PROPERTY AND PRESERVATION: THE ROLE OF CONSERVATION COVENANTS UNDER THE INDIAN TRANSFER OF PROPERTY ACT, 1882

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This article examines the potential for integrating conservation covenants within the framework of India's Transfer of Property Act, 1882 ('TPA'). Challenging the view of Indian property rights as crystallised and rigid, the article instead argues that the TPA can indeed incorporate environmental priorities, thereby reimagining property rights as valuable tools for conservation. Specifically, the article seeks to clarify both the scope and doctrinal basis for conservation covenants within Indian law, suggesting that these covenants could serve as permissible 'burdens' capable of running with the land. In examining the Act's approach to restrictions on interests created by property transfers, specifically under §11 and §40, this article illustrates how conservation covenants could be integrated effectively within the doctrinal confines of the provisions. Further drawing on comparisons with the UK's National Trusts Act, 1937, it evaluates the benefits of such integration within India's legal landscape. In doing so, it provides an evaluation of how conservation covenants can be effectively implemented in India and argues for a reimagined approach to property rights and the 'fusion' of private rights with public environmental goals.

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I. INTRODUCTION

This article seeks to shed light on the role of conservation covenants in the context of the Transfer of Property Act, 1882 ('TPA').[1] Curiously, the TPA itself is a statute that governs transfers of property, as opposed to dealing with 'property' in a broader sense.[2] This focus on transfers rather than 'property' stemmed from the criticism of earlier drafts, which

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[1] The Transfer of Property Act, 1882.

[2] Shyamkrishna Balganesh, *Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint*, Vol. 63(1), AM. J. COMPAR. L., 40 (2015).

were deemed overly heterogeneous and impractical.[3] Instead, the codification of the TPA ended up being centred around two objectives — *first*, to align the rules governing *inter-vivos* transfers and the devolution of property over time, in turn complementing the legal framework established for intestate and testamentary succession. *Second*, it sought to 'complete' the Code of contract law insofar as it related to immovable property.[4] Thus, the scheme of the TPA was to focus on 'voluntary' transactions concerning property, rather than engaging with the various complexities of defining what 'property' as a legal concept would mean,[5] including varied conceptions and obligations.

This streamlining, it has been argued,[6] was a conscious attempt to rigidise property rights within a clear, predictable framework, favouring doctrinal certainty over engaging with property's inherently fluid nature. In this context, the TPA has faced criticism for its crystallising and standardising of common law.[7] In fact, property rights have generally been seen as the 'stuff of crystals', with a preference for clarity and doctrinal certainty to adjudicate legal relationships.[8] While this is not undesirable, since property rules create enduring economic and emotional attachments that are difficult to sever,[9] the aim of this article is to test the limits of its crystalline scheme by examining how the TPA can assist in implementing conservation covenants through the application of §11 and §40, thereby accommodating ecological considerations within its doctrinal confines. In this manner, this article espouses the merit of reading and reflecting on the 'old' and existing statutory apparatus better to inform present and future reasoning concerning environmental problems.[10]

Part I begins by elaborating on what conservation covenants are and articulates the need to understand the 'fusion' of public and private law that is implicated in this context. In doing so, it cautions against conceptualising environment law as a purely 'public law' field.[11] Part II outlines the scheme of §11 and §40 of the TPA and demonstrates how conservation covenants could operate the scheme of the existing doctrinal structure. In this context, §8 of the UK National Trusts Act, 1937, is highlighted as an illustrative framework and a potential model for guiding the operation of conservation covenants within Indian law. Part III proceeds to specifically emphasise the promise of conservation covenants for the future of environmental protection in India, given its 'hybrid' nature. Part IV concludes.

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[3] *Id*.
[4] Whitley Stokes, THE ANGLO-INDIAN CODES, Vol. 1, 726 (Clarendon Press, 1887).
[5] Balganesh, *supra* note 2, 40.
[6] *Id*., 44.
[7] *Id*., 36–38.
[8] Carol M Rose, *Crystals and Mud in Property Law*, Vol. 40(3), STAN. L. REV., 577 (1988).
[9] *Id*.; Holly Doremus, *Climate Change and the Evolution of Property Rights*, Vol. 1(4) UC IRVINE L. REV., 1092 (2011); Helen Conway & John Stannard, *The Emotional Dynamics of Property Law* in RESEARCH HANDBOOK ON LAW AND EMOTION, 242 (S.A. Bandes et al. eds., Edward Elgar Publishing, 2021) (on how people exhibit identifiable emotional attachments to material objects which influences how the latter is perceived and valued).
[10] Elizabeth Fisher, *Going Backward, Looking Forward: An Essay on How to Think about Law Reform in Ecologically Precarious Times*, Vol. 30(2), N.Z. UNIVERSITIES L. REV., 111 (2022).
[11] Elizabeth Fisher et al., ENVIRONMENTAL LAW: TEXT, CASES & MATERIALS, 59 (Oxford University Press, 2nd edn., 2019).

II. INTEGRATING ENVIRONMENTAL PROTECTION INTO THE TRANSFER OF PROPERTY ACT, 1882

Conservation covenants are now being increasingly recognised as 'hybrid institutions'[12] — in that they incorporate elements of both public and private law in unique ways. Specifically, they take the form of voluntary private agreements concluded between landowners and a public authority for environmental protection.[13] Thus, while these covenants are personal contracts/agreements when they concern ecological protection or 'conservation', they necessarily implicate the body of environmental law which is thought to be of a 'public' nature.[14] It is instructive to turn to the UK's Environment Act, 2021 which defines a conservation covenant agreement as one between a landowner and a 'responsible body'. Such an agreement must satisfy three criteria: it must include provisions that are of a qualifying kind, serve a conservation purpose, and be intended by the parties to promote the public good.[15]

In this context, these covenants could include the following obligations: (i) protecting woodlands and forests over generations, (ii) protecting heritage property, and (iii) conserving biodiversity and ecosystems.[16] They are private agreements which serve a public purpose (or promote 'public good') — namely, ecological protection.[17] It is interesting to consider the position of these covenants in the context of the TPA for a few reasons.

First, the TPA in India is seen as a formalised, rights-based, adversarial framework that governs property transfers.[18] In this sense, it is the primary framework that lays down the doctrinal 'core' concerning the rules, rights, and remedies available for transfers of property. Some have seen this 'closed set' as a deliberate attempt to restrict judicial creativity due to the codification exercise in colonial India.[19] The preoccupation with 'freezing' property rights, however, is not unknown. Property, it has been argued, is nothing but a "basis of expectation",[20] and there are arguments of efficiency to make concerning the need for crystalline rules.[21] However, the over-emphasis on the rigidity of doctrine is often unhelpful. Doremus, for instance, has highlighted the need for courts to be slow to 'freeze' property rights by erecting barriers to legal change and to understand that the evolution of property law is a healthy, and longstanding process.[22] In fact, property rights have often rendered themselves to be malleable, and this is also attributable to the case-driven nature of common law which has long exhibited a piecemeal approach towards regulation.[23] Importantly, despite the rigidity of the TPA, it is open to courts to pragmatically interpret the statute in a manner that produces sensible outcomes.[24]

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[12] Christopher Rodgers & David Grinlinton, *Covenanting for Nature: A Comparative Study of the Utility and Potential of Conservation Covenants*, Vol. 83(2), MOD. L. REV., 374 (2020) (These are 'conservation easements' in the United States, 'conservation burdens' in Scotland, 'open-space covenants' in New Zealand.).
[13] *Id*.
[14] Fisher et al., *supra* note 11.
[15] The Environment Act, 2021, §117 (U.K.).
[16] LAW COMMISSION OF UNITED KINGDOM, *Conservation Covenants*, Law Commission No. 349, 2, 3 (2014).
[17] Rodgers & Grinlinton, *supra* note 12.
[18] Balganesh, *supra* note 2, 60.
[19] *Id*., 63.
[20] Rose, *supra* note 8.
[21] *Id*., 609.
[22] Doremus, *supra* note 9, 1123.
[23] Sean Coyle & Karen Morrow, THE PHILOSOPHICAL FOUNDATIONS OF ENVIRONMENTAL LAW: PROPERTY, RIGHTS AND NATURE, 110 (Bloomsbury Publishing, 2004).
[24] David Grinlinton, *The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges*, Vol. 62(3), MCGILL L. J., 648 (2017).

It is in this context that considering the nature of environmental law becomes relevant to understanding the 'mutualism'[25] between property and environmental law. Environmental law is the law relating to environmental problems,[26] and these are systemically complex, boundary-crossing (conceptually and jurisdictionally), and 'collective' in nature.[27] There is an 'everything and nothing' nature about the field,[28] as it deals with significant contestation of rights, frames, and even ways of how the world is understood.[29] Given this contestation, if environmental law can be understood as the 'law' relating to environmental problems, it is receptive to any 'form' of law. The doctrinal content of Indian environmental law, for instance, serves as a good illustration. India exhibits a rich rights-jurisprudence stemming from Articles 21, 51A(g), and 48A of the Indian Constitution,[30] as well as a specified statutory basis in the form of diverse legislations dealing with 'niche' environmental issues.[31] Several fields, such as nature conservation,[32] the regulation of toxic chemicals,[33] or the grant of clearances for 'polluting' activities,[34] involve deliberative choices concerning land use and directly implicate proprietary interests. Given this, there is value in reflecting on the 'old' and legal pasts to inform present and future reasoning better.[35]

Second, even if the TPA is thought of as frozen in time,[36] it is incorrect to say that Indian jurisprudence concerning environmental law has not seen 'development' through private law. There are two notable areas worth mentioning in this context. *First*, tort liability in India concerning environmental problems has seen a widened application of environmental principles in cases involving the discharge of pollutants by industries affecting local populations,[37] as well as the development of new principles (such as 'absolute' liability) to deal with unprecedented and large-scale disasters.[38] Thus, tort law has been receptive and undergone a thoughtful process of development to accommodate environmental legal interests in India. *Second*, is the recent focus on environmental, social, and governance factors ('ESG') alongside corporate social responsibility under the Companies Act, 2013.[39] The Supreme Court also

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[25] Eloise Scotford & Rachel Walsh, *The Symbiosis of Property and English Environmental Law — Property Rights in a Public Law Context*, Vol. 76(6), MOD. L. REV., 1011 (2013).
[26] Fisher et al., *supra* note 11, 5.
[27] *Id*., 25–33.
[28] *Id*., 60; *See also* A. Philippopoulos-Mihalopoulos, *Towards a Critical Environmental Law* in LAW AND ECOLOGY: NEW ENVIRONMENTAL FOUNDATIONS, 18 (A. Philippopoulos-Mihalopoulos ed., Routledge 2011).
[29] *See* Elizabeth Fisher, *Environmental Law as "Hot" Law*, Vol. 25(3), J. ENV'T L., 351 (2013).
[30] Arpitha Kodiveri, *Climate Change Litigation in India: Its Potential and Challenges* in LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION, 369 (César Rodríguez-Garavito ed., Cambridge University Press, 2022).
[31] *See* The Water (Prevention and Control of Pollution) Act, 1974 ('Water Act'); The Wildlife (Protection) Act, 1972 ('WLP Act'); The Environment (Protection) Act, 1986 ('EP Act'); The Air (Prevention and Control of Pollution) Act, 1981 ('Air Act').
[32] M.K. Ranjitsinh v. Union of India, (2024) INSC 280.
[33] Deepak Nitrite Ltd v. State of Gujarat & Ors., (2004) AIR SCW 3285.
[34] Krishi Vigyan Arogya Sanstha v. Ministry of Environment & Forests, (2011) SCC OnLine NGT 18.
[35] Fisher, *supra* note 10, 111.
[36] Balganesh, *supra* note 2, 65.
[37] *See*, *e.g.*, State of Madhya Pradesh v. Kedia Leather and Liquor Ltd, (2003) 7 SCC 389 (on nuisance and environmental harms); Ratlam v. Varichand, (1980) 4 SCC 162 (concerning discharge of pollutants); and Indian Council For Enviro-Legal Action v. Union of India, (1996) 3 SCC 212 (polluter pays principle in the context of the production of H-acid by certain fertilizer plants).
[38] *See* M.C. Mehta v. Union of India (Shriram - Oleum Gas), (1987) 1 SCC 395, ¶31 (per Bhagwati J.) (on 'constructing a new principle of liability').
[39] The Companies Act, 2013, §135; *See also*, Umakanth Varottil, *The Regulatory Progression of ESG in India*, INDIACORPLAW, January 14, 2023, available at https://indiacorplaw.in/2023/01/the-regulatory-progression-of-esg-in-india.html (Last visited on January 21, 2025).

recognised the interlinkages between company law and environmental protection in the case of *M.K. Ranjitsinh* v. *Union of India*,[40] noting that the director's duty to act in good faith under §166(2) of the Companies Act extends "not only in the best interest of the Company, its employees, the shareholders and the community, but also for the protection of environment".[41]

In sum, with India's aggressive development agenda[42] and the large tracts of privately owned land,[43] there is a need to think about the utility of private law and private agreements in fostering environmental protection. It is unrealistic to say that environmental law is exclusively a vertical relationship — one between the state and persons in a particular territory.[44] While the content of the subject is largely about regulation, such regulation may take place horizontally as well.[45] Part III of this article further elaborates on what conservation covenants are, and how they could fit into the scheme of the TPA.

III. DOCTRINAL UNDERPINNINGS OF CONSERVATION COVENANTS

Before delving into how conservation covenants may be accommodated within the framework of the TPA, this section first unpacks its scheme to examine the functioning of restrictions on land use and potential impediments therein. This is dealt with by §11 and §40, concerning restrictions repugnant to the interest created on the transfer of property.

A. SCHEME OF §11 AND §40

§11 of the TPA deals with the right to enjoy one's property.[46] The provision has two parts: the first is a general right, and confers a right upon a transferee acquiring an absolute interest in property to deal with her property in any manner that she desires. Hence, where there is a term in the transfer that "direct[s]" how the interest shall be "applied or enjoyed" by her, the transferee shall be entitled to the property as if there was no such direction.

This is consistent with the understanding of how an invalid condition subsequent operates. Consider the transfer of property 'X'. If this transfer is coupled with a requirement for the transferee to fulfil a condition prior to the vesting of an interest in X, this is a condition precedent. Similarly, if a transfer of X is coupled with a condition, but the requirement of fulfilling this condition takes place after the vesting of the interest in X has already happened, this is a condition subsequent. §11 deals with the latter, and the general understanding is that in cases where an interest has been vested, and this transfer carries a void

[40] M.K. Ranjitsinh and Ors. v. Union of India, (2021) INSC 257.
[41] *Id*., ¶12.
[42] *See* Kodiveri, *supra* note 30, 370 (on challenges associated with litigating climate change in India).
[43] Bina Agarwal et al., *How Many and Which Women Own Land in India? Inter-Gender and Intra-Gender Gaps*, Vol. 57(11), J. DEV. STUD, 1808 (2021).
[44] Elizabeth Fisher, *Executive Environmental Law*, Vol. 83(1), MOD. L. REV., 166 (2020) (in most Western jurisdictions, environmental law is a dense thicket of legislation, administrative action, and judicial decisions); David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, Vol. 70(4), COLUM. L. REV., 614 (1970).
[45] Kit Barker, *The Dynamics of Private Law and Power* in PRIVATE LAW AND POWER, 20 (Kit Barker et al. eds., Hart Publishing, 2017).
[46] This is evidenced in the text of the Transfer of Property Act, 1882, §11, which states, "[…] terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner". (emphasis added) *See* also, Mulla, THE TRANSFER OF PROPERTY ACT, ¶11.2 (Lexis Nexis, 14th edn., 2023).

condition subsequent, the interest transferred is valid, but the condition is severed for being void.[47] Hence, the transferee may enjoy the property *sans* condition.

The second part, in paragraph two of §11, however, is of more significance as it carries the thrust of the rules concerning covenants, and it specifies:

> "Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof". (emphasis added)

We may better understand this by referring to Figure 1 below. Let us assume that Person A is the owner of a single plot, αβ. She now decides to transfer β to Person B and retains α for herself. Let us assume that while transferring β, A decides to specify two requirements, and both concern the periphery of β, which shares a boundary with α (demarcated as ɣ). On ɣ, being a part of B's property, A specifies: *First*, B is required to routinely maintain the strip of ɣ as a garden[48] and ensure that the trees therein do not grow above the height of 6ft near the boundary of ɣ. *Second*, A requires that B shall refrain from building any structure on ɣ.

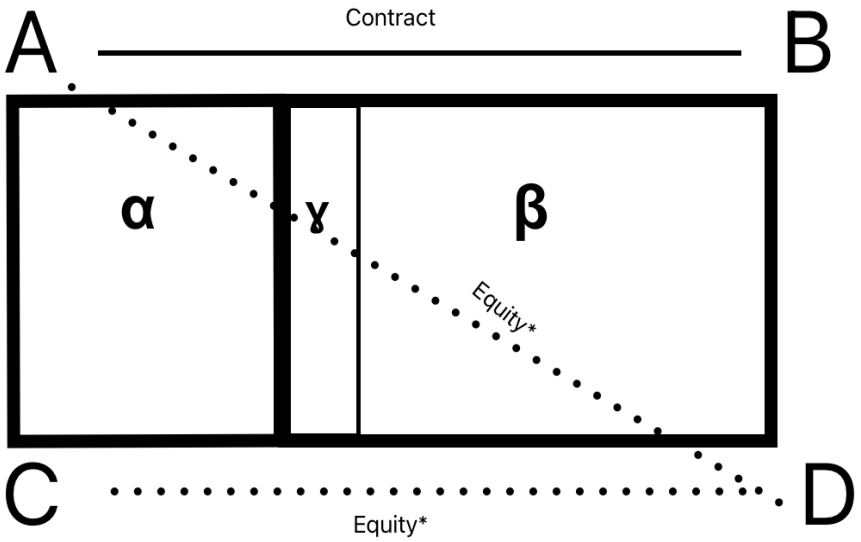

Fig 1. *Illustrating §11 and §40*

Here, the first issue to determine would be whether the directions made by A in respect of ɣ are for the 'beneficial enjoyment' of α.[49] For this, the law in India has closely followed the law in England.[50] Importantly, the requirement of showing 'beneficial' enjoyment of another piece of property is a limitation that is dispensed with by conservation covenants (discussed in Part B below). Now, if A can prove that the restrictions on ɣ are for her beneficial enjoyment, the next consideration is the nature of directions to B. While B now has an absolute

[47] Omniplast Pvt. Ltd. v. H.S.I.I.D.C. Ltd., (2014) CWP No. 21239 of 2013; Indu Kakkar v. HSIIDC, (1999) AIR SC 296.
[48] *See* Tulk v. Moxhay, (1848) 2 Ph 774, ¶1.
[49] Pee Kay Constructions v. Chandrasekhar Hegde, ILR 1989 Kar 241, ¶26.
[50] Mulla, *supra* note 46, ¶40.3.

interest[51] in β, they are now faced with two directions— (i) requiring them to routinely maintain Ɣ as a pleasure garden, and (ii) preventing them from building any structure on Ɣ. The former is an affirmative/positive covenant, which has been seen to generally compel the transferee to 'lay out money' or to do a 'positive' act[52] of an active character.[53] The latter is, in contrast, a restrictive/negative covenant, and restrains B from doing certain acts that would allow them to enjoy their property in the way they desire.[54]

Both covenants are enforceable under §11 of the TPA,[55] as evidenced in the text of §11, which allows A to 'enforce such direction' and confers the right to 'remedy [a] breach' in respect of the covenant. It is important to note here that the enforcement of a positive covenant and the right to remedy a breach in respect of a negative covenant, as far as §11 is concerned, occurs between the parties to the original agreement, these being the covenantee (A), and the covenanter (B). The law concerning subsequent purchasers, however, is governed by §40.

Turning to our hypothetical Figure 1, once again, let us now assume that B transfers β to Party D absolutely. Unlike the relationship between A and B, A is now a third party to the contract between B and D, hence there is no privity to enforce the aforementioned covenants against D. This was first considered in *Tulk* v. *Moxhay* ('Tulk'),[56] where Cottenham J. considered whether "a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased".[57] Hence, where the defendant there sought to alter the character of the land, the Court decided that the equity was "attached to the property, and no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased".[58] Consequently, this was embodied by the drafters of the TPA in §40, which initially recognised both positive and negative covenants as enforceable against subsequent transferees.[59] However, as later cases began to limit the application of Tulk to negative covenants only,[60] the TPA too was amended in 1929 to reflect the same. As a consequence, the provision now reads as follows:

> "Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property […]".[61]

Importantly, the use of "third person" in §40 is of significance, as this could be construed to mean either the original covenantee (A) or even a subsequent purchaser of α from A; let us assume this to be Party C (Figure 1).[62] Importantly, both A and C do not themselves have any 'interest' in β, but they still derive the right to restrain D's enjoyment — hence, recognising only restrictive covenants as applicable against subsequent purchasers.

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[51] Contrast with a 'limited' interest, *see* Omniplast Pvt. Ltd., *supra* note 47.
[52] Joseph George v. Chacko Thomas, 1992 KLJ 1 115, ¶21.
[53] Balganesh, *supra* note 2, 51.
[54] *See* Bhagwat Prasad v. Damodar Das and Ors., (1976) AIR All 411.
[55] Joseph George, *supra* note 52, ¶19.
[56] Tulk, *supra* note 48.
[57] *Id*., 2.
[58] *Id*.
[59] For a more detailed discussion on codification and amendment of §40, *see* Balganesh, *supra* note 2.
[60] London and South-Western Railway Company v. Gomm, (1882) 20 Ch. D. 562.
[61] The Transfer of Property Act, 1882, §40.
[62] Mulla, *supra* note 46, ¶40.2.

In sum, a combined reading of §11 and §40 suggests that the original covenants accompanying the initial transfer of property by A are enforceable against B (original covenanter), by operation of privity of contract between A and B (§11) — these include both affirmative and restrictive covenants. Further, they are also enforceable against D (a subsequent purchaser of β) by operation of 'equity' codified in §40,[63] but only if the covenant is restrictive in nature.[64]

B. FRAMEWORK OF THE NATIONAL TRUSTS ACT, 1937

While TPA is focused on codifying principles for voluntary transactions concerning property,[65] as demonstrated above, it also includes mechanisms for covenants which can serve conservation objectives. This framework, though focused on private law, bears a conceptual resemblance to the UK National Trusts Act, 1937. Where the National Trust was established to promote the permanent preservation, for the benefit of the nation, lands and tenements of beauty or historical significance. It also sought to maintain their "natural aspect features and animal and plant life".[66] The National Trust achieves these ecological goals through property arrangements that ensure long-term conservation.[67] To demonstrate and examine the precise nature of conservation covenants, it would be instructive to turn to the UK, where the National Trust has the statutory power to take and hold conservation covenants.[68] Figure 2 below showcases this structure, where §8 of the National Trusts Act details the power of the Trust to enter into and enforce agreements restricting land use (much like §40, TPA).

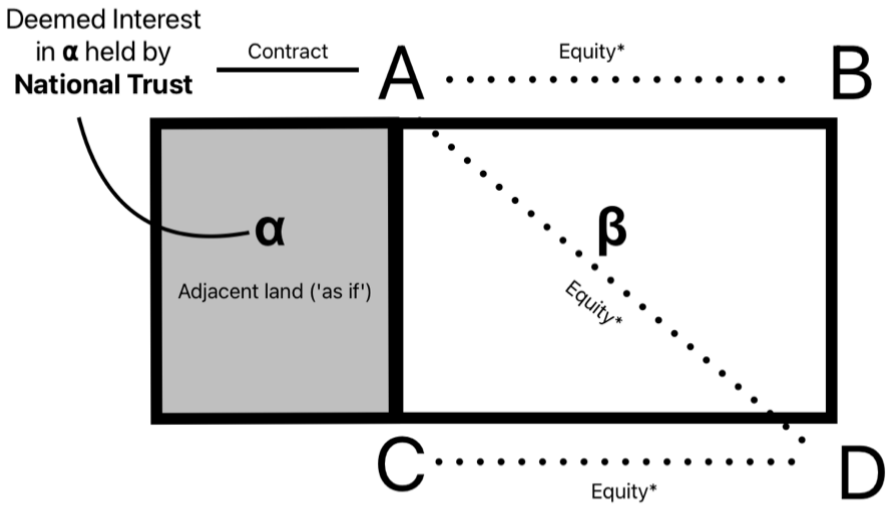

***Fig 2**: Conservation Covenants as 'hybrid' instruments (UK)*

Here, let us assume A now owns β, and seeks to ensure that the existing species of plant and wildlife are protected on her property, even if the property changes hands.

[63] Tulk was a case in equity (Court of Chancery); however, while the Transfer of Property Act, 1882 was being drafted, the principle was codified in the Act. *See* Balganesh, *supra* note 2.
[64] The Transfer of Property Act, 1882, §40 also clarifies that restrictive covenants are only enforceable against subsequent transferees for consideration, and with notice of the "right or obligation" therein. *See* Leela v. Ambujakshy, AIR 1989 Ker 308.
[65] *See supra* text accompanying notes 1–7.
[66] The National Trusts Act, 1937, Preamble (U.K.).
[67] The National Trusts Act, 1937, §4 (U.K.).
[68] *Id*., §8 (U.K.); Rodgers & Grinlinton, *supra* note 12, 390.

Consequently, A now has the ability to execute a voluntary agreement with an authorised/relevant statutory body (in the UK, the National Trust) for the conservation of her property. A continues to live on this land (β) but is subject to certain restrictions concerning use and enjoyment necessarily consistent with the terms of the covenant.[69] Unlike in Figure 1 above where A was the covenantee, here A takes the place of a covenanter and is bound by the specific obligation for ecological protection. Consequently, the Trust oversees the enforcement of the covenant in question. This is akin to §11, TPA, where the relationship between A and the Trust is governed by contract. Just as §11 grants the transferor the right to enforce these restrictions or seek remedies for breaches, in this context, the National Trust would be the authority to supervise and enforce the terms of the agreement. While A retains ownership of her property, she is contractually bound by the specific conservation obligations.

Now, assuming A transfers β to B, and the latter being the subsequent purchaser, is not bound by privity with the National Trust. However, this is where the 'hybrid' nature of conservation covenants becomes relevant. Under §40 of the TPA, the person seeking to enforce the covenant must have an interest in the adjacent land (here, α, as per Figure 2 above), that they seek to enjoy beneficially. This derives from the common law requirement that covenants must 'touch and concern' the land which is sought to be beneficially enjoyed.[70] Since the covenant was executed between A and the Trust concerning β, the requirement of benefit to the 'adjacent' land (α) is unmet. However, this requirement is dispensed with by §8 of the National Trusts Act, which states that:

> "Such agreement or covenant [can be enforced] against persons deriving title under him in the like manner and to the like extent as if the National Trust were possessed of or entitled to or interested in adjacent land and as if the agreement or covenant had been and had been expressed to be entered into for the benefit of that adjacent land".[71] (emphasis added)

Here, §8 does two key things. *First*, it suggests that the covenant underlining A's obligations under contract would be enforceable against persons as if it were the National Trust interested in the adjacent land. The phrase "as if" under §8 creates a deeming fiction that the National Trust is in possession, entitled to, or interested in the adjacent land (here, α). Thus, under the Act, the covenant in question need not 'touch the land',[72] and there is no requirement that the actual owner/occupier's interest is implicated in any way.

Second, it proceeds to lay down that this covenant is deemed ('as if') to be for the benefit of the adjacent land, and the 'beneficiary' of the covenant is the National Trust with whom A contracts. The burden of proving 'beneficial enjoyment' is discharged by the assumption that the relevant authority indeed has a benefit arising out of the ecological protection mandated by the covenant burdening β. This is owing to the shift in A being a covenanter as opposed to the covenantee and is significant given that conservation covenants confer benefit to the 'public' by protecting 'green spaces' in private lands.[73] Consequently, the covenantee (the National Trust) is the one enforcing such an obligation against subsequent purchasers.

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[69] Peter England, *Conservation Covenants: Are They Working and What Have We Learned*, Vol. 34(1), U. TASMANIA L. REV., 95 (2015).
[70] *See* Rogers v. Hosegood [1900] 2 Ch. 388, 395 (Court of Appeal England and Wales). Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board, [1949] 2 KB 500 (Court of Appeal England and Wales).
[71] The National Trusts Act, 1937, §8 (U.K.).
[72] Rogers, *supra* note 70, 395.
[73] Rodgers & Grinlinton, *supra* note 12, 390.

While the National Trusts Act dispenses with the need to prove that a covenant is for the beneficial enjoyment of an adjacent land, which §40 requires, a second impediment remains. Like §40, the National Trusts Act is restricted to enforcing only negative covenants against subsequent purchasers. Affirmative covenants requiring future owners to undertake a positive act for ecological conservation/protection would not be enforceable. This is a similar limitation concerning the use of conservation covenants in England.[74] Thus, the National Trust's power can only be used to protect existing 'green spaces' by restraining certain actions that would alter their character.[75] Grinlinton and Rodgers, while considering the Law Commission's proposal for new legislation concerning the use of covenants, suggest that these conservation covenants must establish the use of both, positive and negative obligations.[76]

Regardless, the framework of conservation covenants sits comfortably within the doctrinal confines of §11 and §40 of the TPA. While, presently, there is no 'relevant authority' in the Indian context,[77] §11 can be employed to establish a contractual relationship between such an authority (considered in Part IV below) and the landowner, enforcing both positive and negative obligations, while §40 binds future transferees to restrictive covenants. Part IV now considers the promise of this 'fusion' for the future of environmental protection in India.

IV. PRIVATE COMMITMENTS FOR PUBLIC GOOD: CONSERVATION COVENANTS IN INDIAN ENVIRONMENTAL LAW

A. ON THE USE OF TRUSTS AND RELEVANT AUTHORITIES

Conservation covenants may find a sound basis in Indian environmental law, which is comprised of diverse legislations, as well as a rich rights jurisprudence.[78] While the previous section of this article laid down the role of the National Trust in the UK, and the relevance of §8 in dealing with conservation covenants, there exists no comparable authority in India. However, there are certain legal configurations which allow authorities to deal with individual property rights which provide useful context for understanding the potential basis for conservation covenants in India. For instance, the Indian Forest Act, 1927, empowers Forest Settlement Officers to enter into agreements with landowners for the surrender of rights and to acquire such lands under the Land Acquisition Act, 1894.[79] These mechanisms demonstrate an interaction between State authorities and private landowners but remain focused on the acquisition or extinguishment of rights rather than fostering voluntary, binding agreements aimed at conservation. Similarly, Pollution Control Boards operate under environmental statutes with specific mandates, such as the power to search and inspect sites,[80] take samples,[81] and enforce compliance with pollution norms.[82] But these powers are primarily regulatory in

[74] Rogers v. Hosegood, *supra* note 70; Balganesh, *supra* note 2, 51.
[75] Rodgers & Grinlinton, *supra* note 12, 390.
[76] *Id*., 391.
[77] Consequently, there is no authority capable of contracting into such property arrangements (such as under §8 of the UK National Trusts Act), unless there is a specific enactment creating or conferring such rights on a body.
[78] Kodiveri, *supra* note 30, 369.
[79] The Indian Forests Act, 1927, §11(2) ('Forests Act').
[80] Water Act, *supra* note 31, §23; Air Act, *supra* note 31, §24.
[81] Water Act, *supra* note 31, §21; Air Act, *supra* note 31, §24.
[82] *See generally* Water Act, *supra* note 31, Chapters IV, V & VII; Air Act, *supra* note 31, Chapters IV & VI. These powers also extend to declaring pollution control areas, *see* Air Act, *supra* note 31, §19; *See also*, Orissa State Prevention and Control of Pollution Board v. Orient Paper Mills, AIR 2003 SC 1966.

nature. While these reflect a capacity to engage with certain 'property rights',[83] they fall short of enabling the framework necessary for conservation covenants.

In this context, conservation covenants present a shift in how we understand a new legal mechanism that fosters voluntary, binding agreements between diverse stakeholders for ecological conservation. This section delves into how these conservation covenants may find their underpinnings and underscore their potency as a strategic regulatory tool for ecological conservation in India.

The Indian Trusts Act, 1882, provides for the creation of trusts in relation to movable and immovable property[84] and states that "every person capable of holding property" may be a trustee.[85] In this context, a settlor may contract with a relevant authority who is "bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation".[86] Further, this notion of the state as a custodian in the environmental law context is recognised by the application of the public trust doctrine in India.[87] As observed in *MC Mehta* v. *Kamal Nath*:

> "The executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources".[88]

However, while the public trust doctrine positions the State as a trustee of natural resources, this role is inherently broad and distinguished from the individual-centric focus of conservation covenants. It underscores the State's regulatory role in safeguarding public interest, adopting a fundamentally top-down approach. In contrast, conservation covenants enable a landowner to bind their property to certain conservation objectives through a legally enforceable agreement with a relevant authority.[89] Here, it is the individual landowner's attempt to contribute to conservation efforts. Importantly, at their core, these contracts are 'voluntary' obligations,[90] where the locus of decision-making shifts to the individual.

Beyond this basis for trusteeship, there must also be a statutory basis for a landowner to voluntarily contract with an authorised body (such as the National Trust in the UK) to oversee the implementation and management of covenants. For this, one may turn to

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[83] On property rights being more than 'ownership' and for various definitions of property and property rights, *see* Luke Rostill, *The Pluralities of Property*, Vol. 44(3), OXF. J. LEG. STUD., 733 (2024); Jeremy Waldron, *What Is Private Property* in THE RIGHT TO PRIVATE PROPERTY (Oxford University Press, 1990); Sarah Blandy et al., *The Dynamics of Enduring Property Relationships in Land*, Vol. 81(1), MOD. L. REV., 92 (2018).
[84] The Indian Trusts Act, 1882, §§5, 6.
[85] The Indian Trusts Act, 1882, §10.
[86] The Indian Trusts Act, 1882, §11.
[87] MC Mehta v. Kamal Nath, (1997) 1 SCC 388. *But see* Grinlinton, *supra* note 24, 675 (resembling a fiduciary duty, applying to commons property).
[88] *Id*., ¶35.
[89] England, *supra* note 69; and *see supra* text accompanying notes 65–77.
[90] *See* Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, Vol. 76(1), L. & CONTEMP. PROBS., 19–23 (2013) (citing Raz, "the purpose of contract law should be ... to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice".); Barker, *supra* note 45, at 28 (on private law doctrine and autonomy).

§3 of the Environment Protection Act, 1986 ('EP Act'), which empowers the Central Government to take "all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment".[91] While there is no express mention of contractual relations with respect to land, this must be read with §3(3) of the EP Act, which allows the Central Government to "constitute an authority […] for the purpose of exercising and performing such of the powers and functions" under the Act.[92] Hence, the statutory basis allows for the creation of a suitable authority that may be equipped with the powers conferred to the National Trust in the UK, as under §8 of the 1937 Act, discussed above.

Further, one may consider cloaking this authority with powers of enforcement of covenants, even beyond the equitable foundations of §40 of the TPA, including the capacity of such a trust to enforce affirmative obligations in addition to restrictive covenants.[93] Importantly, this would go further than the National Trusts Act in the UK which is presently only restricted to enforcing negative covenants. Consequently, this authority may have the capacity to enforce affirmative obligations, such as managing land for landscape restoration,[94] enhancing biodiversity, recreating or improving natural habitats, planting native species, and so on.

Given that the legal basis for conceptualising such an authority exists within the environmental statutes and property law in India, it is necessary to then think about the utility of these conservation covenants for environmental law in India. While Part I of this article addressed the need to challenge the assumption of environmental law being a 'public' law discipline and highlighted the 'everything and nothing' nature of the field,[95] this part addresses three ways in which this 'fusion' of TPA and private law with environmental law shows promise for the future of ecological protection in India.

B. HOW FUSION AIDS ECOLOGICAL PROTECTION IN INDIA

First, property rights have traditionally been thought of in terms of 'exclusion' and 'exploitation', and the TPA is comprised of tight-worded rules, a rigid structure, and a 'closed' set.[96] However, this does not take away from the potential porosity of property rights. Indeed, for there to be a 'fusion' as suggested in this article, there must be a basis for property ownership itself to incorporate sustainability as an inherent responsibility of holding rights in land and natural resources.[97] Importantly, this fusion of public and private law has been observed by the Supreme Court of India and has indeed yielded beneficial results. In *Orissa Mining Corporation* v. *MoEF* (the Niyamgiri case),[98] the Court confronted the question of bauxite mining rights by Sterlite Industries (a subsidiary of Vedanta Limited) in the Niyamgiri hills, home to forest-dwelling tribes like Dongaria Kondh.[99]

It was argued by the counsel for the state that the ownership rights over the minerals beneath forests vests in the State and that there was no basis for Tribals to raise proprietary claims. While the Court did not articulate the ownership rights of the forest-

[91] EP Act, §3.
[92] *Id.*
[93] For more on this criticism and the limited application of conservation covenants to affirmative covenants, *see* Rodgers & Grinlinton, *supra* note 12, 391.
[94] *Id.*
[95] Fisher et al., *supra* note 11.
[96] Balganesh, *supra* note 2, 60.
[97] Grinlinton, *supra* note 24, 680.
[98] Orissa Mining Corporation v. MoEF, (2013) 6 SCR 881 ('Niyamgiri case').
[99] *Id.*, ¶5.

dwelling communities, it was nevertheless reasoned that the Forest Rights Act being a welfare legislation, protects various rights of forest dwellers and scheduled tribes which include "customary rights to use forest land as a community forest resource and [it was] not restricted merely to property rights or to areas of habitation",[100] recognising the interconnectedness of communities and their natural environment. The Court recognised "a secure and inalienable right" and "a permanent stake [to the forest dwellers who had] a symbiotic relationship with the entire ecosystem".[101]

This judicial recognition demonstrates the porosity of property rights, where the rigid framework of exclusion and exploitation gives way to a more inclusive model that integrates public good and sustainability into the concept of ownership. By granting a secure and inalienable right to forest-dwelling communities, the Court bolstered the conservation regime. This case exemplifies an incremental development in property law,[102] where private claims are increasingly seen as subservient to the public good, and the notion of ownership is infused with responsibilities towards sustainability and community welfare.

Second, Grinlinton and Rodgers argue that the price to be paid by the flexible nature of the conservation covenant is the lack of public participation in determining what 'benefits' are being delivered by the covenant.[103] However, they still suggest that these covenants can deliver a nuanced balance between access and conservation in contrast to statutory restrictions on persons. That being said, it is important to clarify that the purpose of this article is not an end in itself, given the rate and impact of climate change today.[104] Rather, this regulatory tool must be understood in a supplemental way, while thinking about the role of private agreements for ecological conservation in India. Thus, it is not to displace the framework contained in environmental statutes such as the power to reserve forests over areas where the government has a proprietary interest,[105] the power to declare areas as sanctuaries or national parks,[106] and conservation reserves.[107] The provisions of these statutes further allow for regulation of these areas in the form of access controls,[108] prevention of exploitation, destruction, or damage within these declared zones,[109] as well as declaring the standards of quality of air, water or soil.[110] Thus, conservation covenants should be viewed as complementary measures that can enhance these existing statutory frameworks by engaging private landowners through voluntary agreements, thereby broadening the scope and participants engaged in ecological conservation in India.

Finally, there is an appeal in thinking about the voluntary nature of these conservation covenants which takes place on an individual level. Environmental law itself has a wide group of actors and the lack of a stabilised knowledge base.[111] While India has seen a proactive judiciary engaging with contested rights and the tussle between environmental protection and development particularly in the context of public interest litigations, there have

[100] *Id*., ¶43.
[101] *Id.,* ¶42.
[102] Doremus, *supra* note 9, 1110.
[103] Rodgers & Grinlinton, *supra* note 12, 402.
[104] *See* Intergovernmental Panel on Climate Change, *Sixth Assessment Report*, August 6, 2021, available at https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/ (Last visited on January 25, 2024).
[105] Forests Act, §§3, 20.
[106] WLP Act, §38.
[107] *Id*., §36A.
[108] *Id*., §27.
[109] *Id*., §29.
[110] EP Act, §6.
[111] Fisher, *supra* note 29, 351.

been criticisms of this process on account of there being overreach.[112] In contrast, the system of conservation covenants is predicated on contractual enforcement, which is rooted in the 'people' deciding the extent of their obligations. Kit Barker, in this context, observes:

> "Private law's doctrines and rules provide individuals with their own powers of self-advancement and purposive disposition (through contract, property, and trust); and they serve to address and redress the effects of important misuses of power by the State, private institutions, and individuals. Its facilitative institutions hence bestow on private parties the power to chart for themselves lives which are more".[113]

This contractual basis, by prioritising personal obligations contrasts a top-down regulatory approach by the State. For instance, in the 2024 case of *Ranjitsinh* v. *Union of India*,[114] where the Supreme Court pronounced that Indians have a right against the adverse effects of climate change,[115] the court also suggested that this case is distinguished from 'conventional' cases which "pits economic growth against environmental conservation",[116] and instead suggests that this case is about balancing "the conservation of the Great Indian Bustard ('GIB') on one hand, with the conservation of the environment as a whole on the other hand".[117] This is puzzling as one would think that the conservation of the GIB is fundamentally environmental. The Court was only able to do this by pitting the conservation of the GIB against climate change when it is, however, fundamentally a consideration about "meeting the rising power demand in the country in an expeditious and sustainable manner".[118] In this case, the protection of the Bustard's habitat was compromised, which perhaps could have been avoided with the use of conservation covenants by allowing for tailored, enforceable commitments by private landowners in the region.

In jurisdictions such as New Zealand, for instance, the success of conservation covenants underscores the value of their voluntary nature.[119] This allows private landowners to decide and set the specific features of the covenant, including setting high or low levels of accessibility to their land.[120] This is in contrast to a 'top-down' regulatory approach which may entail rigid restrictions on property use.[121] The bottom-up approach presented by conservation covenants instead allows private property owners to define and shape their own conservation commitments, catering to their needs.[122] In India, for instance, where significant portions of land are held privately,[123] these covenants can foster a deeper, more personal investment in environmental protection.

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[112] *See* Prashant Bhushan, *Supreme Court and PIL*, Vol. 39(18), E.P.W., 1770 (2004); Lavanya Rajamani, *The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?*, Vol. 16(3), REV. EUR. CMTY. INT'L ENV'T L., 274 (2007).
[113] Barker, *supra* note 45, 3.
[114] Ranjitsinh, *supra* note 32.
[115] *Id*., ¶19.
[116] *Id*., ¶53.
[117] *Id*., ¶60.
[118] *Id*., ¶52.
[119] David Grinlinton, *The Intersection of Property Rights and Environmental Law*, Vol. 25(3), ENV'T L. REV., 206 (2023).
[120] *Id*., 206. For an alternative view, *see* Bonnie Holligan, *Narratives of Capital versus Narratives of Community: Conservation Covenants and the Private Regulation of Land Use*, Vol. 30(1), J. ENV'T L., 55 (2018).
[121] *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (Supreme Court of the United States) (involving restrictions imposed by the South Carolina Beach Front Management Act, and whether the same constituted a 'taking' in contravention to the petitioners' rights).
[122] Grinlinton, *supra* note 119.
[123] Agarwal et al., *supra* note 43, 1808 (over 85% of arable land in India privately owned).

V. CONCLUSION

In conclusion, this article has espoused a creative application of §11 and §40 in conjunction with existing powers conferred upon the Central Government by environmental statutes, borrowing from the UK National Trusts Act, 1937. It has addressed how the TPA, while primarily an instrument governing property transfers, has the potential to play a significant role in India's conservation strategy, including addressing critical issues such as habitat destruction, biodiversity loss, and climate change. This potential stems from the 'stickiness'[124] of property rules, which can create enduring legal relationships, and the fusion of public and private law implicated in conservation covenants. This fusion of environmental and property law, though complex, highlights the utility of private law and private agreements in fostering environmental protection, challenging the traditional view that environmental law is purely within the public law domain. With the TPA's doctrinal framework, conservation covenants could serve as an innovative regulatory strategy, utilising the private nature of contractual obligations for public good.

[124] Doremus, *supra* note 9, 1092.