

Negotiating Land-Use Conflicts: A Survey and Comparison Across Three Systems in Guatemala, India, and China

Introduction

According to U.N. reports, human use of land affects “more than 70%” of all ice-free areas on Earth.¹ Global population growth and an increasing rate of consumption have resulted in an “increase in greenhouse gas emissions, a loss of natural ecosystems, and a decline in overall biodiversity.”²

Governments have struggled with a tension between traditional and economically driven land uses which threaten to worsen problems of land-scarcity and climate change.³ While Western approaches to this problem have centered on advancing environmental regulation, legal systems connected to *chthonic*, religious, or other non-Western legal traditions may exhibit alternative approaches grounded in alternative legal principles.⁴

Comparing customary, religious, or otherwise non-codified legal systems in Guatemala, India, and China is of interest for three reasons. First, these countries share a history of customary or religious law.⁵ Second, Guatemala, India, and China are each home to rampant land-use conflicts and related climate change concerns.⁶ Finally, despite sharing a mutual connection to an older system of law, current treatment of these traditions within each country differs wildly.⁷ Parts I, II, and III of this paper will present an overview of the intersection between traditional and current law in Guatemala, India, and China. Part I will detail Maya law in Guatemala. Parts II and III will focus on the respective Hindu and Confucian legal traditions as they inform the formal legal and cultural systems of India and China. Part IV of this paper will conclude by interrogating how similarities among these systems have shaped responses

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND LAND: SUMMARY FOR POLICY MAKERS, 7 (2020), <https://www.ipcc.ch/site/assets/uploads/sites/4/2020/02/SPMUpdated-Jan20.pdf>.

² *Id.*

³ *Id.*

⁴ INT’L BAR ASS’N CLIMATE CHANGE AND HUMAN RIGHTS TASK FORCE, ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION 1, 76-77 (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

⁵ See *infra* discussion of history in Parts I, II, and III.

⁶ See UNITED STATE AGENCY FOR INT’L DEV., ENVIRONMENT IN GUATEMALA, 1 (2019) AID fact sheet at 1 <https://photos.state.gov/libraries/guatemala/788/pdfs/USAIDEnvFactSheetEnglish.pdf>; see also Kamajit S. Bawa, et.al., *China, India and the Environment*, 327 POL’Y FORUM, 1457, 1457 (2010).

⁷ See *infra* discussion of codification in Parts I, II, and III.

to land-use conflict.

I. Contemporary Maya Law in Guatemala

Guatemala is a country of 17 million people, with 42 percent of the population belonging to the indigenous “Maya ethnic group.”⁸ Though the Guatemalan state uses the terms “Maya” or “Maya people,” this group constitutes “twenty-one linguistically distinguishable indigenous groups” dispersed throughout Guatemala’s highland regions.⁹ While linguistic and cultural diversity means that no single system of law applies uniformly within these communities, common principles can be referred to as a “Maya legal system” at work in modern-day Guatemala.¹⁰ Because nearly all of the indigenous Maya population live in rural areas, there has been a historical “absence of the state” in the lives of these indigenous Guatemalans.¹¹ Simultaneously, the Maya legal system has faced significant barriers to implementing its vision of communal and ecologically sound land-use practices.¹² Despite these challenges, Maya communities have affirmed the legitimacy of a Maya legal system, apart from Guatemalan state control.¹³ Therefore, the focus of this section will be system as it exists outside Guatemala’s formal legal system.¹⁴

A. System Overview

i. Maya Sources of Law: The Impact of Colonialism

When Spanish colonizers arrived in Guatemala, they encountered peoples that possessed extensive literary abilities, including the production of vast quantities of texts.¹⁵ Viewing the indigenous written word as a dangerous expression of independence, the Spanish burned nearly every written example of

⁸ CIA WORLD FACTBOOK: GUATEMALA .

⁹ See Jan Hessbruegge & Carlos Fredy Ochoa García, *Maya Law in Post Conflict Guatemala*, 1, 2, 9 (2011) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/event/wcms_084059.pdf.

¹⁰ *Id.* at 2.

¹¹ Hessbruegge & García, *supra* note 10 at 1; CIA WORLD FACTBOOK: GUATEMALA.

¹² See *infra* Part I-B (Discussing tension between Maya and Guatemalan authority in land-use context).

¹³ Hessbruegge & García, *supra* note 10 at 1; see Julie A. Davies, *Indigenous Law in Central America*, Mich. St. L. Rev. 673, 697 (2018) (“Independent Maya communities” established a pattern of resolving legal problems and disputes “using their own systems of justice.”).

¹⁴ See *infra* Part I-A(v) (Discussing codification of Maya law in Guatemala).

¹⁵ David Webster, *The Uses and Abuses of Ancient Maya*, 1, 6 (2017) (Noting evidence that Maya writing existed as early as 200 BC), https://anth.la.psu.edu/documents/Webster_GermanyMaya.pdf; ALLEN J. CHRISTENSON, POPOL VUH: THE SACRED BOOK OF THE MAYA: TRANSLATION AND COMMENTARY 5 (2003) [Hereinafter POPOL VUH].

Maya religion, law, or political will.¹⁶ As a result, no Maya sources of law written in Guatemala before European arrival have survived.¹⁷ However, Spanish “acts of destruction did not mean that Maya literacy ended,” as some literate Maya communities made efforts to “preserve what they could” of their written and oral traditions in compilation-style texts.¹⁸ The most legally significant of these is the *Popol Vuh*, produced by the Ki’che Maya group in the Guatemalan Highlands.¹⁹ The *Popol Vuh* presents the creation story of the Ki’che people and but is also reflective of the current operation of the Maya legal system in contemporary Guatemala.²⁰

Apart from the *Popol Vuh*, the Maya legal system has relied on an “oral transmission,” resulting in both wide system accessibility and a unique preservation challenge.²¹ Roughly 19 percent of Guatemala’s overall population is illiterate, with estimates of illiteracy among Maya ages 15-24 approaching 30 percent.²² Further, a significant portion of the Maya population is “unable to speak or understand Spanish.”²³ Thus, a legal system built around orally transmitted standards and orally driven processes conducted in local Maya languages is well-suited to the needs of the Maya in Guatemala.²⁴ However, reliance on intergenerational communication has meant that the death of a single elder may mean the loss of profound amounts of legal information.²⁵ Ultimately, the overarching source of the Maya legal system

¹⁶ POPOL VUH at 5 (translator’s commentary).

¹⁷ *Id.* More broadly, only four pre-colonization Maya documents or “codices” written outside Guatemala exist. The most notable of these, the Dresden Codex, is focused on timekeeping. CLIVE RUGGLES, ANCIENT ASTRONOMY: AN ENCYCLOPEDIA OF COSMOLOGIES AND MYTH, 133 (2005). While not written in Guatemala, the Dresden Codex’s “law of time” has implications for the way Maya communities in Guatemala conceive of land-use and land management. *See infra* Part I-B(i). (Discussion of of time-keeping in land-use context).

¹⁸ POPOL VUH at 1,11 (translator’s commentary); *see also* W. George Lovell, *Surviving Conquest: The Maya of Guatemala*, 23 LATIN AM. RES. REV. 25, 30-31 (1988) (Describing cultural pressures of colonialization in Guatemala).

¹⁹ Hessbruegge & García *supra* note 10 at 1; POPOL VUH at 11 (translator’s commentary).

²⁰ *See infra* Part I A(iii) (Discussion of deliberative process).

²¹ Rachel Sieder, *Building Maya Authority and Autonomy*, 55 STUD. IN L. POL. SOC’Y, 43, 47-48 (2011).

²² CIA WORLD FACTBOOK: GUATEMALA; LAND, POVERTY AND LITERACY STATISTICS, REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE, Rodolfo Stavenhagen: Mission to Guatemala, 102, 103 (2003).

²³ Hessbruegge & García, *supra* note 10 at 3.

²⁴ *See* Davies, *supra* note 13 at 680; Hessbruegge & García, *supra* note 10 at 15.

²⁵ Hessbruegge & García, *supra* note 10 at 21. Concerns about these lost “links” in the chain of oral transmission are mounting as Guatemala continues to recover from an armed conflict which disproportionately affected many Maya communities. *See infra* Part I-A(iv) (Discussion of civil war).

in the 21st century remains oral tradition.²⁶

ii. Principles of Maya Law: An Integrated Order

Comparativists have observed a lack of “systematic and detailed stud[ies]” of Maya law in Guatemala.²⁷ Fortunately, though Maya law is “flexible and dynamic” across Guatemala’s diverse Maya population, a few legal field studies have revealed shared norms.²⁸ Chiefly, the Maya legal system is inseparable from the “Maya Cosmvision.”²⁹ This Cosmvision teaches that all elements of being are part of and connected through an “integrated order.”³⁰ This foundational belief imbues the Maya legal system with a drive towards social cohesion.³¹ Thus, Maya law is not explicitly concerned with the ensuring the “enjoyment of individual rights,” but instead aims to “maintain community harmony and equilibrium.”³² Subsequently, unresolved conflict or lingering doubt must be must be avoided.³³ Unsatisfied conflict “poses a threat” to cohesion because feelings of resentment or anger may “eat away at the communal fabric” at the center of Maya community.³⁴ This effect may be more severe when the underlying conflict is unacknowledged by the system.³⁵ Accordingly, establishing an uncontested and therefore unifying truth is “paramount in Maya law.”³⁶ A concern for the truth is even reflected in the word some Maya communities use to refer to the legal system: *q’atb’al tzij*: meaning truthfulness among many versions.³⁷

This community orientation also eliminates two distinctions found in many Western legal systems. First, because all conflicts pose a threat to the community, there is no difference between the interests of the common and the interests of private individuals.³⁸ Thus, the Maya legal system contains no distinction

²⁶ Hessbruegge & García, *supra* note 10 at 1.

²⁷ See Davies, *supra* note 13 at 700.

²⁸ *Id.* at 698, 700.

²⁹ Hessbruegge & García, *supra* note 10 at 10.

³⁰ *Id.* (Noting that this “integrated order” includes all elements of nature, including plants, animals, and humans).

³¹ Davies, *supra* note 13 at 698.

³² Hessbruegge & García, *supra* note 10 at 10.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (Noting that unnoticed conflict is “especially dangerous . . . it [unnoticed conflict] may fester and produce vicious rivalries that may even transcend into the next generation.”).

³⁶ Sieder, *supra* note 25 at 56.

³⁷ *Id.*

³⁸ Hessbruegge & García, *supra* note 10 at 15.

between “civil” and “criminal” disputes.³⁹ Secondly, an extra-judicial concern for cohesion means that the explicit prohibition of specific conduct is also of little use. Instead, the Maya legal system’s “law” stems from an overarching social code known as *p’ixab’*.⁴⁰ *P’ixab’* encapsulates “norms, teachings, advice, and moral, spiritual and ethical values.”⁴¹ Unlike codified law, the *p’ixab’* is transmitted through the vehicle which drives much of the Maya legal system: the community.⁴²

iii. Procedure and Outcomes: A Communal Deliberative Process

A concern for social cohesion also influences the procedures of the Maya legal system. An obvious reflection of this influence is the almost total reliance on deliberation.⁴³ This reliance is not just a choice – it reflects a deep cultural value seen in the *Popol Vuh*.⁴⁴ The *Popol Vuh* begins not with world-creation, but with deliberation, as “creator deities” discuss the best way to populate the world.⁴⁵ Readers are told that the deities “talked together. . .they thought and they pondered. They reached an accord bringing together their words and their thoughts.”⁴⁶ Similarly, when conflict arises, parties must select a neutral mediator to facilitate a deliberative process.⁴⁷ For more serious disputes, “community authorities may arrange a public proceeding” during which the deliberation is carried out before the entire community.⁴⁸ The focus of these public proceedings is two-fold. First, like disputant-initiated deliberations, there is an aim to fully resolve conflict.⁴⁹ Second, the public nature allows for the community healing necessary for the restoration of social cohesion in wake of community harm.⁵⁰

While Maya law is accessible, it does impose an access requirement: labor.⁵¹ Many Maya

³⁹ *Id.*

⁴⁰ Sieder, *supra* note 25 at 60.

⁴¹ *Id.*

⁴² *Id.* (Noting that the community transmission of the *p’ixab’* is not limited to family members).

⁴³ Davies, *supra* note 13 at 680.

⁴⁴ Hessbruegge & García, *supra* note 10 at 17.

⁴⁵ *Id.*

⁴⁶ POPOL VUH 57-58

⁴⁷ See Hessbruegge & García, *supra* note 10 at 17 (Noting that minor disputes involve multiple mediators).

⁴⁸ Davies, *supra* note 13 at 700.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Id.* at 680. (Noting profound accessibility); *But see* Hessbruegge & García, *supra* note 10 at 13 (commenting on *Ke’kol* system).

communities in Guatemala adhere to a “structure of community chores” known as *Ke'kol*.⁵² *Ke'kol* assigns each adult a chore that is “not delegable and not remunerated.”⁵³ *Ke'kol* is legally significant for two reasons. First, access to the legal system is predicated on chore participation. If an individual neglects their chore, they are not given conflict resolution assistance.⁵⁴ Second, *Ke'kol* also creates positions of authority within the Maya legal system. At the lowest level are the *alguaciles*: adult males who have gained increased responsibility over their assigned chore.⁵⁵ The *alguaciles* mediate lower-stakes disputes and are available on a round-the-clock basis.⁵⁶ Escalating in authority are ad-hoc councils made up of elder-community members who have progressed through is the *Ke'kol* system.⁵⁷ These councils conduct the public deliberations reserved for more serious disputes and have authority over the *alguaciles*.⁵⁸ Finally, the *alcade comunal* oversees the *Ke'kol* system and functions as a de-facto Mayor, implementing the outcomes reached through community deliberation.⁵⁹

After deliberations have concluded, harmony must be restored.⁶⁰ Most importantly, the transgressor must confess to the commission of community harm.⁶¹ Once this underlying truth is established –itself a key component of community healing – the transgressor may be required to pay restitution or engage in community service.⁶² Maya law also commands public shaming and the use of corporal punishment, or *xik'a'y*, in the wake of serious harms.⁶³ One Maya community’s recent handling of cell phone theft offers

⁵² Hessbruegge & García, *supra* note 10 at 13.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 13-14.

⁵⁶ *Id.*

⁵⁷ *Id.* at 14.

⁵⁸ *Id.*

⁵⁹ *Id.* at 13-14 (Noting that the *alcade comunal* position is increasingly elected rather than appointed).

⁶⁰ Davies, *supra* note 13 at 700.

⁶¹ Sieder, *supra* note 25 at 56.

⁶² See Davies, *supra* note 13 at 700; Hessbruegge & García, *supra* note 10 at 20; see also Sieder, *supra* note 25 at 56 (Noting that banishment is seen as the most extreme and rare criminal sanction in Maya communities because it requires a severance of the social fabric).

⁶³ Sieder, *supra* note 25 at 62-63. Notably, some Maya leaders argue that corporal punishment is not traditional and merely replicates tactics used by the Spanish during the violent period of Guatemala’s colonialization. Other Maya leaders consider *xik'a'y* a vital practice and have criticized efforts by the Guatemalan state to “police custom.” It is also important to note that *xik'a'y* is not intended to cause pain – but rather public shame. See Lucía Escobar, *Maya Justice in Guatemala*, NACLA, (Sept. 4, 2007), <https://nacla.org/news/mayan-justice-guatemala-shame-property-and-human-rights>

an example of these processes in motion. A seventeen-year old male was apprehended by community members and handed over to the *alcade comunal*.⁶⁴ The suspect was forced “to accept” that he had stolen the phones and to agree to pay through community labor.⁶⁵ The entire community, led by the *alcade comunal*, then led the offender around a public square.⁶⁶ Finally, he was brought before the community and given twelve lashes with a thin tree branch.⁶⁷ The events concluded with the *alcade communal* declaring that the same fate would befall any person who committed a theft, pointedly implying that the proceedings were directed at the community and the wrongdoer equally.⁶⁸

iv. System Evolution: System Survival

Though the “key paradigms” of the Maya legal system have existed in continuous operation, it has unsurprisingly “adapted in the face of outside influences.”⁶⁹ When Guatemala emerged from Spanish control in the 1800s, state authorities sought to unify the country and create a labor class for the expanding coffee industry.⁷⁰ The government adopted “assimilationist policies” and a forced labor scheme that aimed to curtail the autonomy – legal and otherwise – of Maya communities.⁷¹ With the start of Guatemala’s Thirty-Six Year Civil War in 1960, Maya communities again suffered profoundly at the hands of government forces, who viewed Maya autonomy as “subversive.”⁷²

These violent periods continue to have an impact on the operation of the Maya legal system. Because Maya law relies on intergenerational transfer of information, it “can break down if one generation is taken out of the oral transmission chain.”⁷³ This information drain was prevalent after the 1980s, a decade

⁶⁴ Héctor Cordero, *They Whip a Minor and Warn Offenders About Punishment*, PRENSA LIBRE (July 1, 2017) <https://www.prensalibre.com/ciudades/quiche/azotan-a-menor-y-advierten-a-delincuentes-sobre-castigo-comunitario/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Hessbruegge & García, *supra* note 10 at 9.

⁷⁰ *Id.* at 3-4.

⁷¹ *Id.* Notably, this nation-building era in Guatemala’s history was followed by a period in the mid-1900s in which the legal of some Maya communities was restored. However, A U.S.-backed coup in 1954 brought an “end to these attempt[s]” at reform.

⁷² Davies, *supra* note 13 at 692.

⁷³ Hessbruegge & García, *supra* note 10 at 21.

which saw the “eradicat[ion] of . . . a whole generation of indigenous leaders.”⁷⁴ Even further, the trauma of Guatemala’s civil war is suspected to have “distorted” the Maya legal system, leading to the adoption of non-traditional practices in some communities.⁷⁵ Today, the “vibrancy” of Maya law at the community level is dependent on “the extent of disruption” that occurred within the community during the Civil War.⁷⁶ Simultaneously, since the end of the conflict in 1996, Maya law has been part of a broader identity project.⁷⁷ This “revitalization” of Maya law by community activists is linked to broader push for “greater respect for indigenous authority and the recognition of indigenous autonomy” amid Guatemala’s post-war political landscape.⁷⁸

v. Codification: State-Sponsored Relegation

Despite the relevance of the Maya legal system to large segments of its population, the Guatemalan state has refrained from codifying Maya law or even offering the system meaningful protection.⁷⁹ Instead, Article 2 of Guatemala’s *Ley del Organismo Judicial* –akin to a Code of Civil Procedure –commands that “custom” is a valid source of law only if there is either no applicable state law or if state law specifically delegates its authority.⁸⁰ Even in these limited circumstances, official application of Maya law is only permissible if it is in “conformity with morality.”⁸¹ Marginalization of the Maya legal system by the Guatemala state may be motivated by the will of Guatemala’s non indigenous population, who control much of the country’s economy and political landscape despite constituting a minority of the population.⁸² This group has historically opposed extending codification to the Maya legal system due to a perception

⁷⁴ *Id.*

⁷⁵ *Id.* at 22. There were 421 cases of lynching in Guatemalan Maya communities from 1996 to 2001. Such practices are not widespread but do persist in some communities.

⁷⁶ Davies, *supra* note 13 at 693

⁷⁷ Sieder, *supra* note 25 at 48.

⁷⁸ *Id.* at 59.

⁷⁹ However, the Constitution of Guatemala purports to offer civil rights protections to Maya individuals protections to Maya communities. *See* CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE GUATEMALA, § 3, Art. 66-70 (offering basic equal protection and officially barring discrimination).

⁸⁰ LEY DEL ORGANISMO JUDICIAL TITULO 2, ARTICULO 2 PRECEPTION FUNDAMENTALES; *see also* Hessbruegge & García, *supra* note 10 at 1.

⁸¹ Hessbruegge & García, *supra* note 10 at 1 .

⁸² Davies, *supra* note 13 at 693; CIA WORLD FACTBOOK GUATEMALA .

of Maya law as “anti-Christian” and disruptive to the country’s economic future.⁸³

The peripheral position of the Maya legal system in Guatemala has led to conflict between the Guatemalan state and institutions of Maya law. As a threshold matter, Maya leaders “risk punishment” for applying Maya law within their communities.⁸⁴ Periodically, Guatemalan state prosecutors have even brought kidnapping or illegal detention charges following an imposition of forced *Ke’kol* participation.⁸⁵ Further, the silence of formal Guatemalan law regarding Maya has been as an “excuse” by some state judges to ignore Maya law altogether, creating a self-perpetuating cycle of judicial unfamiliarity.⁸⁶ These conflicts have been especially acute in the land use and environmental law context.

B. Maya Law and Land Use

In both Mexico and Guatemala, the Maya have historically been an “agricultural society.”⁸⁷ A subsequent connection to land and view of land as community resource is apparent even in the *Popol Vuh*, where the “first line” of the text explains that a community should be seen as “as a plant growing from its root.”⁸⁸ Accordingly, the Maya legal system envisions land much like it envisions the transmitted social code of *p’ixab*: an asset to be held in common for the benefit of the community.⁸⁹ A conception of land as a shared resource greatly influences the treatment of land-use conflict by the Maya legal system.

i. Maya “Land-Use Law”: Communal Values

The most defining feature of the Maya legal system’s approach to land-use conflict is its conception of land as communal.⁹⁰ Paradoxically, exclusivity over land in the form of access denial is one potential “punishment” or social sanction in the wake of bad behavior.⁹¹ For example, exclusion from a communal water system used for both irrigation and household needs has been described as a “last resort”

⁸³ Davies, *supra* note 13 at 693. (Noting that worries about the economic effects of Maya law may stem from the system’s lack of individual property rights).

⁸⁴ *Id.* at 696.

⁸⁵ *Id.* Fear of government prosecution has caused an additional problem: participation. Some Maya communities have had difficulty filling community leadership roles due to fears of state sanctions.

⁸⁶ *Id.*

⁸⁷ POPOL VUH at 13 (translator’s commentary).

⁸⁸ POPOL VUH at 13.

⁸⁹ Hessbruegge & García, *supra* note 10 at 4.

⁹⁰ *Id.*

⁹¹ Davies, *supra* note 13 at 722

punishment.⁹² In some communities, the Maya legal system creates groups known as *parcialidades* to oversee the land-management of community owned agricultural and forest areas.⁹³

Even more fundamentally, the Maya Cosmovision’s focus on an “integrated order” means that “animals, plants, or even non-living things [i.e. land itself] must be no less respected by human beings.”⁹⁴ In addition to these general commands, many Maya communities also have “very specific environmental protection norms for their communal forests or sources of water” which are designed to protect the community’s “basis of subsistence:” the land.⁹⁵ For example, trees that cannot be cut until they have reached a pre-determined size.⁹⁶ Similarly, and as reflected in the time-centered Dresden Codex, crops must be planted during specified time windows and communities carefully gauge planting cycles to allow land to regenerate.⁹⁷ Any human interaction with land, such as clearing a forest for agricultural use, must be preceded by a request for permission from the appropriate Earth God.⁹⁸ Maya law seeks to resolve land use conflict in a manner that protects two elements that are inextricably linked: the Maya community and the natural world. Overall, the Maya legal system’s treatment of land-use conflicts is an extension of its overt focus on community. Without proper resource and land management that ensures community access and thus subsistence, the Maya community itself would cease to exist.⁹⁹

ii. Conflict and Issues: Community vs. Economic Priority

Given the dissonance between values of communalism endorsed by the Maya legal system and the economic pressures of modern capitalism, the prevalence of land-use conflict between Maya communities and the Guatemalan state is unsurprising. Moreover, given that 80 percent of Guatemala’s arable land is owned by only 4 percent of the population, many Maya communities have been “legally”

⁹² *Id.*

⁹³ Hessbruegge & García, *supra* note 10 at 14.

⁹⁴ *Id.* at 10.

⁹⁵ *Id.* at 18-19.

⁹⁶ *Id.*

⁹⁷ See Susan Milbrath, *Maya Astronomical Observations And The Agricultural Cycle*, 28 ANCIENT MESOAMERICA 489 (2017).

⁹⁸ POPOL VUH at 61 n. 74 (translator’s commentary).

⁹⁹ Tim MacNeil, *Culturally Sustainable development: Maya Culture, Indigenous Institutions, and Alternative Development in Guatemala*, 26 CULTURAL DYNAMICS, 299, 316 (2014).

separated from lands they historically have claimed.¹⁰⁰ This transfer of land has been made possible by the lack of “title” or exclusive ownership mechanisms within the Maya legal system. Without formal, state-approved proof of ownership, many Maya communities have had their communal lands “usurped” by Guatemala’s state government.¹⁰¹

Currently, the most significant land-use issue facing Maya communities in Guatemala relates to the sale of indigenous lands to large, multi-national corporations.¹⁰² In addition to taking place within culturally important Maya land areas, these forms of exclusive, profit driven ownership are in direct conflict with the Maya legal system’s environmental and land management framework.¹⁰³ Though Maya legal activists have attempted to contest this pattern of communal land removal, a lack of formal recognition of Maya law and land claims from the Guatemalan state has made this fight profoundly difficult.

II. Indian Law – A Hindu Legal Tradition

With a population of over 1 billion people and an 80 percent Hindu majority, India may appear to have little in common demographically with countries that have struggled to negotiate among many competing legal systems.¹⁰⁴ However, modern India faces a complex relationship between its secular, codified, and dominating formal legal system and another system that has gone partially “underground and bec[ome] unofficial law” Hindu law.¹⁰⁵ In a nation where “Hinduism is more than a religion” and is instead a “way of life,” Hindu law has remained “an integral part of the living and living experience of all Indians” and has had an immeasurable cultural influence.¹⁰⁶ However, due to a lack of large-scale codification, the Hindu conception of land-use has not been provided the structural pathways to affect

¹⁰⁰ Hessbruegge & García, *supra* note 10 at 3.

¹⁰¹ *See* Escobar, *supra* note 61.

¹⁰² *Id.* (Detailing sale of Maya highland area to telecom company); *see also* Guatemala – Maya, UNITED STATES DEPT. OF JUST. 1, 6-7 (2018) <https://www.justice.gov/eoir/page/file/1031466/download> (Detailing prevalence of industrial mining in lands traditionally home to large Maya populations).

¹⁰³ *See supra* discussion Part I-B(i) (Detailing environmental values and communal land ownership).

¹⁰⁴ CIA WORLD FACTBOOK: GUATEMALA.

¹⁰⁵ Werner Menski, *Postmodern Hindu Law*, UNIV. OF LONDON, 1, 7, 12 (2001).

¹⁰⁶ Vasudha Narayanan, *Water, Wood, and Wisdom: Ecological Perspectives from the Hindu Traditions*, 130 DAEDALUS 179, 179 (2001); Menski, *supra* note 109 at 9.

environmental issues in India.¹⁰⁷ The focus of this section will be a common conceptual framework of Hindu law that has been described as a complex but culturally significant “legal tradition” within modern India.¹⁰⁸

A . System Overview

i. Sources of Hindu Law: Is there law?

Written sources of Hindu law have been described as challenging “mazes of Sanskrit texts.”¹⁰⁹ Perhaps as a result, merely defining the roles of individual sources within Hindu law has proven controversial. A simplistic view, rooted in a distinctly Western conception of legal systems, has insisted that various ancient Hindu texts should be interpreted as “legal codes” and that Hindu law is subsequently grounded in codification.¹¹⁰ However, a more careful view argues that Hindu law should be understood as a *chthonic*-inflected tradition.¹¹¹ As argued by legal scholar Dr. Werner Menski, under this view, Hindu law is grounded in common principles that go beyond a strictly “legal” system.¹¹² Further, these principles are preserved through community transmission.¹¹³ Thus, Hindu law features rules that are “organically grown [and] socially tested” rather than codified.¹¹⁴

Sources of Hindu law fall under three categories: *Sruti*, *Smrti*, and *Acara*.¹¹⁵ The first of these, *Sruti*, refers to the “heard word” or the “divinely revealed:” information that was received and recorded by earthly “sages.”¹¹⁶ *Sruti* itself is primarily composed of Vedas.¹¹⁷ The Vedas contain chants, ritual

¹⁰⁷ See *infra* Part B (Discussing conservation ethos of Hindu law).

¹⁰⁸ Purushottama Bilimoria, *The Idea of Hindu Law*, 43 J. OF ORIENTAL SOC’Y AUSTL. 103, 115 (2011)(Noting that though “social and political realities” of modern India may mean that the “legal side of Hindu dharma has been lost” for purposes of state authority, the tradition retains its philosophical and cultural norm importance.).

¹⁰⁹ P. K. Menon, *The Traditional Hindu Law in India - Transformation from Customary to Codified Law*, 16 KOREAN J. COMP. L. 105, 105 (1988).

¹¹⁰ Menski, *supra* note 109 at n.28, 10.

¹¹¹ *Id.* at 11

¹¹² Menski, *supra* note 109 at 7; Menon, *supra* note 112 at 105.

¹¹³ Menski, *supra* note 109 at 7; Menon, *supra* note 112 at 105.

¹¹⁴ Menski, *supra* note 109 at 14-15.

¹¹⁵ Bilimoria, *supra* note 111 at 2. Hindu sources are referred to by different names or spellings. For the purposes of this paper, the spellings used here will be used throughout.

¹¹⁶ Shah Mohammad Omer Faruq Jubaer *et. al.*, *A Resemblance of the Origin of Hindu Law: Religious Observation*, 18 GLOBAL J. HUMAN SOC. SCI., 35, 37 (2018).

¹¹⁷ Bilimoria, *supra* note 111 at 2.

instructions, custom, and other liturgical information and are “the first [i.e. most authoritative] source of the sacred law.”¹¹⁸ Notably, no Veda “includes a single positive precept which could be used directly as a rule of conduct,” but each does include a *Upanishad* or synthesis of the message contained within that Veda.¹¹⁹ The common, legally significant thread which runs through the Vedas is “a consideration of a higher order” that regulates all life on earth – an element that would eventually become the all-important principle of *dharma*.¹²⁰

The second major source category of Hindu law is the *Smṛti* or the “memorized tradition.”¹²¹ Unlike the *Śruti*, *Smṛti* is strictly based on human memory.¹²² *Smṛti* includes the *Vedāṅgas*, which are meant to “elaborate and interpret” the Vedas with the aim of making them more accessible in the daily lives of Hindus.¹²³ *Smṛti* also “branches” from the Vedas by addressing strictly human concerns and includes three legally significant components: *Puranas*, *Itihāsa*, and *Dharmashastras*. *Puranas* “narrate universal history” and include “cosmogony” along with ethically instructive tales.¹²⁴ Similarly, the *Itihāsa* contains various historical tales aimed at delivering an instructive message.¹²⁵ Finally, the *Dharmashastras* are fundamentally “collections of rules that were remembered . . . and then transmitted to the rest of humanity.”¹²⁶

Smṛti has generated controversy because its written synthesis of *Śruti* bears some resemblance to a legal code.¹²⁷ Among its *Dharmashastras*, the *Manusmṛiti* or “Code of Manu” has proven particularly contentious and influential.¹²⁸ The *Manusmṛiti* is one of three main *Dharmashastras* and is named for its

¹¹⁸ MANUSMRITI II:6 *translated in* GEORGE BÜHLER, SACRED BOOKS OF THE EAST, VOLUME 25, <https://www.sacred-texts.com/hin/manu.html> [hereinafter MANUSMRITI].

¹¹⁹ Bilimoria, *supra* note 111 at 2.

¹²⁰ *Id.*; see also *infra* Part II-A(ii) (Discussing role of *dharma* establishing principles of Hindu legal framework).

¹²¹ Bilimoria, *supra* note 111 at 2.

¹²² Jubaer *et al.*, *supra* note 119 at 3.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ LUDO ROCHER, THE HISTORICAL FOUNDATIONS OF ANCIENT HINDU LAW 63 (Donald R. Davis ed. 2012).

¹²⁷ See Bilimoria, *supra* note 111 at 2 (Citing numerous scholars that have adopted this view).

¹²⁸ Aside from “legal-source” controversy, *Manusmṛiti* has also drawn criticism for its support of a social order that is oppressive to women. See e.g., Bilimoria, *supra* note 111 at 3 (“[*Manusmṛiti*] has recently come under severe criticism and qualification by scholars of Hindu legal history and certain Indian feminist writers).

supposed author, King Manu, one of several human “lawgivers” within the Hindu tradition.¹²⁹ Most notably, the *Manusmriti* includes Manu’s division of Hindu society into four distinct classes or “castes” and personal endorsement of “conscience” as central to the idea of Dharma, a notion not explicitly found elsewhere in the ancient Hindu law sources.¹³⁰ While some have characterized *Manusmriti* as akin to a legal code book, others, like Menski, have cautioned that this treatment “is a misrepresent[ation]” and assigns *Manusmriti* too much weight in determining Hindu law.¹³¹

Finally, *Acara* is an unwritten set of norms and has been defined as “cultural grammars” which “reflect and regulate” the human world.¹³² The unwritten quality of *Acara* is not an indication of unimportance.¹³³ Instead, notions of *dharma* and the “dictates” of written Hindu law were necessarily derived from a pre-existing *Acara* or a “standard, normative ethos of good people.”¹³⁴ Further, because it is unwritten and community specific, *Acara* bears a resemblance the underlying law of culture found in classically customary legal systems.¹³⁵

ii. Principles and Rules of Hindu Law: A Single Truth

Despite an array of written sources, the Hindu legal system “was never exclusive book law that could be . . . just taken off the shelf.”¹³⁶ Equally, Hindu law cannot be separated from the Hindu religious framework.¹³⁷ While community preservation has imbued Hindu law with a high degree of flexibility, it may also, in conjunction with the system’s religious goals, motivate a reliance on a central, unifying principle: *dharma*.¹³⁸ *Dharma* can be described as Hinduism’s concept of “righteousness” and includes

¹²⁹ See Bilimoria, *supra* note 111 at 2.

¹³⁰ MANUSMRITI II:12-19; See also Bilimoria, *supra* note 111 at 3; See *infra* Part II-A(iii) (Discussing impact of castes).

¹³¹ Menski, *supra* note 109 at 8 n.28; see also Bilimoria, *supra* note 111 at 2-3 (Suggesting that the “Code of Manu” may just be an example of “medieval scholasticism” rather than an accurate representation of Hindu law).

¹³² Bilimoria, *supra* note 111 at 2 (citing SHELDON POLLOCK, PLAYING BY THE RULES: SASTRAS AND SANSKRIT LITERATURE’, IN THE ŚĀSTRIC TRADITION IN INDIAN ARTS, 312 (A. L. Dallapiccola eds. 1989)).

¹³³ Jubaer *et. al*, *supra* note 119 at 35.

¹³⁴ *Id.*

¹³⁵ See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 63-64 (5th ed. 2014).

¹³⁶ Menski, *supra* note 109 at 8. This contention reflects the that Hindu texts like the “Code of Manus” should not be regarded as examples of codified law.

¹³⁷ Menski, *supra* note 109 at 7 (Noting the “impossibility of distinguishing religion from law”).

¹³⁸ Bilimoria, *supra* note 111 at 2; see also K.L Seshagiri Rao, *Practitioners of Hindu Law: Ancient and Modern*, 66 FORDHAM L. REV. 1185, 1193 (Describing Hindu law as a “flexible legal order” even in its ancient forms).

personal obligations, duties, and responsibilities.¹³⁹ Though *dharma* has been simplistically labeled “law,” it encompasses far more than just legal instruction.¹⁴⁰ *Dharma* revolves around an overarching concern for “harmony, regularity, fundamental balance, and proper behavior” that is rooted in a view of the world as a single, unchangeable order.¹⁴¹ *Dharma* protects the integrity of the family, the community, and the world.¹⁴²

The principle of *Dharma* presents an accompanying idea: *karma*.¹⁴³ *Karma* can be understood as the “effects of one’s actions,” which in turn reflect either accord or discord with the principles of *dharma*.¹⁴⁴ *Karma* is also an acknowledgement of the “choices and circumstances” individuals must navigate, culminating in an overall effect on both the individual and “collective” or community *dharma*.¹⁴⁵ Under this framework of *dharma* and *karma*, Hindu law endorses an “idealized” system of individual self-control at all times: humans have a choice to adhere or break from *dharmic* principles.¹⁴⁶ Concepts of *dharma* and *karma* are found in the ancient Vedas and are further synthesized and explained in the *Smriti*.¹⁴⁷ The framework’s focus on harmonious, ultimately good behavior motivates the role of truth within the Hindu legal tradition. For example, the *Mundaka*, one of the Vedic *Upanishads*, declares that “[t]ruth (*satyam*) alone conquers” and that this all conquering, all-harmonizing truth is the path to *dharma*.¹⁴⁸ This connection between *dharma* and truth is again seen in the conception of atonement for bad acts requiring the personal reflection and admission of the wrongdoer.¹⁴⁹

However, the controlling principle of *dharma* and its relation to *karma* are further complicated by the

¹³⁹ Menski, *supra* note 109 at 14; Bilimoria, *supra* note 111 at 2.

¹⁴⁰ Rocher, *supra* note 129 at 60.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Shiv Narayan Persaud, *Eternal Law: The Underpinnings of Dharma and Karma in the Justice System*, 13 RICH. J. L. & PUB. INT. 49, 51 (2009).

¹⁴⁴ *Id.* at 66.

¹⁴⁵ *Id.*

¹⁴⁶ Menski, *supra* note 109 at 14 n. 42.

¹⁴⁷ Karan Singh, *Thoughts on Vedanta*, 28 INDIA INT’L. QUART. 100, 101-102 (2001).

¹⁴⁸ MUNDAKA 3.1.1 translation by JULIUS LIPNER in *The Truth of Dharma and the Dharma of Truth: Reflections on Hinduism as a Dharmic Faith*, 23 INT’L J. HINDU STUD. (2019) [hereinafter MUNDAKA].

¹⁴⁹ See *infra* Part II-A(iii) (Discussing role of admission following bad acts).

Varna or caste system.¹⁵⁰ Largely rooted in *Manusmriti*, the caste system divides Hindu society into four classes.¹⁵¹ The castes are ranked order according to perceived “purity status.”¹⁵² Beginning from the top of the hierarchy, the castes include: (1) Brahmans, (2), Kshatriyas, (3) Vaishyas, and (4) Shudras.¹⁵³ Below these four castes is the lowest designation: the Dalits or “untouchables.”¹⁵⁴ Because each caste occupies its own position within society’s integrated order, each caste carries distinct *dharmic* and *karmic* obligations.¹⁵⁵ For example, *Manusmriti* declares that Brahmans own “whatever exists in this world,” and bestow all others in alms, meaning “other mortals subsist through the benevolence of the Brahmins.”¹⁵⁶

Under this framework of non-universal *Dharma*, punishment for the same crime may depend on the wrongdoer’s caste position.¹⁵⁷ Similarly, the daily obligations or expectations of an individual may also depend on caste position, thereby also affecting the *Karmic* impacts of his or her conduct.¹⁵⁸ However, a critical assessment of the caste system, connected to a broader questioning of the authority of sources like the *Manusmriti* has gained traction.¹⁵⁹ This alternative view suggests that caste is simply no longer critically relevant to the operation of Hindu law, largely due to the emergence of formal state legal systems.¹⁶⁰

iii. Procedures and Outcomes: Inner Reflection, Outer Dharma

At the community level, elements of Hindu law can still be seen in the *Panchayat* system.¹⁶¹ Forms of *Panchayat* – literally meaning “coming together of five persons” – have been practiced for centuries and their existence reflects the historical absence of formal state authority in the lives of India’s large rural

¹⁵⁰ Ludo Rocher, *Hindu Conceptions of Law*, 29 HASTINGS L. J. 1283, 1285 (1978).

¹⁵¹ See e.g., M.V. Nadkarni, *Is Caste System Intrinsic to Hinduism?*, 38 ECON. POL. WKLY. 4783, 4783 (2003).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Rocher, *supra* note 153 at 1297.

¹⁵⁶ MANUSMRITI I:100-102 .

¹⁵⁷ Rocher, *supra* note 153 at 1287.

¹⁵⁸ *Id.*

¹⁵⁹ See e.g., Nadkarni, *supra* note 154 at 4783 (Arguing that Caste system has no basis in Hinduism writ large).

¹⁶⁰ *Id.* at 4791.

¹⁶¹ See MARC GALANTER & UPENDRA BAXI, PANCHAYAT JUSTICE: AN INDIAN EXPERIMENT IN LEGAL ACCESS, in ACCESS TO JUSTICE, EMERGING ISSUES AND PERSPECTIVES 343, 344 ((Mauro Cappelletti & Bryant Garth eds., 1978).

population.¹⁶² Traditional *Panchayats* involved councils of village elders and took the form of “extended discussion among interested persons.”¹⁶³ The community-driven *Panchayat* system presents threshold advantages and continues into the modern era, in the form of *Nyaya Panchayats*.¹⁶⁴ Local dispute resolution means parties are not required to travel long distances to engage with the overburdened low-level Indian state courts.¹⁶⁵ Use of the free *Panchayat* also frees low-income, rural parties from the burden of court costs and filing fees.¹⁶⁶ In contrast to Indian state courts, *Panchayats* offer a highly accessible path to dispute resolution, particularly for India’s rural populations.

The Indian state has attempted to preserve the *Panchayat* system due to its widespread, informal use by village populations.¹⁶⁷ The Amendment Act of 1992 created a tri-level, state-supported *Panchayat* system.¹⁶⁸ These *Panchayats* are primarily concerned with government administration but, particularly at the lowest level (*Gram Panchayat*), also handle low-level criminal and civil disputes.¹⁶⁹ Modern India has also struggled with the development of a fourth *Panchayat*: the *Khap Panchayat*.¹⁷⁰ *Khap Panchayats* are regionalized and are made up unelected male community members engaging in what has been described as vigilantism in the wake of perceived “moral transgressions.”¹⁷¹ Notably, there is an emerging consensus that *Khap Panchayats* have no clear basis in historical practices.¹⁷²

Traditionally, dispute resolution within the Hindu legal system is driven by an desire to maintain both community and individual *dharma*.¹⁷³ This concern is exemplified by the system’s response to adultery. A

¹⁶²*Id.* at 344-45

¹⁶³*Id.* at 344

¹⁶⁴ D. Bandyopadhyay, *Nyaya Panchayats: The Unfinished Task*, 40 *ECON. POL. WKLY.* 5372, 5374 (2005).

¹⁶⁵ Jayanth Krishnan *et. al.*, *Grappling at the Grassroots: Access to Justice in India’s Lowest Tier*, *MAURER SCH. L.* 151, 165 (2014).

¹⁶⁶*Id.* at 171.

¹⁶⁷*Id.* at 154.

¹⁶⁸ Nidhi Kumari, *Concept of Village Panchayat*, *CNLU*, (Apr. 5, 2015) [https://www.lawctopus.com/academike/concept-village-panchayat-constitutional-analysis/\(Escalating in authority are the Gram Panchayat, Samiti Panchayat, and Zilla Panchayat\).](https://www.lawctopus.com/academike/concept-village-panchayat-constitutional-analysis/(Escalating in authority are the Gram Panchayat, Samiti Panchayat, and Zilla Panchayat).)

¹⁶⁹ Galanter & Baxi, *supra* note 162 at 348.

¹⁷⁰ See S.B. Bharadwaj, *Myth and Reality of the Khap Panchayats: A Historical Analysis*, 28 *STUD. HIST.* 43, 67 (2012).

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³ Galanter & Baxi, *supra* note 162 at 344.

Brahman man who commits adultery may be banished, while a man who is not a Brahman who commits adultery may face death, specifically because this latter form of adultery is seen as more disruptive to community harmony in its disruption of the *Varna* or caste system.¹⁷⁴ In the criminal context, *danda* “is the punishment prescribed by Hindu law” and is designed to both deter “evil” behavior which poses a risk to the community and to bring the wrongdoer back upon “the path of justice” towards harmonized *dharma*.¹⁷⁵ Kings protect their communities by “protect[ing] [their] subjects” in accordance “with the sacred law” and carry out justice through three forms of punishment: “imprisonment, fetters, and corporal punishment.”¹⁷⁶ However, “punishment is not alone enough” to restore individual *dharma* and wrongs must be atoned by an internal recognition on the part of the wrongdoer.¹⁷⁷ Accordingly, a thief who is punished after “confessing theft” is deemed to be “pure” and “will go to heaven along with those who have performed meritorious deeds.”¹⁷⁸ Under this approach, the wrong doers confession serves to restore personal *dharma*, and, along with punishment, also restores community *dharma*.

iv. Evolution: Fluctuation in Treatment

Over its long history of operation, Hindu law has faced pressures and has been subsequently altered. The colonial period in India led to the development of “Anglo-Hindu law,” or an attempt by British colonial authorities to codify and administer traditional Hindu law in the style of European common law or civil law systems.¹⁷⁹ What resulted has been described as “monstrous hybridity” in which rules of “positive law” were wrangled out of complex “religious and moral considerations” contained in the many written and customary sources of Hindu law.¹⁸⁰ As India emerged as an independent nation in the mid-20th century, Hindu law again faced pressures, albeit internal ones, related to the country’s efforts to adopt a national legal system that was completely “secular and [part of] a modern value system.”¹⁸¹ Towards the

¹⁷⁴ MANUSMRITI VIII: 352-359.

¹⁷⁵ Rao, *supra* note 139 at 1189.

¹⁷⁶ MANUSMRITI VIII:304, 306, 310.

¹⁷⁷ Rao, *supra* note 139 at 1189.

¹⁷⁸ MANUSMRITI VIII 314-318.

¹⁷⁹ Menski, *supra* note 109 at 12.

¹⁸⁰ Rocher, *supra* note 151 at 1287.

¹⁸¹ Menski, *supra* note 109 at 2.

latter half of the 20th century and into the 21st, however, Hindu law has begun to receive new attention, even from the Indian state itself.¹⁸² Much of the focus has centered on the ways its structures might offer increased access to justice for millions of economically and socially marginalized Indians in rural areas.¹⁸³

v. Codification: Secular Tensions

However, outside of the *Panchayat* system, Hindu law has not been widely codified into India's formal state legal system.¹⁸⁴ Moreover, Indian state law has sought to limit the impact of the Hindu caste system within the state legal system. Articles 14 and 15 of the Indian Constitution explicitly ban discrimination on the basis on of a host of protected characteristics – including caste.¹⁸⁵ Further, other provisions effectively create a regime of affirmative-action for lower caste populations.¹⁸⁶ Whereas applications of Hindu law traditionally differed in accordance with an individual's caste status – a central component of the *Manusmriti* – the formal legal system of India has explicitly rejected this component of Hindu law.¹⁸⁷ The Indian legal system, through its Supreme Court holdings, has also confirmed a universal right of access to the formal legal system.¹⁸⁸ Ultimately, this fundamental gap between Indian state law and a legal tradition which is profoundly culturally important to the country's identity has led to controversy as India grapples with the role of Hindu law in the 21st century.¹⁸⁹

B. Hindu Law and Land-Use

Notably, Hindu law sources include an explicit focus on the natural world. The “Hymn to the Earth” contained within the *Atharvaveda* is part of the *Sruti* and therefore in the category of Hindu law's most important sources. The Hymn is written from the perspective of humanity and contains direct references

¹⁸² See VIDEH UPADHYAY, A STUDY TO REVIEW AND STRENGTHEN NYAYA PANCHAYATS IN INDIA (May 2011) (Indian government report calling for Panchayat courts).

¹⁸³ See Bandyopadhyay, *supra* 165 at 5373; see also Krishnan, *et. al.*, *supra* note 166 (Identifying problems with formal legal system).

¹⁸⁴ There are three notable exceptions, specifically related to domestic matters: Marriage Act, Maintenance act, and Succession Act. See Günther-Dietz Sontheimer, *Recent Developments in Hindu Law*, 8 INT'L COMP. L. Q. SUPP. PUB. (1964) (Explaining mid-century passage of these Acts.)

¹⁸⁵ INDIA CONST. art. 15 (Barring caste discrimination in access to public services and accommodation).

¹⁸⁶ INDIA CONST. art. 16 – art. 17 (Barring caste discrimination in public employment, abolishing doctrine of untouchability, and setting aside reserved spots in education and employment).

¹⁸⁷ See MANUSMRITI II:6-13.

¹⁸⁸ See *S. P. Gupta v. President of India*, AIR 1982 SC 149 (India).

¹⁸⁹ Menski, *supra* note 109 at 32.

to a profound relationship between humans and the earth. The author declares that earth is “all-sustaining and treasure bearing . . . [and] home to all moving life” and that “earth is my mother, her son am I.”¹⁹⁰ The text also suggests the existence of an integrated order which unites all plants, animals, *and* humans. The Hymn insists that all “mortal creatures. . .the biped and quadruped” are born from the same earth that is the “mother of all plants” and that these relationships “upheld by Eternal Law” or *dharma*.¹⁹¹ Because the earth is “held together and bound firm,” by this order, humans must give their “obeisance” or whole-hearted respect to the earth itself.¹⁹² Notably, the theme of the an integrated, ecological order is also seen in Hindu law’s *Smriti* sources, particularly *Manusmriti*. There, Manu extols humans to recognize that “all” land is “created by the gods.”¹⁹³ Moreover, according to Manu, even that which springs “from seed” possess a capacity of “internal consciousness” and is thus able to experience “pleasure and pain.”¹⁹⁴

i. Hindu Land-Use Law: Nature’s Dharma

Stemming from its focus on the natural world, Hindu law sources also appear to espouse an ethos of conservation, suggesting an endorsement of a kind of ecological *dharma*. Again, this theme particularly present in *Smriti* sources in their attempt to distill the *Vedas* into messages or rules for everyday life. For example, in the *Arthashastra*, there is a complex regime of penalties and fines for merely “cutting off the tender sprouts or fruit trees, flower tress, or shady trees” and these fines escalate in accordance with how much of the tree is severed.¹⁹⁵ More generally, the *Manusmriti* also appear to contain an endorsement of responsible, conservation-driven land-use. Tellingly, Manus commands even the Brahman – the most privileged of all castes – to “seek a means of subsistence which either causes no pain to others,” suggesting the inherent good of consumption patterns that are, at the very least, ecologically and socially

¹⁹⁰ ATHARVA VEDA, 12.1:6 *translated by* ABINASH C. BOSE, HYMNS OF THE VEDAS, (1967) [Hereinafter ATHARVA VEDA].

¹⁹¹ ATHARVA VEDA 12.1:15-17.

¹⁹² ATHARVA VEDA 12.1:26.

¹⁹³ MANUSMRITI II:17-23.

¹⁹⁴ MANUSMRITI I:48-50.

¹⁹⁵ KAUTILYA'S ARTHASASTRA III *translated by* R. SHAMASASTRY, KAUTILYA'S ARTHASASTRA (1956) [Hereinafter KAUTILYA'S ARTHASASTRA].

responsible.¹⁹⁶ More directly, Manus also appears to explicitly forbid pollution, as Brahmans in particular are forbidden from “throw[ing] urine or feces into the water, nor saliva. . .nor any other impurity, nor blood, *nor poisonous things.*”¹⁹⁷ (emphasis added). Overall, an attention across Hindu texts for “the practice of non-violence against all things” and an advocacy for “a harmonious relationship with nature” seems to suggest an underlying ethos of conservation, and, in turn, *dharma*-driven land use.¹⁹⁸

iii. Conflict and Issues: Pathways For Use

Despite what appears to be a heightened concern for responsible, conservation driven land-use within the Hindu legal tradition, land-use in India remains an area of law in which there remains significant conflict between customary practices and formal, state land-use law.¹⁹⁹ In large part, the tension stems from to the total control of the Indian state legal system over the management of land and other natural resources.²⁰⁰ Concurrently, India has struggled mightily with an array of land-use issues. According to some estimates, nearly half of all land in the country is degraded to poor land-use management, primarily related to industrial soil pollution and irresponsible agricultural practices.²⁰¹ In response, Indian state law presents “independent, mutually exclusive” regimes of resource regulation that permissively allow the “exploitation of resources.”²⁰² Perhaps most problematic: the current Indian constitution does “not provide for mechanisms of enforcement” of environmental laws, “either by the State or by citizens.”²⁰³

This framework of permissive land-use management stands in sharp contrast to many of the apparent land-use values endorsed by the Hindu legal tradition. Whereas the Hindu tradition’s all-important focus on *dharma* and the integration of the natural world with human life would likely produce a

¹⁹⁶ MANUSMRITI IV: 2-3

¹⁹⁷ MANUSMRITI IV:5-6.

¹⁹⁸ See Narayanan, *supra* note 107 at 182-183.

¹⁹⁹ M.S. Vani, *Customary Law and Modern Governance of Natural Resources in India*, in LEGAL PLURALISM AND UNOFFICIAL LAW IN SOCIAL, ECONOMIC AND POLITICAL DEVELOPMENT 409-446 (Rajendra Pradhan ed., 2002)(Noting tension between informal and formal legal systems in India predating even colonial rule).

²⁰⁰ LAND LINKS COUNTRY PROFILE: INDIA, UNITED STATES AGENCY AID INT’L DEV. (Sept. 2019).

²⁰¹ *Id.*

²⁰² Vani, *supra* note 200.

²⁰³ *Id.*

comprehensive land management system on a highly localized level, none has yet emerged. Without formal codification or independent control, Hindu law may be severely limited in its capacity to address land-use conflict in India’s modern era.

III. Chinese Law – A Confucian Legal Tradition

With a population of almost 1.4 billion and a total land area of about 6 million square miles, China’s demographic, geographic, and cultural vastness makes it an intimidating subject of legal research.²⁰⁴ Officially, the formal Chinese legal is primarily a blend of socialist and highly codified civil law.²⁰⁵ However, China’s legal system also reflects a historical abundance of “competing ideologies and legal and political philosophies” which continue to exert an immense cultural and legal influence within the country.²⁰⁶ One of these “other” ideologies, Confucianism, both draws from China’s earliest customary or *chthonic* traditions and presents its own framework of legally significant philosophy.²⁰⁷ In the land-use context, Confucian commands of proper land management speak directly to many environmental challenges in modern China.²⁰⁸ Thus, the focus of this section will be the Confucian legal tradition and its cultural connections to the Chinese state legal system.

A. System Overview

i. Sources of a Confucian Legal Tradition: Philosophic Texts

A Confucian legal tradition finds its roots in the writings of Confucius, a figure of great cultural significance who has been alternatively portrayed as a “teacher, advisor, editor, philosopher, reformer, and prophet.”²⁰⁹ Subsequently, there are a “wide-range” of ancient Chinese texts which claim either authorship or direct influence by Confucius.²¹⁰ This wealth of sources, originating across nearly all of China’s regions, have provided a profound amount of “material about the philosophy of Confucius, but an

²⁰⁴ CIA WORLD FACTBOOK: CHINA.

²⁰⁵ *Id.*

²⁰⁶ *See* Glenn, *supra* note 136 at 342.

²⁰⁷ *Id.* at 336.

²⁰⁸ *See infra* Part III-B (Discussing Confucian land-use principles).

²⁰⁹ MARK CSIKSZENTMIHALYI, CONFUCIUS, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2020) <https://plato.stanford.edu/archives/sum2020/entries/confucius/>

²¹⁰ *Id.*

incomplete sense” of what sources are most “authoritative” in relation to a Confucian legal tradition.²¹¹

One of many written Confucian sources, the *Analects* is a kind of compilation of Confucius thought.²¹² Notably, because the text of the *Analects* is thought to have evolved over several hundred years of alteration, it is perhaps not an accurate “record of Confucius’s own words or . . . views.”²¹³ Despite this, the *Analects* remains widely considered the most complete and accurate representation of Confucius thought, both as it was received in ancient China and as it currently exerts its tremendous cultural and legal influence on modern China.²¹⁴ Overall, the *Analects* is a legally significant collection of philosophy because of “its influence on the [Chinese] legal system [through its] legal values.”²¹⁵ While not made up of positivist declarations of law or the rights, the *Analects* do contain an “elucidation” of what it means to be in accordance with *moral* law, calling upon the all-important principles of *ren* and *li*.²¹⁶

The Confucian legal tradition is also tightly connected to an older source of law: unwritten custom. Notably, in formulating the legally significant (and perhaps controlling) principle of *li* and the *Analects* more generally, Confucius envisioned a relation to a previous “cultural heritage” -- one that reflected a lost religious framework active even farther back in China’s history.²¹⁷ Therefore, the overarching principles contained in the *Analects* and thereby forming the backbone of the Confucian legal tradition have their roots in a community “body of norms, precepts and rules” which combined to form a customary legal framework.²¹⁸ Though the Confucian legal tradition is not directly *chthonic* or religious law, a connection to older, unwritten tradition built on values of community over the individual is readily

²¹¹ *Id.*

²¹² ROBERT ENO, THE ANALECTS OF CONFUCIUS: AN ONLINE TEACHING TRANSLATION, i (2015) [https://chinatxt.sitehost.iu.edu/Analects_of_Confucius_\(Eno-2015\).pdf](https://chinatxt.sitehost.iu.edu/Analects_of_Confucius_(Eno-2015).pdf).

²¹³ *Id.* (Equating the *Analects* with the gospels of the New Testament with regard to authorship).

²¹⁴ See Csikszentmihalyi, *supra* note 209; see also *infra* Part A-(ii) (Discussing another source – the *Mencius*).

²¹⁵ Dong Jiang & Xiaohong Ma, *The Analects and Sense of Justice: The Spirit of Law and Historical Practice*, 46 MOD. CHINA 281, 283 (2019).

²¹⁶ *Id.* at 289-290; see also *infra* Part III-A-(ii) (Discussion of Confucian principles).

²¹⁷ Wen Yen Tsao, *The Chinese Family From Customary to Positive Law*, 17 HASTING L. J. 727, 731 (1966).

²¹⁸ *Id.* at 731-732.

apparent.²¹⁹

ii. Principles of a Confucian Legal Tradition: Self-Directed Way

Perhaps the most defining characteristics of Confucian law are the overlapping concepts of *ren* and *li*.²²⁰ *Ren* is “the most fundamental concept in Confucian thought” and is also legally significant in its understood meaning as “benevolence” or, more generally, “goodness.”²²¹ In the *Analects*, it is also referred to as the “proper way,” meaning an “innate, unmanifest source. . .of virtuosity.”²²² Critically, *ren* can only be achieved through an overall course of conduct –*li*—which can be translated as “propriety.”²²³ Under this framework, *ren* is the inner, substantial goodness of the human being and *li* is the functioning of *ren* in the manifest world.²²⁴ Accordingly, rather than present explicit prohibitions or rules, the Confucian legal tradition presents law in the form of *li*: proper conduct and social norms that ultimately reflect an individual’s *ren*.²²⁵

A code of conduct in accordance with *Li* is expansive and, in sum, creates a kind of societal “moral order.”²²⁶ Within this order, virtues are characterized as “far more fundamental than [abstract or man-made] rules.”²²⁷ Securing *ren* through *li* is an inward-looking pursuit, and the Confucian legal tradition advocates both good conduct and the self-policing of bad behavior. The *Analects* teach that “if you are strict with yourself, your mistakes will be few.”²²⁸ Similarly, when mistakes arise, people “should not hesitate to correct” them.²²⁹ More generally, and again in place of codified rules or prohibitions, the *Analects* instruct humans to secure ultimate virtuosity by “concern[ing] [them]selves with the

²¹⁹ See Glenn, *supra* note 136 at 328, 336 (Noting similarities between some aspects of Confucius legal thought and *chthonic* law frameworks).

²²⁰ THE ANALECTS OF CONFUCIUS 1:12 (comment) translated by A. CHARLES MULLER (2020) available at <http://www.acmuller.net/con-dao/analects.html> [hereinafter ANALECTS].

²²¹ ANALECTS 1:2 (comment).

²²² ANALECTS 1:2 (text and comment).

²²³ ANALECTS 1:12.

²²⁴ ANALECTS 1:12 (text and comment).

²²⁵ Wang and Solum at 107.

²²⁶ Tsao, *supra* note 217 at 732.

²²⁷ Linghao Wang & Lawrence B. Solum, *Confucian Virtue Jurisprudence*, in LAW, VIRTUE, AND JUSTICE 107 (Amaya, Amalia, and Ho ed.s 2012).

²²⁸ ANALECTS 4:23.

²²⁹ ANALECTS 1:8.

fundamentals,” connoting a level of introspection that suggests a prominent role of truth within the system.²³⁰ This concept of deeply personal, individualized *li* has an additional, legally significant component: treatment of others. In the *Analects*, Confucius is asked to name “a single concept” that can control all human behavior and interaction.²³¹ Confucius answers with the word “reciprocity,” before explaining that “what you don’t like done to yourself, don’t do to others.”²³² Rather than proscribe specific actions in relation to others, the Confucian legal tradition espouses a principle of self-regulation of individual “human desires” for the protection of both the individual *Ren* and the community more broadly.²³³

The primacy of individual *ren* paradoxically means that a Confucian legal framework is also concerned with protecting community by fostering harmonious relationships. In a telling metaphor, the *Analects* suggest that “as for a neighborhood, it is *Ren* that makes it beautiful.”²³⁴ Subsequently, community harmony is paramount and may be impossible to secure if individuals “have resentments” against others.²³⁵ This principle may also mean that individuals should ignore or at least not disrupt community harmony when confronting the anti-social conduct of others.²³⁶ The *Analects* instruct that when facing someone “who is not so good,” individuals should not pursue action or even cast judgement.²³⁷ Instead, the observer – and perhaps even the victim – should “reflect on [their] own weak points,” further suggesting the critical role of self-reflection.²³⁸ Overall, the fundamental principle of a Confucian legal tradition or framework is harmony – both at an individual and community level. Further, it is this socially enforced principle of harmony that serves an explicitly legal function by “forbid[ing] trespasses before they are committed.”²³⁹

²³⁰ ANALECTS 1:2.

²³¹ ANALECTS 15:24.

²³² ANALECTS 15:24.

²³³ Luke T. Lee & Whalen W. Lai, *The Chinese Conceptions of Law* 29 HASTINGS L. J. 1307,1308 (1978).

²³⁴ ANALECTS 4:1.

²³⁵ ANALECTS 4:4; *see also infra* Part A-(iii) (Detailing aversion to conflict and desire to make disputes disappear).

²³⁶ *See infra* Part A-(iii).

²³⁷ ANALECTS 4:17.

²³⁸ ANALECTS 4:17.

²³⁹ Lee & Lai, *supra* note 233 at 1308-1309.

iii. Procedures and Outcomes: Avoid Conflict, Ensure Harmony

Perhaps the most defining procedural characteristic of a Confucian legal tradition is an overall “reluctance to root normativity in formal structures, sanctions,” or laws.²⁴⁰ However, a lack of formal structure does not mean the Confucian legal tradition does not exert influence on operation on dispute resolution processes in China.²⁴¹ Moreover, a grounding of law in individual *li* rather than in formal procedure simply reinforces the notion that the Confucian legal tradition is reliant upon society, rather than government, for enforcement.²⁴²

By avoiding “formal structures and sanctions,” the Confucian legal framework avoids the ultimate risk to harmony: conflict.²⁴³ The *Analects* explicitly caution against conflict and note its destructive effects, whether it be directed against forces of authority (i.e. the government) or local community members: “frequent remonstrance will lead to disgrace. With friends, frequent remonstrance will lead to separation.”²⁴⁴ Even more directly, when asked about the best way to resolve lawsuits, Confucius suggests that lawsuits may ultimately be futile and that “what we need is to have no lawsuits.”²⁴⁵

Similarly, the Confucian legal tradition’s overall lack of consideration to formal, positivist law or *fa*, is also rooted in a desire to avoid imperiling harmony.²⁴⁶ While a Confucian legal framework may conceive of *li* as a “facet” of *fa*, “the converse is not true,” meaning that formal law has little bearing on the drive towards the all-important goal of heightened *ren*.²⁴⁷ Chiefly, a lack of reliance of *fa* to assure harmony is motivated by a uniquely Confucian skepticism about the power of positivist legal structures to adequately accomplish this goal. For example, the *Analects* feature Confucius openly questioning the value of legal administration driven solely by *fa*, saying “you can recite three hundred poems from the *Book of Odes* [an ancient compendium of formal law] but when you try to use them in administration,

²⁴⁰ Glenn, *supra* note 136 at 320.

²⁴¹ See *infra* Parts A-(iv)(v) (Discussing changes and relation to formal Chinese state law).

²⁴² Lee & Lai, *supra* note 233 at 1309.

²⁴³ *Id.* at 1308-1309.

²⁴⁴ ANALECTS 4:26.

²⁴⁵ ANALECTS 12:13.

²⁴⁶ Lee & Lai, *supra* note 233 at 1309.

²⁴⁷ *Id.*

they are not effective.”²⁴⁸ Additionally, purely legal governance in which crime is deterred by punishment may force people “to avoid crime” but will result “in no sense of shame.”²⁴⁹ Instead, the *Analects* endorse a legal procedure that governs based on “virtue” – suggestive of *Li* and *Ren* – will help people “gain their own sense of shame” and therefore correct themselves.²⁵⁰

Without a need for formal structure or formally driven punishment, a Confucian legal system turns away from formal litigation.²⁵¹ Again, this reflects a desire to avoid conflict and disruption as litigation “tends to aggravate [pre-existing] conflict and inevitably ends in enmity.”²⁵² Thus, historically, the Confucian legal tradition “encourag[ed] mediation” and being “litigation-free was the ultimate goal” of a Confucian notion of legal governance.²⁵³ A drive towards dispute resolution through mediation or other means *outside* of litigation is perhaps one of the Confucian legal tradition’s most lasting legacies on China’s current legal system.²⁵⁴

One significant departure from the Confucian tradition’s hesitance to embrace formal structures is the concept of filial piety. Filial piety, or *xiao*, originates from another important textual source of Confucian thought, *Mencius*, written by a Confucian philosopher.²⁵⁵ It prescribes a rigid system of relationship-driven obligations which are rooted in a belief that respect for the family “is the root of all virtues.”²⁵⁶ The system itself revolves around five distinct familial and community relationships, each with accompanying duties. Mencius writes the filial piety requires “affection between father and son, righteousness between ruler and minister, precedence of the elder and younger, and the faithfulness of friends.”²⁵⁷ While the

²⁴⁸ ANALECTS 13:5. Notably, in the same sentence, Confucius implies that this problem may be even more pronounced in rural areas in which custom might be favored over any formalized legal system.

²⁴⁹ ANALECTS 2:3.

²⁵⁰ ANALECTS 2:3.

²⁵¹ Jiang & Ma, *supra* note 215 at 296-297. However, it is important to note that the Confucian legal tradition has always existed alongside other systems which do feature punishments and procedures. *See e.g.*, Tsao, *supra* note 226 at 738 (Detailing punishment and dispute resolution in traditional Chinese clan law).

²⁵² Tsao, *supra* note 226 at 753.

²⁵³ Jiang & Ma, *supra* note 215 at 298.

²⁵⁴ *See infra* Part III-A(v) (Discussing contemporary anti-litigation stance of Chinese legal system and culture).

²⁵⁵ Eno, *supra* note 212 at iii; BRYAN VAN NORDEN, MENCIOUS, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed. 2019), <https://plato.stanford.edu/archives/fall2019/entries/mencius/>.

²⁵⁶ Tsao, *supra* note 226 at 749.

²⁵⁷ MENCIOUS 3A:4 translated by ROBERT ENO IN Mencius: Translation, Commentary, and Notes (May 2016) [hereinafter MENCIOUS].

directness of filial piety is in contrast the Confucian tradition's rejection of reliance on *fa* or other formal systems, filial piety is conceived of as a means to ensure harmony within a family, community, and by extension, broader society.²⁵⁸

iv. Evolution: Influence, Rejection, and Cultural Preservation

Given that the Chinese legal system is widely considered the world's oldest continuously surviving legal framework with nearly four-thousand years of operation, it has undoubtedly absorbed influences from other legal systems.²⁵⁹ Equally, the specific role of a Confucian legal framework has fluctuated throughout China's history.²⁶⁰ Perhaps most notably, during the "Maoist" era of China's mid-century communist revolution, Confucian notions of social harmony were attacked as counter to Marxist tenets of class struggle.²⁶¹ However, "Confucianism survived to outlive Maoism" and a uniquely Confucian socio-legal code of personal conduct motivated by *li* and *ren*, "continue to be a strong influences in modern China."²⁶² Even within China's current, formal legal system, "specific rules of conduct decreed by the government. . . .constitute[e] *fa* yet continue to dominated" by an underlying cultural value of *li*.²⁶³

v. Codification: Confucian Values in China's Formal Legal System

Though there might appear to be an inherent conflict between the Confucian ideal of rule by *li* and a modern "rule by law" system, the current role of Confucian values in China's formal legal system is nuanced.²⁶⁴ In general, Confucian philosophy continues to have an immense cultural influence, and "many Chinese take comfort from and pride in Confucianism as an expression of Chinese values, traditions, and culture."²⁶⁵ On the individual level, the Confucian legal tradition has been periodically called upon by the ruling Chinese Communist Party (CCP) in its mission to "reshape values" and personal

²⁵⁸ See Qingping Liu, *Filiality Verses Sociality and Individuality*, 53 PHILOSOPHY EAST WEST 234, 236 (2003). *But see infra* Part III-A(v) (Discussing problems of Filial values in modern China).

²⁵⁹ Tsao, *supra* note 226 at 750 (Describing China as the land "three ways" due to its unique blend of Taoist, Buddhist, and Confucian legal and social structures).

²⁶⁰ See Shaohua Hu, *Confucianism and Contemporary Chinese Politics*, 35 POL. & POL'Y 136, 140, 143 (2007) (Documenting changes in role of Confucian legal theory across China's history).

²⁶¹ *Id.* at 142.

²⁶² Lee & Lai, *supra* note 233 at 1212.

²⁶³ *Id.*

²⁶⁴ *See infra* Part III-A(ii) (Discussion of Confucian distrust of rule by law or *fa* frameworks).

²⁶⁵ Hu, *supra* note 260 at 150.

attitudes, connecting to the “Confucian emphasis on self-cultivation [i.e. not law] as the basis for political life.”²⁶⁶ For example, in 2005, then-Chinese president Hu Jintao “launched a campaign to promote a more harmonious society” in a clear implication of Confucian legal values of self-regulation over personal conduct.²⁶⁷ In response to challenges facing its rapidly aging population, the Chinese government has also moved to codify the Confucian structure of filial piety, requiring under the “Elderly Protection Act” that children visit their aging parents.²⁶⁸ Most importantly, though, the Confucian legal tradition lives on in China not through codification, but through a surviving cultural value of dispute resolution in favor of litigation.²⁶⁹ In contemporary China, most people resolve their disputes without “ever coming into contact the formal legal system.”²⁷⁰ Words printed on a preserved imperial Chinese banner encapsulate this overarching – and lasting – cultural view.²⁷¹ The banner cautions against litigation because “it drains you of your nerves, your energy, and your money. . .heaven cannot be deceived.”²⁷²

B. Confucian Law and Land-Use

On a basic level, the *Analects* appear to espouse a notion of conservation, particularly in relation to individual habits or, more fundamentally, a person’s *li*. Confucius instructs responsible consumption, saying “if you do everything with a concern for your own advantage, you will be resented by many people,” suggesting the disharmony or disruptions in community *ren* which may result from over indulgence or greed for resources.²⁷³ Elsewhere in the *Analects*, Confucius again cautions that though “riches and honors are what all men desire” if they cannot be obtained in agreement with *ren*, “they should not be kept,” a theme of self-control that is only more important in “in times of difficulty or

²⁶⁶ Li at 330.

²⁶⁷ Hu, *supra* note 260 at 141-142

²⁶⁸ See Elaine Greenwood, *Controversial ‘Filial Piety’ Law Comes Into Effect in China*, PRI: THE WORLD (July 2, 2013), <https://www.pri.org/stories/2013-07-02/controversial-filial-piety-law-comes-effect-china>. Notably, the concept of filial piety has come under criticism from within China, with detractors arguing that it impedes individual freedom, fosters blind loyalty, and may lead to a culture of corruption. See Hu, *supra* note at 141-142.

²⁶⁹ See *infra* Part A-(ii) (Discussing aversion to conflict inducing litigation).

²⁷⁰ Percy R. Luney Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 L. & CONTEMP. PROBS. 129, 136 (1989).

²⁷¹ Jiang & Ma, *supra* note 215 at 288-289.

²⁷² *Id.*

²⁷³ ANALECTS 4:12.

confusion.”²⁷⁴ While these declarations go beyond purely environmental concerns, they, along with “other [similar] ideas and arguments in Confucian discourses” can be used to support “an environmental perspective that sees the human-nature relationship as dynamic and interrelated.”²⁷⁵

i. Confucian Land-Use Law: Securing Welfare

In addition to a subtle ethos of conservation, the Confucian legal tradition also appears to express an explicit regime of land-use law. Confucian conceptions of rules regarding land-use are firmly tied to broader instructions about the role of governance, namely, that governing should also reflect “propriety” or *li*, and that this requires that those in government “be economical in expenditure and love the people.”²⁷⁶ Under this framework, leaders secure the welfare of the people by both leading and by “work[ing] hard” for the community.²⁷⁷ In the “agriculture-based” society of Confucius, this concern for general welfare, proper land management, and, by extension, adequate agricultural production, was especially essential for social harmony.²⁷⁸ When asked what a system of government requires, Confucius tellingly lists “enough food” on equal footing with conventional governing concerns like “weapons” and the “confidence of the people.”²⁷⁹

Outside of the *Analects*, a concern for common welfare through land-management is even more direct and includes specific commands. Among Confucian thinkers, Mencius in particular “was an advocate for public welfare as a state concern” due to his belief that people could not be expected to behave in an “ethical way” if they “lacked the means to survive.”²⁸⁰ His eponymous text contains numerous land-use and conservation regulations that leaders with “propriety” should implement. In one profoundly direct section which nearly echoes modern environmental regulation, Mencius writes:

²⁷⁴ ANALECTS 4:5.

²⁷⁵ Xinzhong Yao, *An Eco-Ethical Interpretation of Confucian ‘Tiranren Heyi’*, 9 FRONTIERS OF PHILOSOPHY IN CHINA, 570, 573 (2014).

²⁷⁶ ANALECTS 1:5.

²⁷⁷ ANALECTS 13:1.

²⁷⁸ ANALECTS 1:5 (comment).

²⁷⁹ ANALECTS 12:7.

²⁸⁰ MENCIUS at 15-16 (translator’s introduction). Mencius also envisioned societal welfare as a crime deterrent – adequately securing a population’s needs removes incentives for theft or anti-social behavior, further eliminating the need for formal conflict resolution. *Id.*

“If you regulate fishing nets so that fine-woven ones may not be used in the pools and ponds, there will be more fish than the people can eat. If you allow hatchets and axes to be used in the woods only in proper season, there will be more lumber than the people can use. When there is more grain and fish than the people can eat and more lumber than the people can use, the people can nourish their living and mourn their dead without regrets . . . When chicken, pigs, and dogs are bred in a timely way, all who are seventy and over have meat to eat. If laborers in fields of a hundred mu are not taken from their fieldwork during growing season, then families with many mouths to feed will never go hungry.”²⁸¹

Conversely, departure from this model of harmony-minded land management is explicitly characterized as “bad government,” with Mencius envisioning a ruler with “fat meats and fat horses. . .but [with a population] pale with hunger and corpses in the wastelands.”²⁸² Much like Confucian legal tradition’s aversion to litigation in resolving disputes, the tradition’s conception of land-use and land-management is motivated by a desire to preserve community *ren* – a cared for populace carries a lessened risk of conflict and an increased opportunity for the development of individual *li*.

ii. Conflict and Issues: Departure from Confucian Land-Use Principles?

Though elements of the Confucian legal tradition have been embraced by the Chinese state government, China continues to struggle with land-use issues.²⁸³ Critics have pointed to an overall prioritization of “short term economic growth” by Chinese state authorities that has led to de-regulation and overall lack of environmental law enforcement, culminating in widespread pollution and environmental degradation issues.²⁸⁴ Critics assert that these problems are a direct result of the country’s turn away from Confucian conceptions of *ren*-influenced land management and toward market pressures of the global economy.²⁸⁵ Simultaneously, changing agricultural practices in China’s vast rural regions have sought to meet a growing population and have, in turn, “stressed land and water resources.”²⁸⁶

²⁸¹MENCIUS 1A.3.

²⁸² MENCIUS 1A.4.

²⁸³ See e.g., Joyce Yanyun Man, *Land Policy Issues in China*, LINCOLN INSTITUTE OF LAND POL’Y (Jan. 2010), <https://www.lincolninst.edu/publications/articles/land-policy-issues-china> (Detailing land-use and conservation problems in modern China, including farmland destruction in favor of industrialization).

²⁸⁴ Anh Tuan Nuyen, *Role-Based Ethics and Strong Environmental Ethics*, 20 ENVTL. ETHICS, 549, 550 (2011)

²⁸⁵ *Id.*

²⁸⁶ USDA, CHINA’S ONGOING AGRICULTURAL MODERNIZATION, iii (2009), <https://www.ers.usda.gov/webdocs/publications/44377/eib-51.pdf?v=0>

Moreover, as China’s industrial urban centers continue to expand, the central government has faced significant challenges in the effort to boost rural economies and rural standards of living.²⁸⁷

Notably, environmental advocates have called for the Chinese government to implement expressly Confucian principles to solve these problems. On a broad level, under this view, a return to the central, balancing concepts of *li* and *ren* could help China develop environmental laws that draw upon the Confucian legal tradition’s reliance on self-regulation to incentivize better environmental practices.²⁸⁸ On a more pragmatic level, research has suggested the possibility of urging rural agricultural producers to refocus on Confucian principles of community harmony.²⁸⁹ Under this approach, the Confucian legal tradition’s focus on avoiding resentment could foster a culture of environmental stewardship in China’s environmentally imperiled agricultural communities.²⁹⁰

IV. Comparisons and Conclusions

Though specific tenets and structural components of the Maya, Hindu, and Confucian legal traditions differ, there is profound commonality with regard to land-use and other environmental issues. Perhaps more interestingly, these commonalities persist despite central differences in the way each legal tradition conceives of the *purpose* of responsible land-management. However, differing degrees of protection or integration have severely impacted the extent to which these legal systems or traditions are able to effectuate their vision of resolving land-use conflict.

A. Common Values – Differing Motivations

i. The Framing of Land-Use and Environmental Conflict: An Integrated Order

Fundamentally, the Maya, Hindu, and Confucian legal traditions all feature a central focus in the area of land-use: preservation for common benefit. None of these systems acknowledge the possibility that land or natural resources can (or should) be held for private gain or benefit in the form of an *individual*

²⁸⁷ *Id.*

²⁸⁸ Yao, *supra* note 275 at 582-583.

²⁸⁹ See Lili Yu et. al. *Confucian Values, Trust, and Family Farm Adoption of Green Control Techniques*, 27 ENVTL. SCI. & POLLUTION RES. 35099 (2020).

²⁹⁰ *Id.* at 35103.

relationship. Instead, each system prescribes highly specific code of conduct in relation the natural world. For example, Maya communities in Guatemala engage in agricultural activity according to a pre-determined, astronomically ordained schedule.²⁹¹ Elsewhere, in India, Hindu texts make clear that specified, harmful land-use practices are forbidden.²⁹² Similarly, the as seen in the Confucian *Mencius* text, good governance is said to require a system of land and resource management that remarkably akin to Western notions of environmental regulation.²⁹³ These “environmental codes” are found even as these legal traditions generally eschew nearly all other Western notions of codified law. Notably, though the central oral or even textual sources of these legal traditions do not include statutes or formal procedures, formality does seem to arise *especially* within the environmental or land-use context.

i. What Motivates This Common Treatment: Values and History

In addition to sharing similarities in their conception of land-use, the Maya, Hindu and Confucian legal traditions also share at least three common values or features which may motivate their treatment of the issue. First, outside of the strictly environmental context, each of these three legal traditions share a focus on a central philosophical value. In Guatemala’s Maya communities, this value is found in the *p’ixab* social code which underlies much of that tradition’s legal framework.²⁹⁴ Within India’s Hindu law tradition, notions of legality are ultimately connected to the overlapping principles of *dharma* and *karma*, which are at least somewhat comparable to the Confucian values of *ren* and *li*.²⁹⁵ Within each of these value structures, there seems to be a focus on the idea of an “integrated whole.”²⁹⁶ A conception of the world as a single entity, inclusive of all land and life – including humans – certainly lends itself to the development of legal concepts or norms that are protective of the environment.

Secondly, the contemporary Maya legal system, along with the modern Hindu and Confucian legal

²⁹¹ See *supra* Part I-B.

²⁹² See *supra* Part II-B.

²⁹³ See *supra* Part III-B.

²⁹⁴ See *supra* Part I-A(ii).

²⁹⁵ See *supra* Part II-(A)(ii); Part III-A(ii).

traditions, all share a connection an older, strictly *chthonic* legal system. Though the Maya legal system’s orality and prioritization of community may make it the most obviously *chthonic* inspired system, Hindu and Confucian legal traditions share a similar historical connection. A relationship to *chthonic* legal traditions appears to have imbued each these systems with an underlying norm of “living close to the land and in harmony with it.”²⁹⁷ Moreover, these historical roots also seem to have created legal frameworks surrounding land that simply do not allow for individual “domination over the natural world” within each system.²⁹⁸ Third, and related to this shared *chthonic* past, each system’s treatment of land-use also seems to reflect an understanding of the connection between environmental health and human survival. In short, because a previous *chthonic* system or even an early version of each of these systems may have depended on effective agriculture and natural resources, each of these systems aims to encourage behavior that is environmentally protective.

B. Differences: The Impact of Integration

i. Codification to Cultural Protection

The integration of Confucian values like *li* and *ren* into the Chinese state legal system stands in sharp contrast to the formal treatment of both the Hindu and Maya legal traditions. This difference may be motivated by a cultural embrace of Confucius as a national symbol and a subsequent alteration of Confucian legal concepts to suit a CCP agenda.²⁹⁹ In particular, Confucian *li* values of self-regulation and reflection over formal dispute resolution seem well-suited for a political framework which demands a high-degree of social harmony to function. Additionally, the basic accessibility of many Confucian texts may make Confucian legal concepts more easily transmittable to a large population.

Occupying a middle ground, Hindu law also appears to occupy a central cultural position in India, despite not being widely codified within the country’s formal state legal system. In part, this may be motivated by demographics, as the Indian population is overwhelmingly Hindu. Notably, the Indian state

²⁹⁷ Glenn, *supra* note 135 at 69.

²⁹⁸ Glenn, *supra* note 135 at 69.

²⁹⁹ *See supra* Part III-A(v)

has moved to enact legal codes that directly contradict certain Hindu legal concepts, such as framework of *dharma* that is dependent on caste position.³⁰⁰ Hindu law appears to have a relationship with the Indian state that implicates culture, religion, and formal state law.

Finally, the Maya legal system in Guatemala stands as an example of a legal tradition which may be under attack by the state-supported legal system of its country of operation.³⁰¹ Unfortunately, the current marginalized position of the Maya legal system represents a continuing pattern of exclusion and dissonance from state authority. Despite these challenges, the Maya legal system continues to function independently, delivering conflict resolution and ensuring community cohesion in Guatemala's rural highlands. Ultimately, a Maya framework of shared values, community concern, and deliberative justice may simply be incompatible with Guatemala's current political landscape.

C. A Comprehensive Approach for Resolving Land-Use Conflict

Despite an overall concern for responsible and sustainable land-use, even the most integrated of Maya, Hindu, and Confucian legal frameworks have faced significant challenges in effectuating respective environmental values. Primarily, it appears that these challenges may be rooted in a resistance of governments and formal legal systems to expand normative ideas about the impacts of environmental threats beyond the strictly economic. However, as the international community reckons with ever-mounting environmental problems, strains on natural resources, and general land-use conflict, the most central value of these legal systems may offer a useful solution: the integrated order.

Applying a concept of community harm to land-use conflicts worldwide could help courts and regulators see environmental harms differently. Under such a framework, land-use problems would not be seen as threats to individual property rights or violations of abstract environmental regulations. Instead, disputes over natural resources could be understood as threats to communities more broadly, thereby encouraging more direct government action to address these environmental dangers. The integrated environmental order promulgated by the Maya, Hindu, and Confucian legal traditions may still resonate.

³⁰⁰ See *supra* Part II-A(v)

³⁰¹ See *supra* Part I-A(v)