the instrumentality of the extra-legal and apathetic causes in the pattern of dependent development. It not only inhibits structural change and reform in the economy, but also distorts and undermines the development process fundamentally. The rentier economy creates distortions and prevents capitalist development in the region, while the sovereign decides which informality to encourage and which ones to curb. The monopolies, corruption, misuse of political power, lack of public assistance to government initiatives cannot be treated as an aberration. They become a part of the logic of exception that is used to contribute to the process of dependent development.
NOTES

[1] Contribution of agriculture sector to J&K’s GDP is 22.63% and horticulture contributes 45% of the GDP from agriculture (Government of Jammu and Kashmir 2014).

[2] The roles of pre-harvest contractors and commission agents have been discussed in detail in later sections of this paper.

[3] For example, Interviewee #1 (6/4/2014) of Rafiabad, spoke about the time when his mother used to work on the field. He mentioned that around the year 1987, women withdrew from farm activities because militant separatist movement began in the region and army increased its deployment. He said that “there were a number of rape and molestation incidents and it became unsafe for women to venture out alone.” We were able to speak to this person’s mother and another elderly neighbor of hers. The two women recalled the time when they used to actively participate in plucking, sorting and packing of apples. Delivering food to the farms for the male members of the household and the workers was another regular activity. They also mentioned that during pruning of the apple trees, they collected the stems and burned them to make charcoal in order to use it for lighting the Kangri, the earthen pot full of embers that Kashmiris use to keep warm in winters. Of late, some women have started collecting stems for charcoal from the fields again, but to a much lesser extent.

[4] For example, Interviewee #2 (6/12/2014), of village Nowpora, is skilled in Shakh Tarashi or pruning of apple trees. The months for pruning are typically September-October and February-March. During these months of high demand, his job fetches him a daily wage ranging from Rs.1000-1200. In other months, he has to travel to nearby villages to find a job and he claimed that usually he manages to earn around Rs.500-700 daily.

[5] For example, Interviewee #3 (6/14/2014) from Uttar Pradesh works as an unskilled laborer in the apple farms. He makes Rs.300 on an average daily, while during times of labor scarcity he works at Rs.300-500 per day.

[6] The rate of interest charged by the PHCs is, in some cases, charged on the value of apples sold. In those cases it goes by the name of “commission charges”.

[7] For example, Interviewee #4 (6/5/2014), who owns 3 hectares of land in Rafiabad, borrowed Rs.1.5 million from a PHC in January, 2013. He had to make a commitment to sell apples from his orchard worth Rs.4.5 million through him. He charged an interest of 12%. The PHC took his produce to Azadpur market in Delhi where he found a buyer for his produce at a good price and took commission of 3% on the final value of apples sold.

[8] In some reports, the commission charges have been shown to be as high as 6-12% (Fayyaz 2013).

[9] Interviewee #5 (7/3/2014), a pre harvest contractor in Sopore, owns a fad in the Sopore fruit market. He mainly receives his finances from a Delhi-based company and claims that Sopore has the highest number of commission agents in Kashmir valley. He had to obtain permission from the Sopore Apple Growers’ Association and the Sub-district Magistrate (or Tehsildar) to set up his fad. He said that the local government officials have always helped them go about their business smoothly. But they have to regularly bribe them to keep them “in favor.”

[10] Interviewee #7 (2/15/2015 in Azadpur market, Delhi) listed the ‘hidden charges’ that he had to pay to bring his produce to the market in Delhi. It included the costs of the phone calls made by the driver and the assistant to the agents in Delhi, their snacks, food and lodging costs (since it takes
about 20 hours from Sopore to Delhi during good weather conditions) and the money that they offered at the famous shrine, Ziarat Syed Hassan Man Taqi, on the way. He joked about an event in the past where he discovered in the final list of various ‘hidden’ charges the cost of visiting a local brothel by the driver!

[11] Many of the farmers recalled that about 2-3 years ago, they were sold some pesticides in the market that turned the apple trees and their surroundings so poisonous that it killed any stray cattle that ate the grass under those trees (Mohiuddin 2015).

[12] Dilawar Mir was sentenced in 2014 to three years imprisonment for ‘wrongful release of Rs.3 million and contract for sale of urea to his firm (M/S Good Friends Agency) by National Fertiliser Limited (NFL)’ in 1993-96 (Times of India, 8 November 2014).

[13] For example, Interviewee #8 (12/24/2014) spoke about shortage of good quality pesticides in Sopore. He said, “last year Iqbal Dythene had sold sabun (local name for pesticide) worth Rs.4 crores. It was only later that products from other companies entered the market.” Another farmer added that, “each year government sends samples of pesticides for testing and issues a warning in October or November that such-and-such product is spurious and should not be used, though the pesticides have already been sprayed in March or April.”

[14] Interviewees #9 and #10 (12/27/2014) were vehement in their criticism of the apparent monopoly enjoyed by Iqbal Dythene and Dilawar Mir in the pesticide business. They mentioned that Mir has also been indicted and sentenced by the High Court. One grower commented that “these individuals are well entrenched in the system. They themselves are the politicians as well as the businessmen. They also have connections with the army. It is not possible to get anything done, let alone do business on that scale in Kashmir without army’s blessings”.

[15] Interviewee #9 (12/27/2014) remarked that “individuals like Iqbal Dythene are the Ambanis of Kashmir. They fund both the parties. They not only have political and business connections with parties but have familial relations with the leadership of both the parties. They are Peers (the religiously and socially dominant section among the Kashmiri Muslims) and they are highly endogamous. So whichever party comes to power, their interests are always taken care of. But they are supposed to be closer to PDP now, since it is said that they funded PDP when it first came to power in J&K. Iqbal Dythene’s son recently won as a PDP candidate”.

REFERENCES


PRIVATE MAINSTREAMING: USING CONTRACTS TO PROMOTE ORGANIZATIONAL AND INSTITUTIONAL ADAPTATION

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ABSTRACT

This article develops the concept of ‘Private Mainstreaming,’ which is a process for developing intra-organizational capacities to horizontally identify, manage and diffuse value-add innovation primarily through the utilization of contracts. Private Mainstreaming is an extension of the concept of ‘Public Mainstreaming’ wherein climate policies are horizontally integrated across a variety of divisions and agencies with the intent to build cross-linkages across heterogeneous actors based on the emergence of common values and language. While adaptation scholarship has focused almost exclusively on public law and policy, understanding the nature and mechanisms of private sector adaptation through contracts is critical to understanding larger dimensions of socio-ecological and institutional adaptation. This article sets the stage for future research into the operationalization of organizational mainstreaming in the promotion of more robust adaptive capacities in the private sector.
Introduction

The severity of the impact of climate change on society will depend on the ability to distribute limited resources in order to mitigate risks, to invest in resilient social and physical infrastructure and to build adaptive capacities to accommodate the larger social, economic and environmental unknowns. Arguably, the widely distributive impact of climate change is well beyond the capacity of the public, private or civic sectors to accommodate in isolation. It is assumed that, in the best case scenario for reasons of equity and justice, it is the rule of law which will help guide the allocation of capital to make investments necessary for a collective process of adaptation which results in co-benefits between the public and private sectors (Paavola & Adger 2002; Adger 2006; Toth 2013). However, in the absence of positivist public laws which impose or facilitate adaptation across sectors, adaptation in the private sector is dependent, in part, on process and technological innovations that create new value to offset the costs of change (Stern 2007; Fankhaeser et al. 2008; Gans 2012). Private capital is unlikely to be motivated to make investments which offer co-benefits for public beneficiaries, unless those co-benefits offer equal or greater levels of return relative to alternative investments which bear exclusively private benefits (Lockie 2013).

This raises a broader research question—assuming that political and institutional stagnation thwart the ability of society to resolve the competition for limited resources in a timely and efficient manner—what role will positive law have in the promotion of adaptation which advances benefits to an equitably distributed class of public and private interests? This article argues that while the scholarship has focused on the socio-ecological adaptation through the operations of public law and policy, private law should also be evaluated as an equally critical and flexible instrument for climate adaptation. This argument is premised in part on the position that institutional change is based on both exogenous and endogenous influences that may arise from the operations of climate policy and contracts, respectively. This research examines the extent to which the adaptation of private law through contract, together with specific organizational processes, can and does promote the capacity of organizations to adapt.

Scholarship has identified a process of Public Mainstreaming (“Public Mainstreaming”) wherein elements of climate change planning and design are incorporated horizontally across a wide array of public sector policies and agencies (Kok & De Coninck 2007; Brouwer et al. 2013; Wamsler et al. 2014). The intent of mainstreaming is to develop a process of horizontally integrating climate change policies from across an organization and/or organizations with the intent to build cross-linkages across heterogeneous actors based on the emergence of common values and language (Juhola & Westerhoff 2011). For these reasons, Public Mainstreaming is argued to be a more effective alternative to designated climate policies which are top-down and generally do not benefit from modes of experimentation or even the validity generated by more localized decision makers and circumstances.
This article argues that the general principles of mainstreaming also apply to the private sector. The concept of Private Mainstreaming (“Private Mainstreaming”) suggests that value-add innovation may be: (i) identified and managed by organizational structures that mediate conflicting interests and define common values; and, (ii) memorialized and diffused by contracts. Innovation must be distinguished as creating additional value that, at the minimum, off-sets the costs of adaptation, as institutional and organizational changes bear a transactional cost and perhaps an opportunity. Through an examination of existing literature, and as exemplified through hypothetical scenarios involving real estate assets, organizations, markets and rules, the concept of Private Mainstreaming sets forth a logical explanation for how firms are likely to adapt or develop the capacity to adapt.

Private Mainstreaming has potential applicability as firms develop management processes and structures for promoting the capacity to recognize and diffuse innovation. This has been particularly true in recent years with the development of adaptation units in Fortune 500 companies to manage supply chain disruptions (Westervelt 2015). Ultimately, Private Mainstreaming could be viewed as an operation for the promotion of a firm’s adaptive capacity which is theoretically dependent on modes of organizational and human intelligence for the recognition and management of change (Staber & Sydow 2002; Grothmann & Patt 2005; Pahl-Wostl 2009; Keenan 2015a). To this end, this research may also contribute to a larger debate as to the merits of the ‘Porter Hypothesis’ (Porter 1991; Porter & Van der Linde 1995) by showing that organizational processes and non-regulatory policies (e.g., disclosure, communications, etc.) help explain why firms may or may not economically benefit from environmental innovation (Arjaliès & Ponssard 2010; Ambee et al. 2013).

As climate change accelerates in its impact on the built environment, the promotion of the adaptive capacity of actors within the built environment is critical for preventing a potentially broad distribution of transactional costs associated with a failure: (i) to mitigate risks; (ii) to be resilient to known risks; and, (iii) to be adaptive to the long-term known and unknown risks occurring within the useful life of individual assets, portfolios and cities at-large. A failure to build adaptive capacities is likely to result in amplified impacts which cut across private and public sectors. Private Mainstreaming may provide a useful concept for building adaptive capacities when public law and policy otherwise fall short in accommodating innovation.

**Rules as Mechanisms of Adaptation**

**Institutional Adaptation**

Institutions can be defined as a set of rules guiding the behaviour of its members across time and space (Giddens 1984). These rules take time to develop and offer a degree of stability for its members through common practices and traditions. At the same time, institutions are constantly in a state of flux as rules evolve and adapt.
For the purposes of this article, the institutions of the built environment are defined by the rules and norms which operate to guide the financing, development, design, operations and transactions of property, real estate and infrastructure. To conceptualize the adaptation of the institutions of the private sector and its constituent actors (e.g., organizations/firms), it is necessary to conceptualize the nature of rules as they relate to the evolution and adaptation of institutions. Thereafter, rules—as manifested in the rule-of-law—can be understood as mechanisms by which human intent may some control or design, for better or for worse, the process of adaptation.

The formation and evolution of institutions follows three primary lines of thought – rational choice, sociological and historical institutionalism (Hall & Taylor 1996). Rational Choice Institutionalism (“RCI”) argues that the “rules of the game” are exogenously derived and serve as a constraint on behavior (Shepsle 2008). RCI has positioned institutions as positive social phenomena which are made up of formal and informal rules which produce desirable and stable outcomes for its members. Sociological Institutionalists (“SI”) argue that institutions are endogenously derived as the “play of the game” or strategies created when agents repeatedly interact in a particular situation (Brousseau et al. 2011:10). Institutions shape the rules of the game and the range of individual options for playing the game based on their own preferences, which are themselves rationally grounded in a set of socially defined morals. This distinction between defining the game and responding to the game represents the ontological duality inherent in institutional thought. Social actors operate within the constraints imposed by institutions, but their actions ultimately define and change these institutions as well. Historical Institutionalism (“HI”) acknowledges this duality and attempts to explain the existence of institutions based on path dependencies and critical junctures that characterize the evolution of social actors and institutions (North 1990; Thelen 1999).

This article attempts to construct a narrative for institutions of commerce that attempts to describe what is likely already happening as a matter of organizational adaptation through contracts. The division between exogenous and endogenous rules is analogous to the division between public climate policies and private contracts. As Fitzpatrick (2014: 3) notes, “[i]nstitutions-as-constraints theories focus on institutions as exogenous rules of the game. Institutions emerge through political processes of interest group bargaining rather than the equilibrium coordination of interacting individuals.” Therefore, it is assumed that public climate policies are an outcome of political interest group bargaining and not equilibrium seeking behavior of coordinating agents, as is the case in the endogenous rules of institutions. As such, it is the operations of contracts and game playing that resolve in a coordinated equilibrium defined by the exchange of resources that is analogous to endogenously derived rules. This division is important to the extent that this article assumes that institutions may change and adapt by a combination of exogenous and endogenous influences. Therefore, if society focuses largely on matters of public policy in addressing climate change, it may be missing an opportunity to advance adaptation...
through private contracts which may have an equally impactful influence on the adaptation of institutions that are critical to society.

In terms of timing and pace, theories of institutional change run along a spectrum from radical to organic evolutionary change. The middle ground is one populated by incrementalism and the notion of institutional design which is loosely defined by a deliberate imposition of rules which cause, influence or perhaps accelerate institutional change (Bromley 1991; Alexander 2002). It has been suggested that institutional design is at the core of planning practice, regardless of whether one follows the rational and communicative models (Innes 1995; Innes & Booher 2015). However, scholarship has been largely focused on a clear dichotomy of design versus evolution (Gualini 2001; Buitelaar et al. 2007). Not all institutions are created the same, and different modes of change and evolution may apply to different institutions (North 1990). As will be discussed, the implementation of processes in line with Private Mainstreaming may be viewed to be consistent with institutional design as a deliberated act or acts that promote an adaptive capacity of the organization. By contrast, the mechanisms (i.e., rules) of the adaptation of institutions are in a constant state of flux (e.g., gradual shifting of contractual terms and values) which is consistent with the incremental nature of evolutionary change. Therefore, it is assumed that the adaptation of institutions is likely a combination of design and evolution that are in dynamic response to exogenously and/or endogenously derived rules.

**Legal Adaptation**

Adaptation is a process and is measured by a host’s capacity to adapt (Keenan 2015a). Adaptation is not an absolute good. Adaptation at one scale and perspective (e.g., private interests) may be maladaptive at another scale and perspective (e.g., public interests)—and, vice-versa. Private sector adaptation may result in inequalities; and, as such, the design of an adaptive capacity has a latent moral implication. In addition, it is the operation of property rights and contracts that likely contributed to the acceleration of human induced climate change (Harstad 2012). However, contracts are morally neutral instruments even though they may transfer moral intent (Haran 2013; Fried 2015). The intent of this section is to provide some theoretical legal basis for describing what is likely already happening in the process of organizational adaptation through contracts. While this adaptation may result in inequalities, it may also result in co-benefits that accrue to public beneficiaries. This is particularly likely in the built environment where public and private divisions of space and capital are not always clear.

While elements of this Private Mainstreaming are normative to the extent that their incorporation may advance a firm’s adaptive capacity, the overall concept is likely to be descriptive of current or actual phenomena in the operation of law. Thinking about the evolution and adaptation of law is not a recent phenomenon, as one might
expect with the recent proliferation in the complexity of law. Benjamin Cardozo viewed the adaptation of law as a function of judicial discretion when he wrote,

“[i]f abrogation is permissible in cases of extremity, still more plainly permissible at all times is continuing adaptation to varying conditions. This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past” (Cardozo 1924: 137).

However, Cardozo’s perspective was relatively narrow in terms of the larger social and equitable values of interpreting common and statutory law within the confines of nuanced facts and/or changing moral or cultural values (e.g., preferences).

The legal theorist Wolfgang Friedmann (1959) argued that there were two fundamental restrictions on the unlimited adaptation of the law that Cardozo referred to. The first restriction is based on the operations of constitutional law and common law precedent which imposes restraint on judicial discretion. The second restriction is the necessity to balance the utility of adaptation with the value of certainty in the law. Friedmann observed that following periods of judicial adaptation of the law to social problems, there were generally subsequent periods of “consolidation and reaction” (Friedman 1959: 28). The often underappreciated intellectual impact of Darwinian evolution on jurisprudence has held that incremental change of laws is a function of “[e]volution, not revolution; slow and unconscious adaptation, not self-conscious institutional engineering…” (Ackerman 1991: 6). Therefore, it could be argued that legal adaptation in its plurality of process is fundamentally not an outcome of institutional design but evolutionary process.

With the emergence of positive economic analysis, scholars have argued that not only was common law effective in its ability to adapt but it was also efficient (Posner 1977). This led to a great deal of debate as to nature of the biases of judges and litigants and the incentives of the parties for either rent-seeking or efficiency seeking actions. In a line of thought parallel to adaptive capacity (Fazey 2007; Pelling et al. 2008), some have carried this research forward by examining the extent to which legal adaptation is predicated on a court’s capacity for learning and for acquiring information (Hadfield 2011). However, this body of scholarship was predicated on the assumption that litigation was the principal mechanism for adaptation. Given the complexity of the vast amount of existing administrative and regulatory law, the more contemporary discourse on the adaptation of law has focused on the internal designs of administration and management of laws and regulations.

In terms of regulatory and administrative law, the current state of environmental, natural resource and land use law provides a highly relevant perspective, especially when contextualized to climate change and the built environment. As Craig (2010) observed, these legal regimes are ill equipped to deal with climate change because they are based on stationary principles of preservation and
conservation. Craig calls for a series of bi-modal legal principles which balance flexibility and discretion on one hand and precautionary principles on the other. In a framework for adaptive management, Craig & Ruhl (2014) extend this argument by proposing an administrative system which is not exclusively reliant on ‘front-end’ analysis and the rationality of the present. Such an alternative administrative order would build in more periodic moments of discretion and a greater role for the public as means of gathering intelligence about the nature and impact of environmental change. The authors contrast this adaptive management approach with the broad strokes of market based mechanisms. As will be discussed, the concept of Private Mainstreaming – which operates in part on a finite scale of bi-lateral contract negotiations premised in part on market forces – is also reliant on administrative innovation to give legitimacy to the innovation that the process of mainstreaming seeks to validate, transact and diffuse. For example, technological experimentation of energy systems in a building will need to pass muster with building code administrators who might not otherwise be incentivized to oversee an experimental technology.

This is consistent with what many have normatively positioned as a response to the complexity of law, in that collaborative (e.g., public and private) mechanisms of policy making arguably offer a wider range of potential paths which address, in part, the problem of path dependencies of historic decisions based on information which is now out of date (Axelrod 1997; Dorf & Sabel 1998; Hornstein 2005; Broto and Bulkeley 2013). There is now global recognition that local governments offer the optimal scale for legal, process and technical experimentation (Amundsen et al. 2010; Brunner & Lynch 2013; Nalau et al. 2015).1 As Flatt (2012) argues, local political will together with broad police powers — albeit delegated — place local governments in a position to tailor solutions to local problems which may not be perceptible or scalable in terms of responsive or preparatory interventions at the federal level. As such, an evaluation of the adaptation of law in the advancement of larger measures of socio-ecological adaptation is perhaps most fruitful at the local level and within the confines of the built environment which is almost entirely a function of local governance, economy and society.

Because public and private interests are so interconnected within the built environment at a local level, this scale provides a ripe level of analysis for understanding the experimentation and diffusion of innovation which is dependent on the adaptation of not only public law and legislative policies but also private law and market rules and norms. There is some empirical precedent for the role of private contract law driving institutional adaptation as mediated by public law. This occurred most notably with the promulgation of various state and federal brownfield amendments that allowed risk to be managed through contract, including insurance contracts, in the remediation and redevelopment of toxic brownfield sites (Keenan 2005). The result was a great deal of innovation in terms of governance and technology which led to a new generation of brownfield sites being redeveloped (Orts & Deketelaere 2001; Wernstedt & Hersh 2006; Buchanan 2010).
In relating institutional theory to the legal scholarship cited herein, it can be argued that public climate policies are largely exogenously derived through plurality of the legislative and judicial processes and that private contract formation is largely endogenously derived through strategic game playing in markets. Together these exogenous and endogenous influences drive larger cycles of institutional formation and adaptation. Again, this division is not clear-cut because even the rules of the game are historically path dependent with respect to a point in the institutional cycle where rules might have been exogenously derived, and even exogenously derived rules are subject to some measure of game playing by judges and litigants. Brousseau & Raynaud (2011) make a complementary argument which acknowledges the limitation of exogenously derived rules that are mitigated in part by the operation of contracts.

“These rules may take the form of state-level collective rules or social norms that grant agents initial rights and offer coordination solutions, thereby setting the initial transaction costs. However, this order is both incomplete and imperfect. It is incomplete because it cannot cover the diversity of coordination needs of heterogeneous agents; it is imperfect because it provides only broad, general solutions that may not be well adapted to particular or evolving situations. For this reason, agents have an incentive to make individual efforts toward tailoring their property rights over economic resources, transferring these rights, and ensuring that they are enforced. Such efforts take the form of bilateral contracts between parties that (incompletely) describe each party’s commitments and related enforcement devices” (Brousseau & Raynaud 2011: 68).

By focusing exclusively on the adaptation of relevant commercial institutions as designed by public climate policies, the scholarship has overlooked the value of a theory of adaptation driven in equal measure by contracts which are produced at a much more finite scale (i.e., bi-lateral regulated market negotiation) and are arguably more facile in their ability to coordinate collaborative partners. If contract law is the instrument of the diffusion of innovation, then it is the process of Private Mainstreaming where contracts, rules, organizations and institutions collectively adapt in a synchronistic fashion yet be explored. It is not one or the other—it is a combination of influences between policy and contract that will give some measure of design to the ongoing evolution of markets and firms.

This research is positioned within a larger known phenomena as to the lag between innovation and regulation which poses a significant barrier to the rule mechanisms of adaptation (see generally, Oster & Quigley 1977; Jaffe & Palmer 1997; Brunnermeier & Cohen 2003). When contextualized to the built environment, innovation comes in multiple forms generally attributable to technological innovation in building and infrastructure systems and process innovation (e.g., regulatory experimentation) in land use and environmental planning. While the latter is principally driven as a matter of process by public law, it is the former which is the primary object of the concept developed herein.
Private Mainstreaming

This article extends the concept of mainstreaming to the public policy domain by suggesting that private sector organizations (i.e., firms) at various scales are able to mainstream adaptation through private-law based corporate actions and strategies. As a general principle, mainstreaming is a process of horizontally integrating climate change policies within an organization or across organizations with the intent to build cross-linkages across heterogeneous units based on the bottom-up emergence of common values and language. The intent is to facilitate a series of homogeneous translations as to the nature of impacts and the definition of interventions and strategies to address known, anticipated and unknown impacts and risks. If mainstreaming is successful, then the adaptive capacity of the subject organization is more robust in that the organization has the capacity to identify, utilize and transact innovation which is critical for addressing risks and opportunities associated with climate change.

In the context of Public Mainstreaming, innovation is derived largely from process innovation in terms of administration and management within local and/or state government. This process innovation also serves to advance the identification, evaluation and promotion of technological innovation, as in Private Mainstreaming. However, with Private Mainstreaming, innovation may manifest along more conventional pathways of operation and transaction which may or may not be subject to same degree of institutional constraints. As innovation is defined and property rights are assigned thereto, mechanisms which promote institutional change scale up from within the organization to a constellation of organizations and then beyond to a wide array of actors and institutions.

This article will use the hypothetical examples of a building, a real estate firm and set of related built environment actors to illustrate the concept of Private Mainstreaming. It is first useful to conceptualize the nature of the intent and operationalization of mainstreaming in a commercial context. Climate change poses a vast array of stimuli with varying degrees of proximity to climatic conditions which may be distilled to costs relating ultimately to either supply or demand. Likewise, it is assumed that the goal of a private firm is to seek a state of stable equilibrium which maximizes profit and minimizes costs. As such, value-added innovation is a mechanism for minimizing costs and creating additional enterprise value through the exploitation of opportunities and/or preparation for disruptions either in the supply and operations of buildings or in demand from users and investors.

Intra-organizational Processes

In more immediate terms, the goal of strategically mainstreaming in the private sector is two-fold. First, it contextualizes a specific risk which may be unrealized to
a known range of problem-solution sets within an existing organizational capacity. This is important as a means of identifying and communicating the risk and for deliberating contextual modes of action for addressing the risk. For example, flooding within commercial buildings has historically impacted below-grade critical buildings systems which have in turn impacted user operations. By mainstreaming the risk within design, maintenance and operations departments of an organization, there exists an opportunity to create value on the operations side of the asset in terms of the business continuity of users, for example. By compartmentalizing and dividing a singular risk into multiple risks managed by different departments within the organization, there exists an opportunity for the collective organizational enterprise to become adaptive to not just the risk of flooding but other related risks such as power surges and brownouts on hot days. This method has been observed to be consistent with managing supply chain risks in highly turbulent markets, wherein each element of risk is positioned within the context of systematic and dependent relationships for each relevant division/unit of a firm (Trkman & McCormack 2009).

Second, aligning multiple benefits from the incremental cost of mainstreaming increases the marginal benefit of the action, as well as the benefit associated with risk mitigation and/or transfer. In returning to the example above, a department responsible for overseeing design of a critical power system may require a passive connection to the electrical system for autonomous power generation. The cost of implementing this technology may add only one or two percentage points to the cost of the power system. The reason for this design requirement may be based on the mainstreamed deliberations from both the operations and maintenance departments within the organization. In the example above, the relatively limited incremental costs of designing and constructing a passive connection may mitigate business continuity risks which minimizes actuarial risk that may be reflected in lower insurance premiums among other benefits. Of course, if the amortized cost of this incremental technology is grossly misaligned with the actuarial, actual or perceived risk in net present value terms, then it might not be worthwhile to proceed; but, this too is also a positive outcome to mainstreaming as adaptation may involve both action and inaction in the allocation of resources.

An approach to mainstreaming which unites the first and second strategic processes is to promote consistent measures of value and risk across departments such that it becomes possible to assess the aggregate benefits which may accrue to the actions of one department at costs borne by another department. An early review of case studies in interdepartmental conflicts suggests that the management of these processes is accomplished through a combination of rewards and consequences (Walton & Dutton 1969). Empirical research in the intra-organizational diffusion of IT has suggested that (i) managing departmental conflict is most effective when interdepartmental contracts are utilized to enforce incentives and consequences; and, (ii) contracts that are regularized are more effective than limited one-time contracts for shaping this cooperative behavior (Bhattacherjee 1998). In the hypothetical example presented above, the design department now bears a higher construction cost which...
benefits the operations and maintenance departments. This disconnect between departmental accounting may result in certain frictions. However, mainstreaming in the private sector could be conceptualized to not only include adaptation internal to each department but across departments. In this dual intra-organizational scale, the top-down cross-departmental deliberation may act to net-out these disparate departmental allocations of costs and benefits through methodological or accounting solutions (i.e., formal contracts) and through political or communicative solutions (i.e., informal contracts). The question for future research then becomes what is the normative executive hierarchy of departments or personnel which could mediate and execute mainstreaming?

Prior research has suggested that senior executives in small and mid-sized firms and corporate real estate and service executives in a large firm have served this mediation role (Keenan 2015a; 2015b). However, this is unlikely to be scalable or sustainable as the diversity of external influences is beyond the capacity or attention of leadership that is tasked with a variety of tasks and roles. Research in technology firms have suggested that each department or division should be responsible for not only mediating and resolving conflicts, but they should anticipate and plan for conflicts that might arise as innovation is first identified (Marshall & Vredenburg 1992; Meyers et al 1999; Kim & Pae 2007). While the answer to this question is entirely dependent on a variety of conditions outside of the scope of this article, it is expected that several departments may serve this cross-departmental intra-organizational role depending on the nature of the subject innovation, as characterized by its compatibility, complexity and observability (Kim & Srivastava 1998). As previously cited, many corporations now have designated adaptation units that have to-date mainly focused on supply-chain disruption. As such, should innovations specific to the built environment be advanced by an adaptation unit that focuses exclusively on elements relating to technological and process innovation? Empirical research across a variety of technology dependent industries has suggested that a focused unit with a refined capability to design contracts is likely be the most effective organizational structure to promote innovation (Argyres & Mayer 2007).

The most immediate facet of corporate strategy for mainstreaming is within the risk management department. Enterprise risk management is generally an autonomous department within an organization which identifies, mitigates, avoids, absorbs and transfers risk in various other departments including, strategic planning, marketing, accounting compliance, governance and ethics, law, operational quality assurance, design and construction, operations, asset management and audit departments. While the identification and management of risk falls within the risk management department, the department may or may not be able to enforce or mediate adaptive capacities across other departments depending on the organizational governance structure and the department’s level of sophistication in identifying and managing risk which often falls outside of known actuarial parameters (i.e., statistical probability) and/or methods (i.e., inability to measure non-proximate phenomena yet to exist). Borgelt and Falk (2007) argue that risk management tends to ‘dumb
down’ complexity that works against the development and diffusion of innovation. Prior research suggests that risk management departments in real estate firms are ill equipped to incorporate climate change into their methodologies and practices (Keenan 2015b). Other potential departments which conventionally work across various departments are strategic planning, law and operations. However, each one of these departments may be subject to the same aforementioned institutional and practical limitations. These constraints reinforce the arguments for a designated specialized unit consistent with the findings of Argyres & Mayer (2007).

The process of mainstreaming may be department specific in its initial stage with secondary phases being defined by cross-departmental sub-organizations and/or processes that mediate and execute mainstreaming across departments as those frictions arise. From a macro perspective, the creation of new processes and the modification of existing processes as a consequence of mainstreaming within an organization, whether that is for conventional risk management or the utilization of new technologies, represents an important part of process innovation. The optimal outcome is the identification and underwriting of innovation so that future assignments of value and property rights may be pursued through contracts outside of the organization. However, it is also conceivable that intra-organizational contracts may be utilized to incentivize cooperative behavior among employees and/or units that have historically had limited interaction or competing internal interests.

**Constellation of Organizations**

Aside from the advantages and hurdles to mainstreaming in an intra-organizational context, there exist influences within a group of organizational actors which also impact institutional change in favor of adaptation. While some have theorized that institutions possess an innate adaptive capacity independent of the operation of rules and norms (Gupta et al. 2013), the limited definition utilized herein of institutions as merely rules and norms suggests an alternative perspective on institutional change and adaptation. Through an actor-oriented perspective, this article conceptualizes a ‘constellation’ of organizations which relate to each other through multi-lateral interactions—in this case, in the built environment—in both cooperative and non-cooperative terms (Scharpf 1997). It is assumed, as Scharpf identifies, that institutional change can either be deliberate by design or can be through evolutionary processes of mutual adaptation (Brennan & Buchanan 2008; Shivakumar 1998). Of course, one notable exception to this horizontal cooperation is the provision of anti-trust regulation (Jorde & Teece 1993). By mutually aggregating incremental exercises in risk taking in the advancement of innovation, the constellation can more fluidly and flexibly accommodate change. This is particularly relevant for real estate where the costs of institutional non-compliance are great by virtue of the fixity and lack of diversification in the property rights regime.
While the mainstreaming processes may be different at this intermediate constellation scale from those of the intra-organizational scale, the discrete innovative outcomes derived from intra-organizational mainstreaming may be diffused through the constellation by the instrumentation of contract as mechanism of mutual adaptation (Williamson 2002). Case studies in multiple sectors have identified firms that have developed intra-organizational contracting capacities that have advanced inter-organizational innovation, including aerospace (Crocker & Reynolds 1993), IT (Kalnins & Mayer 2004), biotechnology (Lerner & Merges 1998) and healthcare (Rolfstam 2008). In continuing the example above, let us assume that Firm A undertook certain actions cited to design, install and operate passive energy connections for autonomous power generation. At the same time, Firm B has mainstreamed a variety of strategies within their legal and accounting departments, and, as such, these departments are aware of the value associated with the technology. If Firm A contracts to sell to Firm B, and Firm B requires contractual language which requires Firm A to warrant the condition of the equipment, then Firm B is benefiting from constellation level mainstreaming. It is also possible that Firm A benefits because it can now assign value to the technology in a manner which is understood by Firm B’s accounting department and is allocated to the purchase price. Even if Firm B did not recognize the technology and its underlying value, Firm A’s contract (or, offer) would put Firm B on notice of the innovation whether or not the transaction closes. As this contractual language proliferates and is modified by and between Firms A and Y, and B and X, then a variety of actors and institutions are adapting by virtue of a change and/or modifications of the rules and norms.2

Over time, as these contracts create larger bodies of private law, they themselves form the basis for an intermediate level institution which supports innovation (or, at least particular types of innovation such as technology). This is consistent with Brousseau and Raynaud’s theory that,

“Intermediary institutions emerge to address coordination problems at a lower cost than bilateral and generic devices. Collective ordering yields benefits due to the combination of at least three effects in the design and enforcement of rules: economies of scale and scope, learning and specialization benefits, and reduction of collective welfare losses by managing interdependencies among community members” (Brousseau & Raynaud 2011: 68).

An example of this intermediate institution grounded in contract and private law is the Leadership in Energy and Environmental Design (LEED) standards promulgated originally by the U.S. Green Building Council—itself positioned within a constellation of organizations. The rules of the program were designed to promote technological innovation in building systems, design and management and were ultimately diffused by local community benefits agreements, covenants within commercial leases for tenants’ operation in the buildings, and a number of other legal
instruments. Likewise, when many LEED buildings did not perform as they were predicted, it was litigation based on contract rights which helped drive not only another generation of technology but another generation of more sophisticated contracts. This highlights the mutual dependency between public and private law as an influence of institutional adaptation.

Relationship between Public and Private Mainstreaming

Aside from mainstreaming innovation in contract, cooperative or semi-cooperative behavior in the diffusion of innovation may be motivated by factors which are not necessarily reducible in immediate terms to monetary value, such as social approval (Rege & Telle 2004). Regulatory approval may provide monetary value in terms of timing, efficiency and risk and/or may also be reduced to contract (e.g., community benefits agreement, brownfields contracts, etc.). For instance, regulatory process innovation by one actor may set the stage for other actors to benefit and for collective adaptation through constellation interaction. A classic example of this is the constant development of on- and off-site mitigation interventions and strategies developed pursuant to various wetlands and environmental regulations, such as within a wetlands banking platform (Robertson 2004). The innovation is either in terms of bioremediation technology or methodologies for assessing impact and benefit. Contractual agreements with the Army Corps of Engineers and various agencies are closely monitored by industry in order to place a price and a risk metric to certain untested innovations.

Mainstreaming in the literature conventionally refers to acts within public policy development which are horizontal in the sense that legitimacy is derived from the alignment of adaptation with other public policy goals—very often with dominion over private actions and benefits (Klein et al. 2007; Van Buuren et al. 2014). Unfortunately, the private sector is often too quickly conceptualized as providing “constraints” to the legitimacy or efficacy of mainstreaming in the public sector (Dovers & Herzi 2010: 218). To the contrary, private actors may initiate bottom-up regulatory mainstreaming through the promotion of value with wider benefits.

In returning to our hypothetical scenario, there may be a situation in which the laws and regulations relating to the energy, environmental and construction domains have not explicitly caught up with the passive energy technology sought to be utilized in the building by Firm A. If Firm A takes the steps to lobby for and even litigate for the adoption of public policies and regulations which allow for the utilization of the technology, then Firm B, Yx, and Xy all benefit from these actions which may arise by virtue of contract or by their own independent use of the technology in other buildings. Pursuant to this example, these benefits—assuming a positive value innovation—would be amplified as they scale up from the building to the organization to constellation of organizations and perhaps even to intermediate institutions which allow for the innovation to be scaled down back to the building.
This highlights the constant cycle between exogenous and endogenous rules over the lifecycle or institutions whose duality of influence is observed to be reciprocal, if not mutually dependent. Likewise, it can also be conceptualized that institutions reflexively adjust rules for the implementation of innovation as both a deliberate and evolutionary process which results in a constant feedback loop of trial and error in the development and diffusion of innovation. By examining case-specific technological and process innovations and contextualizing their realization within this framework, it is anticipated that future researchers will not only be able to identify barriers and efficiencies in the process of mainstreaming but will also be able to make normative claims on this basis. It is likely that these processes are already underway in organizations and institutions and have yet to be fully evaluated or understood.

**Conclusions**

As a set of rules in a constant state of evolution, yet manipulated by design, there is nothing static about institutions—adaptation is as perpetual as existence. The same can be said for even the most discrete elements of public and private law. As climate change progresses in its severity and impact, the larger question is the extent to which the speed and depth of the adaptation of institutions, organizations, laws and rules will intersect in synchronistic fashion with environmental, economic and social objects that bear the impact of change. While some measure of lag is to be expected, the concept for Private Mainstreaming is intended to identify a logical connection between contracts and the adaptive capacity of organizations that may result in process and technological innovations diffused across various scales. While this may ostensibly be self-serving to private interests, the capacity to adapt may very well serve co-benefits to public interests. In a regulated economy, such as real estate, institutional and organizational adaptation is a reflection of the intersection between public and private rules. Therefore, an understanding of the nature of innovation and the mechanisms of its diffusion would help maximize the opportunities for co-benefits where they may exist.

Future research has the opportunity to continue to advance an understanding of the operationalization of adaptive capacities through various potential applications of Private Mainstreaming. For instance, what are the optimal organizational structures to mediate friction between the assignment and control of innovation within an organization? How can these structures work collaboratively as a matter of firm policy to draft and enforce contractual provisions? What are the internal controls for understanding when experimentation no longer accommodates strategic goals? As major global firms such as Nike, Hewlett-Packard and Starbucks continue to develop sophistication in their adaptation units, there is an opportunity to develop empirical research which draws out a series of values and risks and the extent to which these values and risks are registered and weighted along a continuum from
day-to-day business to the long-term shareholder value for future generations (Westervelt 2015).

While companies will be drawn into litigation and will rely on public laws to protect their interests and to efficiently and justly mediate the allocation of limited resources, private contracts will fill the void where timing, efficiency and predictability are critical values. In order to promote a firm’s adaptive capacity, it will be necessary for these contractual relationships to move outside of the limited confines of risk management and legal departments to engage a much broader range of intra-organizational actors who are often themselves the source of innovation. Likewise, firms will need to develop external modes of intelligence which extend beyond supply chains and customer networks in order to register incremental changes and to identify innovation as it is underwritten, assigned and transacted.

While the market forces associated with property rights and the negotiation of contract might be timely and efficient, they will not always result in just or equitable outcomes. Therefore, Private Mainstreaming has to be contextualized within a broader concept of the necessity of law to adapt in both the private and public domains. While the scholarship to date has focused on the public regulation of direct impacts, it is the indirect consequences of climate change in economic and social terms which must also be addressed. A failure to think across a wide variety of legal domains, organizations, and institutions will result in a piecemeal approach which is likely to lead to inefficient outcomes whose costs will ultimately lead to greater social inequality and environmental injustice. Ultimately, society will need to ‘mainstream’ not only at the scale of institutions and organizations but also at the scale of each individual as they balance their ethical responsibilities as consumers and citizens which serves as the basis for the rule of law and the ordering of civil society (Hart 1961).

NOTES

[1] Under COP21, local governments will for the first time have a seat at the table in global climate change negotiations in Paris in December, 2015.

[2] Of course, it could also be maladapting if the economic allocation of resources to manage a risk are ultimately inefficient by virtue certain biases and illusions collectively shared by the organizations within the constellation that do not represent actuarial or actual risk. Likewise, innovation may possess both positive and negative values in its utilization and generalized application.

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AUTHORS' BIOGRAPHIES

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