



CUSTOMARY LAW AND THE PROTECTION OF INDIGENOUS KNOWLEDGE

**Draft Report
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BACKGROUND

Indigenous communities share a very close interdependent relationship with their surroundings including the natural resource since time immemorial. This relationship has helped them develop a very peculiar but sound understanding of their surroundings. Consequently, this understanding, developed into a knowledge system handed down from one generation to another came to be used for a vast number of activities like subsistence and conservation. This system of knowledge is known as Indigenous Knowledge (IK)¹. IK has a direct impact on the biodiversity and vice versa. Since a rich biodiversity facilitates breeding of IK, most of the IK comes from biodiversity.

IK, is thus closely intertwined with the bioresources available with the communities who usually possess some form of traditional operative framework of rights, powers and obligations relating to the use and management of the natural resources. These may be termed as customs or customary laws. Customary practices pertaining to biodiversity may take the following forms:

- a. belief systems which guide people's relation with the entities around them (for example, the concept of sacred groves).
- b. socio-political and economic systems including the mode of resource use, relations of property and custodianship, patterns of leadership etc.
- c. knowledge systems which may be either informal such as the knowledge held by tribal communities and formalized systems such as Ayurveda and other traditional sciences.²

Generally speaking, contemporary developmental international and national laws/policies/measures have been curtailing the domain of customary laws and practices and the usage of the IK system. This has not only eroded the control that communities used to enjoy over bioresources, but have also affected their decision-making capacity adversely. This has multi-dimensional effects that may not always be quantified in economic terms.

Though thinkers and visionaries have been highlighting the importance of biodiversity to the human kind (not only limited to communities) through the ages, a wider consciousness of IK is met as it should be only recently. Even though a mass realization stage is still to be reached, this wider consciousness has contributed to law/policy and other efforts at international and national levels to conserve biodiversity by, among other things, protecting and promoting the IK system.

There is another, yet related, dimension of "protection" of IK, which is in the context of intellectual property rights. Technology (read knowledge) is the center of contemporary economics (knowledge economy). Technology can be owned, sold and transferred for

¹ Gene Campaign recognizes that indigenous knowledge has its strength in its dynamic nature as much as in its antiquity. Therefore it uses the term 'indigenous' in place of traditional for the knowledge system in question.

² Kothari, Ashish, *Biodiversity Traditions and Indian Law: Can the two co-exist?*, undated.

economic gains. The party owning the technology will not only make maximum economic gain, but is also likely to exercise maximum control over the supply-distribution chain of the product made out of that technology. Through the concept of IPRs (particularly patents) exclusive economic rights (ownership of sorts) are granted over technology/ knowledge. There have been many instances where a claim made for patent protection was either derived from the IK system or simply translated into modern scientific language – a phenomenon popularly called as biopiracy. Protecting IK from piracy is therefore another meaning of the word “protection” (defensive in nature). In addition, “protection” can also be understood as bestowing some form of IPRs (sui generis) over IK (positive protection) to its holders, so that they cannot be discriminated against in the knowledge economy paradigm.

Different approaches have been suggested in international fora regarding building systems to protect IK, one approach is to strengthen and further develop existing IK protection systems, based on documentation of IK, building institutions, developing networks and strengthening the use of customary law. According to the Canadian Indigenous Peoples’ Organization,³ it is commonly assumed that “indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language”. But such an assumption that there is a generic form of customary regulations governing IK use or dissemination ignores the intricacies and diversity of traditional systems.

India’s rich and varied heritage of biodiversity finds reflection in its rich ethos of biodiversity conservation and indigenous knowledge systems. As far back as 300 B.C., rulers such as Ashoka dictated that certain habitats and species were to be left alone, while rural communities- both tribal and non-tribal often kept forests or tanks or grasslands as sacred spaces, or protected certain species as totems or religious symbols.⁴

The persistence of customary practices or local laws governing the use of natural resources may be observed in the context of forest use practices, traditional water technologies, landholding patterns, agricultural practices, fisheries, common land uses for agricultural and non-agricultural purposes etc.⁵

The indigenous knowledge that is interlinked with the country’s rich natural resource base has the potential to provide enormous benefits to humanity in the fields of medicine, health care, biotechnology etc. Protecting and preserving the rich biodiversity and the associated IK is thus essential for the country. It is in this context that the strengthening of customary laws and practices by endowing them with legal teeth assumes relevance.

Against this backdrop, the project study in its **first year** has endeavoured to review and examine customary laws and practices of the local communities in various parts of India.

³ Report of the AD Hoc Open Ended Working Group on Access and Benefit Sharing, UNEP/CBD/WG-ABS, 10th August 2001.

⁴ *ibid.*

⁵ Vani, M.S., 2002, *Customary Law and Modern Governance of Natural Resources in India- Conflicts, Prospects for Accord and Strategies*, paper submitted for the Commission on Folk Law and Legal Pluralism, XIIIth International Congress, Thailand.

On the one side, the study tries to highlight the way in which these laws and practices are protective of IK of biodiversity, on the other, it also analyses the treatment given to customary laws and practices under the modern legal system in India, including that in the Constitution of India. A critical analysis of the theoretical research into customary laws and practices from the above mentioned perspective has been dealt with in part A of the document which has been sought to be substantiated with case studies contained in Part B of the document thereby striving to attempt a holistic treatment of customary laws and practices in the context of protection of biodiversity and associated IK.

PART A-CRITICAL ANALYSIS

NEED TO STRENGTHEN CUSTOMARY LAW

Sustainable use of bioresources is reflected in the customs of local communities. For example, many communities have concepts like stewardship, custodianship, which imply responsibilities as well as rights, fostering a judicious use of the natural resources. For instance, in the Khasi community of Meghalaya state in India, villages own groves, which are the common property of the community. Composed of mainly oak and rhododendron trees, these are held sacred. It is an offence for anyone to cut timber in the grove, except for cremation purposes.⁶ Again, the Todas of the Nilgiri Hills in south India believe that the Goddess Tokissay created them and their unique buffaloes. Many of the peaks and grasslands where they graze their buffaloes are enshrined in their myths and legends and are sacred to them. Therefore, the Todas who are vegetarians neither hunt animals nor till the earth for agriculture.⁷ Again, though the Nishi tribe of Arunachal Pradesh in north east India hunts the hornbill for the use of its beak in their traditional headgear, there is an inbuilt mechanism within their culture to protect the bird in the form of customary prohibition on the killing of the bird during the breeding season.⁸

It is thus imperative that local traditional bodies and customary law need to be empowered which by protecting biodiversity contributes to the protection of IK. As a corollary, the extinction of local customs can go against any move to restore sustainability into the modern development paradigm. National and international laws and policies, if not promote, should not at least adversely affect customary laws and practices. In fact, lessons can be learnt from local customs in order to incorporate elements of sustainability into developmental policies. James D. Wolfensohn, former President of the World Bank insists, “We need to learn from local communities to enrich the development process”.

CUSTOM

To make any effort at understanding customary law, we must begin with looking at what custom is. Custom is not a term that can be constrained to one definition, however, in common parlance it can be understood as uniformity of conduct of people under like circumstances. It is a practice that by its common adoption and long unvarying habit has come to have a force of law. It is that body of law, which is predominantly oral rather than written and derives its authority from sources other than State. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality is

⁶ Gourdon, P.R.T., 1914, *The Khasis*, London: Macmillan and Co. Ltd(first published in 1906).

⁷ Krishnan, B.J., *Customary Law*, undated.

⁸ Discussion at the Project Launch Meeting of Gene Campaign’s project *Protection of Indigenous Knowledge of Biodiversity* held on 7th July 2004 at New Delhi.

entitled to exercise specific rights against certain other persons or property in the same locality.⁹

In primitive times there was little sense of rules or regulations. This concept (of rules and regulations) developed with the evolution of a community and community into a society. Most of these principles were derived from usage or practice of the community for their subsistence. The long and continuous usage by the community of the natural resources of their locality evolved into customary practices. These customary practices are localized and vary from area to area and community to community. These customs were evolved keeping in mind the needs of the people since these were developed by those on whom it had an influence. Customary practice is an evolutionary practice which changes with the times and the people but one thing remains the same, that is, it is by the people and for the people.

A legal custom is that custom which operates as a binding rule of law, independently of any agreement on the part of those subject to it.¹⁰ In India, for a custom to have a colour of a rule or law, it is necessary for the party claiming it to prove that such custom is ancient, certain and reasonable; Custom being in derogation of law are to be construed strictly. In Indian Jurisprudence, custom is not merely an adjunct of the law but an integral constituent of it. However, there has always been a debate whether in reality customary law is recognized as merely a source of law or does it actually form a constituent of Indian Legal System.

DEVELOPMENT OF INDIAN LEGAL SYSTEM IN THE BRITISH PERIOD

It was acknowledged as early as 1773 by the British that Indians should be governed by their own laws in matters of family, religion and inheritance. Matters other than these continued to be governed by government courts on the common law principles of 'justice, equity and good conscience'. This led to a wide importation of English laws, enactment of procedural codes, which showed no fusion with the traditional laws, and curtailing of application of customary laws through informal tribunals.

For codification of personal laws, collections and translations of ancient texts were made. Numerous digests and commentaries also came up on these translations, such as Colebroke's digest. Subsequently it was realized that lesser bodies of customary laws governed many a matters. But even customary laws were not found to be sufficient since when the quasi-legislative role of tribunals restricted and customs were recorded there were not enough rules in express terms. This resulted in elevation of textual laws over lesser bodies of customary laws.¹¹ Although according to Hindu Law where there was a conflict between shastras and customs, custom overrode shastras,¹² strict rules of

⁹ *State of Bihar v. Subodh Gopal Bose* AIR 1968 SC 281

¹⁰ Garner B.A. (Ed). 2004. Black's Law Dictionary, 8th Edition. West Publishing Company

¹¹ Many jurists like Nelson questioned this policy as the basis of understanding Indian Law. According to them customary laws should be enforced rather than declaration of the *rishis*.

¹² *Collector of Madura v. Mootoo Ramalinga* (1868) 12 M.I.A.397

evidence provided for disappearance of customary laws, as it was very difficult to prove unwritten customs.¹³

There also emerged a sense of individual right not dependent on community opinion or usage. The concept of common property had little space in the modern legal system.

Fields like natural resource management and conservation activities, which facilitate development of knowledge especially of conservational and medicinal value, were for long taken care of by the communities in accordance with their customs. Although, the British realized the importance of indigenous and local laws in matters which are commonly known as personal laws, they ignored the role that communities had been playing in conservational activities. The plethora of legislation that came up in relation to forest and water did not incorporate customary practices and law at all.

Of special importance in this context are the Indian Forest Act of 1865 and the Indian Forest act of 1878 which replaced the former. The provisions of the 1878 Act established a virtual monopoly of the state over the forests in a legal sense and attempted to establish that the customary use of the forests by the villagers was not a 'right' but a 'privilege' that could be withdrawn at will.¹⁴

This enactment of 1878 was preceded by a heated debate on how best the state could remove the existing ambiguity about the absolute proprietary right of the state. Many forest areas were wholly out of the category of state property and even forests, where the state had in theory retained its absolute proprietorship, were used by all classes to get what they wanted. According to Dietrich Brandis, the Inspector General of Forests, the most important omission of the Act VIII of 1865 was "the absence of all provisions regarding the definition, regulation, commutation and extinction of customary rights... (by the state)".¹⁵

According to Gadgil and Guha, in the debate on how best to accomplish this separation of rights, three distinct positions emerged which they call annexationist, pragmatic and populist respectively.¹⁶

The most active proponent of the annexationist position was a senior civil servant, B.H. Baden Powell. The bedrock of this position was the claim that all land not actually under cultivation belonged to the state. Baden Powell made a clever distinction between 'rights' defined as strict legal rights which unquestionably exist, and in some instances have been expressly recorded in land settlement records and 'privileges' defined as 'concessions of the use of grazing, firewood, small wood etc. which though not claimable as of legal

¹³ Galanter, Marc, "Displacement of Traditional Law" in Dhavan, Rajiv (ed.) *Law and Society in Modern India*.

¹⁴ Saldhana, I.M., "Colonialism and Professionalism- A German Forester In India", *Economic and Political Weekly* quoted in Upadhyay, Sanjay and Videh Upadhyay, 2002, *Forest Laws, Wildlife Laws and the Environment*, New Delhi: lexis Nexis Butterworths, p.227

¹⁵ Quoted in Gadgil, Madhav, Ramachandra Guha, 1997, *This Fissured Land: An Ecological History of India*, Delhi: Oxford University Press, p.124.

¹⁶ Gadgil and Guha, *op.cit.*, P.124-134.

right, are always granted by the policy of the government for the convenience of the people’.

The Madras Government, proponent of the populist position, totally denied the legitimacy of any state intervention in the forest. All instances of the use of the forest by the people, it argued, should be taken as presumptive evidence of property therein.

Intermediate between these two extreme positions was the Inspector General of Forests, Brandis, who allowed that in certain cases the state had indisputable rights. However, he disputed Baden Powell’s contention that rights had to be ‘proved’ in writing before they could be said to exist. In most forest areas, he believed, villagers were accustomed to freely graze their cattle, cut wood etc., subject only to some restrictions which rulers imposed from time to time. Brandis, quite remarkably for his time and milieu, placed considerable trust in the ability of village communities to manage their own affairs. He wrote appreciatively of the extensive network of sacred groves in the subcontinent, which he termed ‘the traditional form of forest preservation’.¹⁷ He was especially keen on reviving and strengthening village communal institutions.

Brandis’ noble sentiments were not shared by his peers and masters in the British colonial system and the Act of 1878 reflected a victory of the ‘annexationists’. Based on Baden Powell’s distinction between rights and privilege, the Act was a comprehensive piece of legislation which attempted to obliterate centuries of customary use by rural populations all over India. In reserved forests constituted under the Act, a legal separation of rights was aimed for, it being though advisable to safeguard total state control by a permanent settlement that either extinguished private rights, transferred them elsewhere, or in exceptional cases allowed their limited exercise. In the case of protected forests, control of the state was maintained by providing provisions for closing the forest whenever required to grazing and firewood collection. Under this act, each family of ‘right holders’ was allowed a specific quantum of timber and fuel, while the sale or barter of forest produce, was strictly prohibited. While denying or restricting access to pasture and forests on one hand, it allowed ‘right holders’ only a marginal and inflexible claim on the produce of the forests.

CUSTOMARY LAW AND THE INDIAN LEGAL SYSTEM

Customary law has a crucial role to play in the development of a national regime to protect India’s rich biodiversity and the associated IK. It is thus essential for us to look at the position that customary law enjoys in the Indian Legal System and explores ways and means for strengthening it. For this, it is necessary to achieve clarity on when exactly does it become law recognized by the courts.

Unlike State laws, these emerge from within the community and command social acceptance and observance. Statutory law is uniform whereas customary law is an adaptive, flexible, evolving body of norms and rules governing the behaviour of communities. While the former is for the community latter is in the community.¹⁸

¹⁷ Gadgil and Guha, *op. cit.*

¹⁸ Upadhyaya, Videh, “Customary Rights over Tanks:Some plain Talking on Limits of Custom”, *Economic and Political Weekly*, November 1, 2003

Certain tests or essentials have been laid down by jurists, which a custom must satisfy for its judicial recognition. These are:

1. Antiquity- A custom to be recognized as law must be proved to be in existence from time immemorial. The English Common Law rule of the immemorial user is not required to establish a custom in India. It has been held that it is sufficient if the court is satisfied of its reasonableness and certainty and the user on which the custom is founded is not exercised by stealth or force and that the right had been enjoyed for such a length of time as to suggest that by agreement or otherwise the usage has become the customary law of the locality.¹⁹
2. Continuance- If a custom has been interrupted for a considerable time then a presumption arises against it. It is due to discontinuance of the 'right' not 'possession' that the claim to a custom is abandoned.
3. Peaceful enjoyment- The custom must have been enjoyed peacefully. If the custom has been in dispute or in the court for a long time it negates the presumption that it originated by consent as most customs naturally might have originated.
4. Obligatory force- The custom must have an obligatory force and must have been enjoyed as a matter of right without stealth or force.
5. Certainty- A custom, which is vague or indefinite, cannot be recognized. The court must be satisfied by a clear proof that the custom exists as a matter of fact, or as a legal presumption of fact.
6. Reasonableness- This test gives a wide discretion to the courts in the matter of recognition of customs. It is for the courts to decide whether the alleged custom is reasonable or not. Relying on a 1951 judgement, the Supreme Court in 2003 held an unrestricted fishing right unreasonable as a right being destructive of the subject matter itself would be unreasonable. If there was no restriction of any kind, then a customary right, which could produce such right, must be deemed to be unreasonable.²⁰
7. Conformity with Statutory Law- Statute made laws are given precedence over customary laws. Therefore, even where the customs meet the requirement of being ancient, certain and reasonable, they being in derogation with general laws are to be construed strictly. This hierarchy makes the position of customary laws very vulnerable in the legal system. Although the constitution of India recognizes customary law, in effect this recognition is subject to being in consonance with the statute made laws. The Supreme Court has emphasized on this requirement time and again. Therefore it is of prime importance that whenever any legislature is passed, due consideration is shown towards existing customary laws. An effort to this effect has been lacking so far. The objectives of the legislation should not be such to as to ignore the existence and purpose of customary laws. A fine

¹⁹ *Prannath Kundu v. Emperor* AIR1930 Calcutta 286.

²⁰ *Tulsi Ram v. Mathura Sagar* (2003) I SCC 478 relied on AIR1952 SCR 431.

balance has to be struck between the statutes and the customs so that the effects of certain statutes may not be so overriding that the laws developed by the people for themselves as per their requirements lose their justiciability.

CUSTOMARY LAW IN THE POST INDEPENDENCE REGIME

Ever since the codification and formalization of Indian law started after independence, there has been a lopsided conflict between the statutory and the customary law. A set of statutory laws based largely on principles of English Common law with little reference or influence from local laws emerged supreme. In the structure of this so-called formal legal system, customary law has almost always been a loser in terms of recognition and acceptance. Before making a detailed analysis, which is more advantageous, and people friendly let us look at which provisions in the Constitution of India and other Indian statutory law deal with custom and customary law directly or indirectly.

EVIDENCE AND CUSTOM

Although rules of evidence make it difficult to prove customs, the Indian Evidence Act, 1872 is the earliest legislation to formally recognize customs. According to S.13 of the said Act, when any right or custom is in question, instances and transactions through which the custom is created, claimed, asserted, or denied are to be taken into account, *e.g.* any village administration paper or settlement records which show that a practice is being carried out as a matter of customary right, is of relevance to prove the alleged custom. In 1927, the Privy Council²¹ laid down that a statement in the *wazib-ul-arz*²² of a village that there is such a custom, which is not in contravention of law, is a good prima-facie evidence of instances in which it has been exercised. And upon the entry in the *wazib-ul-arz* the custom was held to be proved. It further held that it is easier to hold established a custom, which as here only proves a well recognized adjunct to the ordinary law, than it is where the law is said to be actually altered. But since customs are by and large oral it becomes difficult to produce documents. Besides sometimes documents could be inadequate due to other factors such as illiteracy and low status. Unfortunately, the Supreme Court in a recent decision²³ has not taken note of this factor and denied *Dhimars* of *Parshioni* a customary right to obtain fishing rights.

S. 57 of the Evidence Act also recognizes customary laws as it says that the courts must take judicial notice of ‘all laws in force in the territory of India’. In 1935, the Allahabad High Court held that where a particular custom is of general prevalence and is commonly recognized, it is open for the court to take judicial notice of such customs having the force of law u/S. 57 of the Evidence Act. It was held that it is not necessary that there should be evidence produced in each case to establish such a custom. However, recent judgments (including the *Dhimar* case (see box1 below)) suggest that absence of

²¹ *Sheobaran Singh v. Mt. Kulsum un Nissa* AIR1927 Privy Council 113

²² A village administration paper that became a settlement record; statutory presumption and correctness was attached to it u / S. 79 of the 1920 CP land Revenue Code.

²³ *Ramchandra Wahiwatdar v. Narayan and others* 2003 (7) SCALE 7

evidence may make it difficult to prove a custom. In absence of evidence and proof of alleged custom the Supreme Court in another 2001 case conferred no right.²⁴

Box 1: The Dhimar Case

2003 (7) SCALE 7

Ramchandra Wahiwatdar v. Narayan and others

A suit was filed by the owners of a tank to restrain the fishermen of a community (*dhimar*) from interfering with the rights of the owner of the tank. The trial court observed that the *dhimars* had no right independently of the *theka* agreements. The court in referring to the *wajib ul arz* of certain years held that nothing in the documents show that the *theka* or lease used to be given only to them. The act of catching fish in the suit tank was only permissive and not on account of some independent right. In the first appeal it was held that *dhimars* have got permissible fishing rights under the lease and the fishermen have a customary right to obtain lease or licence to catch fish from the tank by executing *theka patra*.

On appeal, the High Court observed that the custom of fishing by the *dhimars* was in existence prior to 1861 and continued thereafter which shows that it is acquired by long usage, which was recognized by community and administrator. Subsequently, it has not been regularly recorded because of their low status and illiteracy.

Supreme court ruled that there was no justifiable reason for High Court to observe that the claim was not recorded due to their low status and illiteracy. Relying on an earlier case SC held that from the documents court arrived at a conclusion that *dhimars* had a permissive right to catch fish and once there is a permissive right under lease or licence it is difficult to arrive at a conclusion that they have acquired a customary right. The court further based its decision on a 1951 judgement whereby it was held that village is not a corporate body.

Thus the implication of such a ruling would be that to assert any right the community has to do so in the context of the so called formal laws such as the system of lease or licence.

EASEMENT AND CUSTOM

Customary Rights are rights partaking of some of the characteristics of an easement but are not easements in the proper sense; customary rights are not necessarily appurtenant to tenement but exist in gross. They are not for the beneficial enjoyment of a dominant heritage but exist for a personal benefit. Easements are generally understood to be private rights belonging to a person whereas customary rights are public in nature annexed to a particular locality or community in general. In India, just as much as in England, there are three distinct rights of easement. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements and such rights commonly have their origin in grants and prescriptions. Secondly, there are rights belonging to certain classes of persons or certain portions of public. Such rights commonly have their origin in customs. Thirdly, there are public rights for the benefit of all.²⁵

²⁴ *Surajmani Stella Kunjur v. DurgaCharan Hansdah* AIR 2001 SC 938

²⁵ 15 Calcutta 46(FB) [1888], *Pran Nath Kundu v. Emperor* A.I.R. 1930 Calcutta 286

The Indian Easements Act, 1882 states that nothing herein contained shall be deemed to affect any law not hereby expressly repealed, or to derogate from any customary or other right (not being a licence).²⁶ Under this Act an easement may be acquired in virtue of a local custom. Such easements are called customary easements.²⁷

FOREST LEGISLATION AND CUSTOM

The first act for the regulation of forests was passed in 1865. It empowered the **government** to declare any land covered with trees or brushwood as **government** forest and to make rules to manage them. The Act of 1865 was replaced by a more comprehensive Indian Forest Act of 1878. Forests were divided into reserve forests, protected forests and village forests. According to Baden-Powell, '*The right of **government** to all uncultivated, unappropriated land is the basis on which the Indian forest law proceeds.*'

The Indian Forest Act of 1927 replaced the earlier Act of 1878. The Indian Forest Act of 1927 is still in force together with several amendments made by state governments. The preamble states that the act seeks to *consolidate* the law relating to the transit of forest produce and the duty leviable on timber and other forest produce. Firstly it suggests that there have been no new laws only consolidation of the old ones and secondly, there is a clear emphasis on the revenue yielding aspect of forests. The free access enjoyed by local communities was suspended. Thereafter forests were used as a matter of privilege not right. Concessions were individualized at the cost of community interests. In short, customary rights of people over forestland and produce curtailed and transformed into concessions to be enjoyed at the will of the forest officials and, most important, forests became a major source of revenue for the **government**. The Indian Forest Act of 1927 does have a provision²⁸ under which management of a forest area can be assigned to village communities. However, experts feel these are but gaps in the legal regime which might raise some hope to accord some legal recognition to the efforts of communities involved in conservation.²⁹ Village forest is the forest that has been legally transferred to the village community by the State Government. The forest in the vicinity of the village can be so transferred even if it is a reserved or a protected one. Once a forest has been so declared, the rights of the villagers (some of them customary rights) about grazing, gathering minor forest produce etc. become the rights over the property legally assigned to them. The Act's recognition of rights of the communities, when it talks about commutation of rights³⁰ in declaring reserve forests, can go in vain in light of the powers conferred upon the Settlement Officers.

The Forest Policy of 1988 focuses on requirements of communities but it has not given due recognition to the customary practices and indigenous knowledge that communities, both rural and tribal have used for natural resource management.

²⁶ Section 2 (b), Indian Easements Act, 1882

²⁷ Section 18, Indian Easements Act, 1882

²⁸ Section 28, Indian Forest Act, 1927

²⁹ Pant, Ruchi, 2002, *Customs and Conservation: Cases of Traditional and Modern Law in India and Nepal*, Pune: Kalpavriksh.

³⁰ Section 16, Indian Forest Act, 1927

THE PANCHAYAT (EXTENSION TO SCHEDULED AREAS) ACT, 1996 (PESA)

With the enactment of The Provisions of the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA), the provisions of the Panchayat have been extended to the Scheduled Areas with exceptions and modifications as specified in the Extension Act.

One of the important features of PESA is that it acknowledges the *competence* of Gram Sabha, the formal manifestation of a village community, to ‘safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolutions.’³¹ S. 4(d) of the Act confers positive right on the Gram Sabha whereas S. 4(a) gives a negative right in as much as it does not allow the Legislature of a State to make laws that are not in consonance with the customary law, social and religious practices and traditional management practices of community resources. Under the new Act, the State and its organs are not absolved of their Constitutional obligations but the community, which so far had not been formally recognized, has been empowered in the form of Gram Sabha to meet challenges both from within and outside.³²

By virtue of Sections 4 (e) and 4 (m), the Gram Sabha now is responsible for managing almost all affairs that have a direct or an indirect affect on the life of the people of the village. As per this Act, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed *specially* with powers like ownership of minor forest produce, power to prevent alienation of land in Scheduled Areas and to take action to restore any unlawfully alienated land of a Scheduled Tribe, power to manage village markets, power to control over local plans and resources among other things.³³ The most important outcome of this PESA was expected to be ‘removal of dissonance between tribal tradition of self-governance and modern legal institutions’.³⁴ However, this Act though a welcome move has not been used to its optimum potential. The steps taken by the states for the purposes of this Act have not been successful in strengthening the concept of self-governance as envisaged by this legislation. Thus the potential of PESA has not been put to the possible use of recognizing the customary practices and laws through the institution of Gram Sabha.

THE BIOLOGICAL DIVERSITY ACT, 2002

In 2002, the Biological Diversity Act was enacted with a view to providing legal protection to the biodiversity for the first time in the country. The Act elicited a mixed response of both hopes and apprehensions. The Act provides for establishment of bodies at different levels – national, state and local. The Biodiversity Management Committees at the local level could have been very useful if only their role was more expansive than mere documentation. They have no powers *vis a vis* giving recognition to the customary rights of the local people as per the rules which have come out in 2004.

³¹ S. 4(d) of PESA

³² Sharma, B.D., 50 years of Anti Panchayati Raj

³³ S. 4 (m) of PESA

³⁴ Sharma, B.D., 2001, *Tribal Affairs in India- The Crucial Transition*, New Delhi: Sahyog Pustak Kuteer Trust.

DIFFERENCE BETWEEN STATUTORY LAW AND CUSTOMARY LAW

	<i>Statutory Law</i>	<i>Customary Law</i>
<i>Form</i>	Written thus usually codified	Rarely codified. It is an expression of positive will of the people handed over from one generation to another
<i>Nature</i>	Uniform	Varies from community to community and is usually area specific
<i>Extent and Application</i>	Extends to those parts of the country or the state as mentioned in the law	No uniformity and its extent and application are restricted to a smaller field (region or community specific)
<i>Acceptance</i>	Acceptance by the people is not all that important. A handful of people makes laws and makes it applicable. Even if the affected people do not willingly accept it still has a binding effect	Acceptance from the community is of utmost importance as it is their acceptance that makes any customary law binding on the community
<i>Understanding</i>	Many times complicated for a common man to understand	Simple and lucid therefore indigenous people have a better understanding of these
<i>Awareness</i>	Awareness of these laws is usually low especially in remote and underdeveloped areas due to the above mentioned factor	Awareness is high as it is developed by those very people and is specific to the community or locality
<i>Enforceability</i>	Any dispute regarding any violation of this law is brought before formal courts or judicial authorities.	Any contravention of this law is challenged in the traditional tribal courts. Recognition given to customary law in some statutes but in case of a conflict between the two, the principle is that any customary law is not to be in derogation of statutory law
<i>Dispute Settlement</i>	Disputes are resolved and decided by the judges of relevant courts	Disputes are settled by consensus or majority in the traditional courts or gram sabha
<i>Penalty</i>	Uniform for all. Does not take into account the capacity of the persons. This results in inability to pay the fine at times.	Less harsh as usually the penalty is determined according to the capacity of the offender thereby ensuring that the fine or penalty is paid

CONSTITUTION OF INDIA

CUSTOM

The Constitution of India also gives recognition to customs and customary practices. All laws in force before the commencement of this Constitution shall continue in force therein until altered or repealed or amended.³⁵ The effect of this provision is to continue the entire body of laws as prevailing in India before the constitution came into force. Not only statutory laws but also laws like Law of torts, Hindu Laws, Mohammedan Laws, Custom having the force of law.³⁶

According to Article 13, the term ‘law’ includes ‘customs’ and ‘usages’ having the force of law. A reasonable and certain ancient custom is binding on the courts just like an Act of legislature. However such a law cannot infringe any of the fundamental rights conferred by part III of the Constitution.

PANCHAYATS

Article 40 of the Constitution states that the State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.. Article 243 envisages establishment of Panchayats for the rural areas at three levels - village, intermediate and district. The Constitution states that a Gram Sabha may exercise such powers and perform such functions as the legislature of state may by law provide.³⁷

Part IX and IX A of the Constitution which embody principles of self governance did not include the Schedule Areas in its application till as late as 1996 except for the power given to parliament and legislature of the state to extend provisions of this part with necessary modification and exception.³⁸ With the enactment of The Provisions of the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA), the provisions of the Panchayat have been extended to the Scheduled Areas with exceptions and modifications as specified in the Extension Act.

LEGAL PLURALISM & SCHEDULES

Part X of the Constitution deals with the Scheduled Areas and Tribal Areas. Administration of these is dealt with in Article 244 r/w the V and VI Schedules. ‘Scheduled tribes’ means such tribes or tribal communities or parts of or groups within such tribes or communities as are illustrated in the Scheduled Tribes Order under Article

³⁵ Article 372

³⁶ *Gopalan v. State of Madras* 1958 Madras 539

³⁷ Article 243 A

³⁸ Article 243M(4) & Article 243ZC(3)

342. ³⁹'Scheduled Areas' has been defined as such areas as the President may by order declare to be Scheduled Areas in Para 6 of the Vth Schedule.

Vth Schedule deals with administration and control of Scheduled Areas and Scheduled tribes in any state other than Assam, Meghalaya, Tripura and Mizoram. Vth Schedule described, as a Constitution within the Constitution is the most comprehensive provision for the protection of the tribal people living in Scheduled Areas against the State and other exotic forces.⁴⁰ As per Para 2 and 3 of the Schedule and Art. 60 and 159, it is the duty of the President and the concerned governors to preserve, protect and defend the Constitution including this special feature concerning the Schedule Areas and the law including customs and usage of tribal people. Subject to only one condition that it does not affect the basic structure of the Constitution, governor is given immense power to apply or not to apply any Act to the Scheduled Area, make regulations for peace and good governance of any area of the state, which for the time being is a Scheduled Area.

VI Schedule deals with Administration of tribal areas in the states of Assam, Tripura, Meghalaya and Mizoram. In these areas, there are Formal Modern Central Laws, Traditional Customary Laws from within community and Laws by Autonomous District Councils. There are three institutions for justice administration – Traditional Institutions dealing with customary and folk laws, Formal Administrative Bodies like Deputy Commissioner and Autonomous District Councils.

Non-VI Scheduled Areas are governed by Rules of Administration of Justice (State wise rules). VI Schedule Areas bar application of Acts of Parliament and State Legislature to areas in the subject matter where Autonomous Council is authorized to make and extend laws.⁴¹ This is the major distinction between the Sixth Schedule states and non-sixth Schedule states. This implies that the Indian Forest Act, 1927, the Forest (Conservation) Act of 1980 and the Wild Life Protection Act 1972 would be extended to the Autonomous District Council Areas only to the extent of Reserve Forests therein, whereas these Acts would apply *in toto* to the other North Eastern states of the country.

DIRECTIVE PRINCIPLES OF STATE POLICY

Directive Principles of State Policy are enlisted in Part IV of the Constitution. Article 38(1) embodies the principle of 'justice, social, economic and political'. It expects the State to take adequate steps to continue and promote social and welfare measures. Article 39(b) enjoins a duty upon the state to direct its policy towards securing that the ownership and control of the material resources of the community which are to be distributed as best to subserve the common good. The term 'material resources of the community' as used in the article include everything that is capable of generating wealth for the community. The ownership of community goods to sub serve common good is not restricted to natural or physical goods but also movable or immovable property such as

³⁹ Article 366 (25)

⁴⁰ Sharma, B.D., 2001, *op.cit.*

⁴¹ Part 3 of VI Schedule

land or other such assets. The state should look into matters of adequate distribution and availability of raw materials, which have, potential of creating wealth.⁴²

The above articles are to be read with Article 46, which directs the State to promote educational and economic interests of Scheduled Tribes and protect them from exploitation. The State is under an obligation to see that these sections of the society are not open to exploitation and deprived of their rights on account of their illiteracy and low status. In 1985, a law prohibiting transfer of land belonging to a member of Scheduled Tribes to a non-tribal was held to be valid by the apex court under this article.⁴³

FUNDAMENTAL DUTIES

Part IV-A imposes a duty on the citizens to value and preserve the rich heritage of our composite culture⁴⁴; to protect and improve the natural environment including forests, lakes and rivers, which are great reservoirs of indigenous knowledge⁴⁵. But these duties can at best be 'regarded as directories.' These can be used to read ambiguous statutes and can be promoted through constitutional means. There is no provision clarifying the relation between Fundamental Duties and Fundamental Rights⁴⁶.

LAND REFORM LEGISLATION

Article 31 - A enacts that a law that comes under any of the sub clauses of the article shall not be open to challenge on the ground of contravention of Article 14 or 19⁴⁷. The protection is available not only to Acts covered under the sub clauses, but also to the Acts amending such Acts to include new items of property or which change some detail of the Act provided, the change does not exclude the Act out of the purview of Article 31-A.

Sub clause (a) of Article 31-A enables the State to acquire any estate or any rights vested therein or to extinguish or modify any such right. 'Rights' in relation to estate is defined as to include any right vested in a proprietor, sub-proprietor, tenure holder or other intermediary and any other rights or privileges in respect of land revenue. Article 31-A (1)(a) envisages only laws concerning agrarian reform.⁴⁸

Article 31-B purports to validate retrospectively certain specified Acts and regulations already passed, which, but for such a provision, might have been open to challenge under Article 13. Even the Acts which were void or inoperative at the time of enactment by

⁴² *Assam Sillimanite Ltd v Union of India*

⁴³ *Lingappa v State of Maharashtra* AIR 1985 SC 389

⁴⁴ Article 51A (f)

⁴⁵ Article 51A (g)

⁴⁶ M.P. Singh (ed.), *Shukla on Constitution of India*

⁴⁷ Article 14 lays down that the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Article 19 guarantees to the citizens of India the six fundamental freedoms (speech and expression, assembly, association, movement, residence and settlement, profession or occupation and trade) which are exercisable by them throughout and in all parts of the territory of India.

⁴⁸ *K.K. Kochuni v. Union of India* 1960 Sc 1080 and *Balmadies Plantations Ltd.v. Union of India* 1972 SC 2240

reason of infringement of Article 13(2) can assume full force retrospectively once they are included in the Ninth Schedule r / w Art. 31 – B of the Constitution. In the absence of any guiding provisions, there is a great danger of misuse of this provision by putting just about any matter in the Ninth Schedule.

The Twenty Fifth Amendment, 1971 gave complete immunity to a law if it had the President's assent that it was enacted to promote the policy laid down in Art 39 (b) & (c)⁴⁹. That is to say that no law containing a declaration that it is for giving effect to a policy as for securing principles specified in Article 39(b) or (c) shall be deemed to be void on the ground that it is inconsistent with or takes away any of the rights conferred by Article 14, 19 or 21. Nor shall such a law be called in question on the ground that it does not give effect to such policy.⁵⁰ As per Krishna Iyer, J⁵¹, the result of the Twenty-fifth Amendment is that the quantum of the amount or the reasonableness of the principles are out of bounds for the court. However, the Article is subject to a rider that there should be a nexus between Article 39 (b) & (c) and the object of acquisition.

FUNDAMENTAL RIGHTS

The Constitution of India nowhere confers specifically rights that are related to the rights of the indigenous communities to economic and social development. Therefore, one has to read into the provision of Article 21, which confers, Right to Life. Therefore the indigenous communities have a right not to be displaced and disabled by actions robbing them of their customary rights so that they can live with basic human dignity. Another very important aspect of the right to life envisaged in Article 21 is right to livelihood. It can check actions that dislocate poor people or disrupt their life style. The state may not by affirmative action be under a compulsion to provide for means of livelihood but any person who is deprived of his right to livelihood, except according to a due process of law, can challenge the deprivation as offending the right to life conferred under Art. 21.⁵² In 1987 Supreme Court took step further and detailed safeguards to protect tribals who were being ousted from their forest land by the Rihand thermal project of NTPC. The court in the course of its order observed that tribal people for generations had been using the jungles around for collecting the requirements for their livelihood and ousting them from that land would amount to depriving them of their fundamental right to life implying to livelihood.⁵³

GIVING EFFECT TO INTERNATIONAL LEGISLATION

Article 253 of the Constitution empowers the Parliament to give effect to International Instruments.⁵⁴

⁴⁹ Article 39 (b) and (c) together with other provisions of the Constitution contain the objective building of a welfare society and an equalitarian social order.

⁵⁰ Held invalid by *Kesavanandan Bharti v. State of Kerala* (1973) Supp SCR1

⁵¹ *State of Karnataka v. Ranganatha Reddy* AIR 1978 SC215

⁵² *Olga Tellis v. Union of India* AIR 1986 SC 180

⁵³ *Banwasi Sewa Ashram v. State of Uttar Pradesh* AIR 1987 SC 374

⁵⁴ This article is intended to make it clear that the power to enter into treaties conferred on the Parliament, carries with it, as incidental thereto a power to invade the state list to enable the Union to implement the treaty. Thus a law passed by the Parliament to give effect to an international convention shall not be invalidated on the ground that it contained provisions relating to state subjects. But other provisions of the Constitution, e.g., Fundamental Rights, cannot be overridden by a law made under Art. 253

For quite some time after the commencement of the Constitution, not much use was made of this provision. But now almost all the legislations on environment since mid 1970s have been enacted under this provision. Legislations relating to TRIPS, ensuring India's conformity with WTO, are also being enacted under this provision.

ADVANTAGES OF CUSTOMARY LAW

The biggest advantage of a customary law is that it comes from the community and therefore simple and easy to understand. Moreover, it is friendlier to the locality or community from where it has emerged. Hence, it receives better compliance from the local people.

Customary law is less complicated. It is speedier and less expensive than formal court of law. Any dispute that takes years to resolve in a formal court of law is resolved in much less time by traditional institutions.

Most of the indigenous communities have little exposure to modern systems of judicial redress. As against this, people are well aware of their own customary laws; therefore it is easy for them to go their traditional institutions for administration of justice. Besides, cases are decided keeping in mind the needs of the society, the victim and capacity of accused. A very fine example of speedy and flexible redressal under customary law can be found in Nishi case from Arunachal, India. The village headmen had constituted a volunteer force to monitor any illegal activities in the community forest. The village volunteer force cleared a 5-meter strip to demarcate forest area. A contractor from another village had been warned earlier on account of his violation of rules. He sent his labour force to harvest cane from this part of the unclassed state forest. The volunteer committee beat up the labourers and seized their tools and cane.

The case was heard by Nyel, the traditional council of the Nishi Tribe. An arbitrator from a third village and an official from the police department were present. It was decided that the medical bills for the labourers be borne by the contractor. After payment of a certain fine and on a warning being given, the contractor was allowed to keep the cane.

DISADVANTAGES OF CUSTOMARY LAW

The biggest problem that customary law faces is that it is region specific and thus there are multiple laws that might be overlapping. There may be a customary law of one community, which is different from another community in the same or neighbouring locality. In such a case how is one to decide which law shall prevail?

It is not necessary that all customary laws are people and society or even bio diversity friendly. Although they have an inbuilt system of checks and balances to preserve their rich surroundings, there may be laws that are not very practical and advisable.

Since, customary law is a law by the people, the disputes are also decided by the very same people (most of the times). Although this may have its own advantages, there is always a danger of partiality.

Customary law is largely oral and its lack of any documentation, especially precedents, proves to be a difficulty in deciding cases in a fair manner as per the customs.

With the concept of individual right as against the community right seeping in with the times, People have stopped relying on customary law. Education has also played a role in this. With education, people have learned that customary law has little recognition in the legal system. This by no means implies that education is bad. All that is being said here is that there is not enough education amongst the youth about how valuable their own customary laws are and how they can be revived.

PART B- CASE STUDIES

CASE STUDY 1

STATE FOREST AND WILDLIFE LEGISLATION: A CASE STUDY OF ASSAM FROM THE PERSPECTIVE OF PROTECTION OF INDIGENOUS KNOWLEDGE OF BIODIVERSITY

BACKGROUND

When India attained independence in 1947, forests were placed on the State List of the Constitution. Forest departments of individual states continued to regulate forests in accord with the Indian Forest Act of 1927, enacted during the British period itself, as implemented by state regulations. However, some states had and some have their own Forest Acts.⁵⁵ The basis of all state forest legislation is the same as that of the Indian Forest Act of 1878 taken with certain exceptions in the Indian Forest Act 1927.

In 1976, the 42nd amendment to the Constitution transferred the forests from the State List to the Concurrent List, thus re-emphasizing the role of the Central Government in the management of forests. The Government of India passed the Joint forest Management resolution on June 1, 1990 recognizing for the first time the rights of the protecting communities over forestlands. After the 1990 resolution, most of the states have formulated their own guidelines for Joint Forest Management (JFM) with the stakeholders, and have been implementing the programme at different intensities. More recently, the 73rd and 74th Amendment to the Indian Constitution made it mandatory for all the states to introduce democratic decentralization of governance through three tier structure of Panchayati Raj (Local Self Government) institutions (PRIs). The spirit of the constitutional amendment is to promote participatory democracy through empowering Gram Sabhas to have a decisive say through open and transparent decision making at the

⁵⁵ In India, at present, the following State Acts which deal with conservation and safety of forests, are in force:

Assam- Assam Forest Regulation 1891.
Andhra Pradesh- Andhra Pradesh Forest act 1967
Karnataka- Karnataka Forest Act 1963
Jammu and Kashmir- Jammu and Kashmir Forest Act 1987
Kerela- Kerela Forest Act 1961
Nagaland- Nagaland Forest act 1968
Orissa- Orissa Forest Act 1972
Rajasthan- Rajasthan Forest Act 1953
Tamil Nadu- Madras Forest act 1882

village level instead of the concentration of decision-making power in a few elected representatives. Twenty-nine functions have been recommended for decentralization to the Panchayati Raj Institutions. Management of state owned forestlands is not included but may be specifically notified by individual State Governments. These objectives are endeavoured to be implemented through empowerment of the village level Joint Forest Management Committee (JFMCs). The Panchayat Act, which has now been extended to agency areas i.e. Scheduled areas through the Panchayat (Extension to the Schedules Areas) Act 1996⁵⁶, grants ownership rights of minor forest produce to the Gram Sabha. It gives radical powers to the tribal community and recognizes its traditional community rights over natural resources and also directs the state governments not to make any law, which is inconsistent with the above-mentioned practices.

It is in this background that Assam's forest legislation needs to be examined.

Along with the introduction of scientific management of some forest area of other provinces (now states) in India in the year 1862, in Assam also, 269 square miles of forest areas were converted into Reserved Forests for scientific management. In the very same year, the first Inspector General of Forests, Dietrich Brandies also visited Assam. In September 1864, Dr. T. Anderson, the then superintendent of the Royal Botanical Garden, Calcutta was appointed, in addition to his other duties, Conservator of Forests of the Lower Provinces.⁵⁷ When in 1874, Assam was made a separate province under the Chief Commissioner Col. Keating; an independent Forest Department was created for Assam in 1874-75 under the charge of a Deputy Conservator of Forests.

The Assam Forest Regulation was enacted in the year 1891, which is in force today subject to amendment in the year 1995. Also, the Government of Assam has notified the **the Assam Joint (People's Participation) Forestry Management Rules, 1998** "for the active participation and involvement of local people for regeneration, maintenance and protection of degraded forest and plantations." The Government of Assam has also come out with "an environment and peoples friendly" **Assam Forest Policy 2004**.

In the context of state legislation pertaining to wildlife, one significant legal enactment of the 19th century was the Elephant Preservation Act 1873 also known as the Madras Act. It was the first Act under the British regime for regional protection of wildlife. The subsequent enactment of the Wild Birds and Animals Protection Act No. 8 of 1912 prohibited for the first time, the killing of wild animals and birds and the disobedience of this mandate entailed penal consequences. The said Act empowered the local government to apply the provisos of this Act to any kind of wild bird or animals other than specified in the Schedule, which, in its opinion, was desirable to protect or preserve.⁵⁸ Besides, 'the local government may by notification in the local gazette, declare the whole year or any part thereof to be a closed time through out the whole or any part of its territories for any kind of wild bird or animal to which this Act applies, or for any female or immature wild birds or animals of such kinds....'⁵⁹ Also, for the first time, the provincial government

⁵⁶ Scheduled Areas are those areas that are identified under Schedule V of the Constitution. At present there are 8 Scheduled States in the country. They are Andhra Pradesh, Bihar (including Jharkhand), Gujarat, Madhya Pradesh (including Chattishgarh), Maharastra, Rajasthan & Himachal Pradesh.

⁵⁷ Assam and Bengal together constituted the Lower Provinces prior to 1874.

⁵⁸ Section 2(2) of the Act

⁵⁹ .Section 3.

could by notification set aside an area to be a Sanctuary for protection and growth of wild animals and birds.

Significantly, the sanctuaries and game reserves formed in the early 20th century were by notifications of state governments and not under legislations and thus they were vulnerable to abolitions/ alterations.⁶⁰ The first protected habitat created by a legislative measure was the Hailey National Park under the United Provinces National Parks Act 1935. The other states then followed with similar legislations.

The Indian Board for Wildlife (IBWL) was set up in 1952 and on its recommendation and subsequently at the Central Government's intervention - various state governments set up Wild Life Advisory Boards. Also numerous State Wildlife Acts were passed such as the **Assam Rhinoceros Act 1963**, the Punjab Wildlife Preservation Act, 1959, the West Bengal Wildlife Preservation Act, 1959 to name a few. In 1972, India adopted a comprehensive national law, the Wild Life (Protection) Act of 1972, intended solely to protect wildlife, one of the objectives of which was to have a uniform legislation on wildlife throughout the country. The Wild Life Act was enacted by the Parliament under Article 252⁶¹, after eleven State legislatures passed the required resolutions. After the subject wildlife was moved to the Concurrent List by the Forty-Second Constitutional Amendment in 1976, the Parliament was empowered to enact laws relating to wildlife without recourse to Article 252(1). By the 1991 amendment to the Wild Life Act, the Parliament extended the Act to the whole of India except Jammu and Kashmir, which has its own Wild Life Protection Act similar to the national law. Thus, Assam too falls under the purview of this Act.

OBJECTIVES OF THE STUDY

An effort is being hereby made to examine the provisions of the legislation, rules and policy pertaining to forest and wildlife and critically analyze them with a view to achieving the following objectives:

- (1) Identifying those provisions which protect Indigenous Knowledge (IK) of Biodiversity directly and also those that can be construed to protect IK.
- (2) Identifying those provisions which accord recognition and protection to customary laws and practices as there is a close relationship between it and protection of biodiversity and natural resource management, which indirectly protect Indigenous Knowledge.
- (3) Identifying those provisions which mandates local community participation, as it is believed that local communities have an intimate knowledge of their habitat and know best how to protect it, with conservation ethos being very much inbuilt within their culture.

⁶⁰ Upadhyay, S. and V. Upadhyay, 2002, Handbook On Environmental Law, Vol. I, New Delhi: Lexis Nexis Butterworths, p.229.

⁶¹ The article makes it possible for Parliament to make such laws relating to State subjects as regards such States whose legislature empower Parliament in this behalf by resolutions.

SCOPE OF THE STUDY

The study would examine and analyze the provisions of the following with a view to arriving at the above mentioned objectives:

- (1) The Assam Forest Regulation 1891.
- (2) The 1995 Amendment to the Assam Forest Regulation 1891.
- (3) The Assam Joint (People's Participation) Forestry Management Rules, 1998.
- (4) The Assam Forest Policy, 2004.

THE ASSAM FOREST REGULATION 1891

The Assam Forest Regulation of 1891 like the other state legislation of the times drew heavily from and was modeled on similar lines as the Indian Forest Act of 1878. The provisions of the latter established a virtual state monopoly over the forests in a legal sense and attempted to establish that the customary use of forests by the villagers was not a 'right' but a 'privilege' that could be withdrawn at will.⁶²

This enactment of 1878 and the state legislation governing forests were preceded by a heated debate on how best the state could remove the existing ambiguity about the absolute proprietary right of the state. Many forests areas were wholly out of the category of state property and even forests, where the state had in theory retained its absolute proprietorship, were used by all classes to get what they wanted. According to Gadgil and Guha, in the debate on how best to accomplish this separation of rights, three distinct positions emerged which they call annexationist, pragmatic and populist respectively.⁶³

The most active proponent of the annexationist position was a senior civil servant, B.H. Baden-Powell. The bedrock of this position was the claim that all land not actually under cultivation belonged to the state. Baden-Powell made a clear distinction between 'right' defined as 'strict legal rights which unquestionably exist, and in some instances have been expressly recorded in land settlement records and 'privileges' defined as 'concessions of the use of grazing, firewood, small wood etc. which though not claimable as of legal right, are always granted by the policy of the government for the convenience of the people.'⁶⁴

The Madras government, proponent of the populist position, totally denied the legitimacy of any state intervention in the forest. 'All instances of the use of the forest by the people', it argued, 'should be taken as presumptive evidence of property therein.'

Intermediate between these two extreme positions was the Inspector General of

⁶² Saldhana, I.M., "Colonialism and Professionalism- A German Forester in India", *Economic and Political Weekly* in Upadhyay, S. and V.Upadhyay, *op. cit.*

⁶³ Gadgil, M. and R. Guha, *op. cit.*, pp 124-134.

⁶⁴ *Ibid.*

Forests, Brandis who allowed that in certain cases the state had indisputable rights. However, he disputed Baden-Powell's content that rights had to be 'proved' in writing before they could be said to exist. In most forest areas, he believed, villagers were accustomed to freely graze their cattle, cut wood etc., subject only to some restrictions which rulers imposed from time to time. The settlement of rights, he insisted must be done in a just and equitable manner. Brandis advocated the restricted take over of forests by the state. In the process, he justified this middle course both on the grounds of equity-respect for age-old rights and efficiency- as the only feasible course.

Brandis, quite remarkably for his time and milieu, placed considerable trust in the ability of village communities to manage their own affairs. He wrote appreciatively of the extensive network of sacred groves in the subcontinent, which he termed ' the traditional form of forest preservation'. He was especially keen on reviving and strengthening village communal institutions.⁶⁵

Brandis' noble sentiments were not shared by his peers and masters in the British colonial system and the Act of 1878 reflected a victory of the 'annexationists'.

Based on Baden-Powell's distinction between 'rights' and 'privileges', the Act was a comprehensive piece of legislation which attempted to obliterate centuries of customary use by rural populations all over India. It provided for three classes of forest. Reserved areas well connected to towns which would lend themselves to sustained exploitation. In reserved forests, a legal separation of rights was aimed for, it being thought advisable to safeguard total state control by a permanent settlement that either extinguished private rights, transferred them elsewhere, or in exceptional cases allowed their limited exercise. In the, second category, the so-called ' protected forests' (also controlled by the state), rights were recorded but not settled. However, control was firmly maintained by outlining detailed provisions for the reservation of particular tree species as and when they became commercially valuable, and for closing the forest whenever required to grazing and fuel wood collection. The Act also provided for the constitution of a third class of forests- village forests- although the option was not exercised by the government over the most part of the subcontinent.

Under the provisions of the 1878 Act, each family of ' right holders' was allowed a specific quantum of timber and fuel, while the sale or barter of forest produce was strictly prohibited. While denying or restricting access to pasture and forests on one hand, it allowed 'rightholders' only a marginal and inflexible claim on the produce of the forests.

The Assam Forest Regulation of 1891 defines itself as “a regulation to amend the law relating to forest, forest produce and the duty leviable on timber in Assam”. Chapter II (sections 4-28) deals with Reserved Forests. Section 4 confers power on the *State*

⁶⁵ *ibid.*, p.132.

*Government*⁶⁶ to constitute any land at its disposal a reserved forest. Section 5 of the legislation reads as under:

“Notification by State Government of proposal to constitute a reserved forest.-(1) Whenever it is proposed to constitute any land a reserved forest, the (State Government) shall publish a notification in the Official Gazette.-

- (a) specifying as nearly as possible, the situation and limits of such land;
- (b) declaring that it is proposed to constitute such land a reserved forest; and,
- (c) appointing an officer (hereinafter called the Forest Settlement Officer), to inquire into and determine the existence, nature and extent of any rights claimed by, or alleged to exist in favour of any person in or over any land comprised within such limits, any claims relating to the practice within such limit of *jhum* cultivation, and to deal with the same as provided in this Chapter...”

Section 10 dealing with the treatment of claims relating to practice of *jhum* cultivation reads as under:

“ In the case of a claim relating to the practice of *jhum cultivation*, the Forest Settlement Officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the state government together with his opinion as to whether the practice should be permitted or prohibited wholly or in part.

- (1) On receipt of the statement and opinion, the state government may make an order permitting or prohibiting the practice wholly or in part.
- (2) If such practice is permitted wholly or in part, the Forest settlement Officer may arrange for its exercise-
 - (a) by altering the limits of the land under settlement so as to exclude land of sufficient extent of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or
 - (b) by causing certain portion of the land under settlement to be separately demarcated, and giving permission to the claimants to practice *jhum* cultivation therein under such conditions as he may prescribe.

⁶⁶ Substituted by the A.O. 1950 for “Provincial Government” which was substituted by the A.O. 1937 for “Local Government”

All arrangement made under this sub-section shall be subject to the previous sanction of the state government.

- (3) The practice of *jhum* cultivation shall in all cases be deemed to be a privilege subject to control, restriction and abolition by the state government and not to be a right.

The above provision of the Assam Forest Regulation is laudable in the sense that it gives recognition to a customary practice, an agricultural practice of the local communities evolved over time tracing its genesis to prehistoric times and in response to the unique demands of the environment. Shifting cultivation is considered by many experts to be ecologically destructive and its practice is looked upon as a major cause of deforestation and soil erosion. However, shifting cultivation is also seen by many as the only practical way out from the inherent difficulties confronted in preparing a proper seedbed in steep slopes as in the case of North East India.⁶⁷ They consider the practice as an organic response of the people engaged in it to certain specific ecological conditions or a reflex to the physiographical character of the land.

While recognizing the claims of the people practising *jhum*, the Regulation promotes state control and monopoly in the sense that the practice of *jhum* is deemed to be a privilege and not a right following Baden- Powell's distinction between rights and privilege reinforcing that it may be controlled, restricted and abolished by the state at will.

Section 11(1) provides that in the case of a claim to a right in or over any land, the Forest Settlement Officer shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part. Section 11(2) says that if such claim is admitted wholly or in part, the Forest Settlement Officer may come to an agreement with the claimant for the surrender of the right or exclude the land from the limits of the proposed forest or proceed to acquire such land in the manner provided by the Land Acquisition Act, 1870. Thus, a legal separation of rights was made by these provisions whereby state control was sought to be retained by a permanent settlement that either extinguished private rights, transferred them elsewhere, or in exceptional cases allowed their limited exercise.

The Assam Forest Regulation also accords recognition to the following customary rights: right-of-way, a right to water-course or to use of water and a right to pasture or to forest-produce (sections 11-13). But these are not legal rights but only concessions or privileges (especially in the context of right to pasture or to forest produce) which the Forest Settlement Officer has the prerogative to admit or reject the same wholly or in part. However, in the context of right-of-way and to water-courses in reserved forests, the Forest Officer's right to stop any public or private way or water course in a reserved forest is limited in the sense that this could only be done provided that another way or water course which, in the opinion of the state government is equally

⁶⁷ Ninan, K.N., "Economics of Shifting Cultivation", in Some Readings of the Seminar on Environment and Education Initiatives for the North-East, October 8 1993.

convenient, already exists or has been provided or constructed by the Forest officer. Here again, the state's predominance is evident in the sense that convenience of the way or water-course is to be determined by the government and not by the person or people by whom it is to be used.

Chapter III (sections 29-31) of the Assam Forest Regulation deals with Village Forests. Section 29 provides that the state government may by notification in the official Gazette, constitute any land at its disposal a village forest for the benefit of any village community, or group of village communities. The Forest Act of 1878 was the first legislation which provides for village forests but remained unimplemented. Likewise is the case with the Indian Forest Act of 1927. The scheme of joint forest management announced by the government confessed, albeit indirectly, that the government cannot manage the forests through its laws and the forest department without participation from the people. It, however, does not repose full faith in the village communities and does not give them an opportunity to undertake all the responsibilities. Secondly, it lacks legal support. It is the provision for village forests that does not have both these deficiencies that have been realized through the experience of many years. The provision for village forests, although an old one, has therefore assumed a new significance in a new context.⁶⁸ Interestingly, the Assam Forest Regulation like the forest legislation of many states have this provision but no rules have so far been drafted by the state government to implement it (exceptions are the states of Uttar Pradesh, which came out with the U.P. Van Panchayat Rules 1976 under the Indian Forest Act of 1927, the Uttaranchal Panchayati Forest Rules, 2001 under the Indian Forest Act of 1927, the Orissa Village Forest Rules 1985 under the Indian Forest Act of 1927).

Village forest, under the Indian Forest Act of 1927, is the forest that has been legally transferred to the village community by the State Government. Once a forest is so declared, the rights of the villagers regarding grazing, woodcutting, collecting forest produce etc. become the rights over the property legally assigned to the village community. While section 28 of the Indian Forest Act of 1927 provides that the state government may assign to any village community the rights of the government to any land which has been constituted a reserved forest, the Assam Forest Regulation is surprisingly broad in the sense that under it, the state government may constitute 'any land at its disposal' as a village forest. The process of notification of a village forest is however the same as for reserved forests as provided in section 30 (2).

Though recognizing the importance of setting up village forests for the 'benefit' of village communities, the Assam Forest Regulation seeks to maintain the state's control over them with the state government being empowered to "vary or cancel any such notification" (section 29). Similarly, section 30(1) of the Regulation confers powers on the state government to make rules "for regulating the management of the village forests prescribing the conditions under which the community or group of communities for the benefit of which any such forest is constituted may be provided

⁶⁸ Hiralal, M.H., 2002, Gateway to Sustainable and Participatory Community Forest Management- Village Forest with Draft Rules under section 28 of Indian Forest Act 1927, Maharashtra: M.H. Hiralal.

with forest produce or with pasture, and their duties in respect of the protection and improvement of such forest.

THE ASSAM FOREST REGULATION (AMENDMENT) ACT, 1995

The amendment to the Assam Forest Regulation 1891 has not made any changes to the above provisions nor has it incorporated any new provisions which may be construed as protecting indigenous knowledge of biodiversity, customary law or promoting people's participation.

THE ASSAM JOINT (PEOPLE'S PARTICIPATION) FORESTRY MANAGEMENT RULES, 1998

These rules have been framed "for the active participation and involvement of local people for regeneration, maintenance and protection of degraded forest and plantations". It is pertinent to look into some of the definitions of these rules:

"Usufructs" means use and profit of the benefits accrued from the property and not the property (section 2(e)).

"Beneficiary" means the members of the Forest Protection and Regeneration Committee the unit of which is a family (section 2(g)).

"Working scheme" means the short term scheme formulated for generation, protection and management of forest area jointly by the members of the Forest Protection and Regeneration Committee and the Forest Department keeping in view the needs and aspirations of the Committee members.

Rule 7 provides for the constitution of the "Forest Protection and Regeneration committee" and further states that the families acting as members of the Committee shall be allowed, as a matter of incentive, usufructs subject to observance of the conditions provided in these rules. Thus, in these rules, the idea is implicit that people dependant on forests for their livelihood need to be involved in their management and that they should have access to the use and profit of the benefits accruing from forests(in the form of rights, concessions or privileges). Also, it is pointed out by experts that the committee constituting of the representatives of all the families in the village is the only structure which ensures proper grassroots' level participation and the cooperation of the real stakeholders.⁶⁹It is, however, felt that if it is provided that one member from each family should be there in the Village Forest Protection and Regeneration Committee, there is a

⁶⁹ Even in the context of PESA, it has been felt that a *gram panchayat* encompassing large populations and with decision making powers concentrated in the hands of the representatives elected through majority vote, is not an effective unit; it has got to be a small revenue village, *pada*, *tola* or *mohalla* having population around 200 to 500 (Hiralal, M.H., *op. cit.*).

possibility that only the male member would attend its meetings. To avert this, the structure should ensure equal participation of women. In this context, the Assam Rules are far ahead in the sense that they provide for equal participation of women. Rule 7(ii) clearly lays down that “the option to become members of the Committee shall be open to all the concerned villagers, living in the vicinity of the Forest concerned. Membership of each family will be in the name of the husband and wife or a male and a female member of the family and shall be considered as one unit of beneficiary”.

The Rules provide for the sharing of usufructuary benefits under the Joint Forest Management Programme with the beneficiaries being permitted to collect minor forest produces, free of cost without causing any damage to the forest/plantations (Rule 10(ii)). However, this is subject to the condition that the beneficiaries shall have to protect the forest to be eligible for sharing the benefits (Rule 10(i)).

As regards the duties and functions of the Forest Protection and Regeneration Committee which includes the beneficiaries, Rule 9 (ii) provides that it has to ensure that no grazing of cattle and other animals is permitted in the forest land under joint forest management. However, permission for cutting and carrying of grass and fodder as permissible silviculturally is allowed free of cost to encourage stall feeding of cattle and other animals. In this manner, the local people’s customary right of pasture is sought to be regulated with the help of the people themselves so as to achieve the goal of forest protection. Again, it seeks to stop a centuries old customary practice which is believed to cause environmental degradation and forest loss- *jhum* cultivation through the community itself by making it one of the duties of the Committee to ensure that none of the beneficiaries practice *jhum*.

The Assam Joint Forestry Management Rules, 1998 while recognizing the imperativeness of people’s participation and also the need to confer usufructuary rights to them, tries to regulate their participation as well as their customary rights over forest through the intervention of the state. State control over the Forest Protection and Regeneration Committee is evident in the sense that the constitution of the Committee including its executive committee (which includes the Gaonbura or any member of the local *Gaon Panchayat* and the elected representatives of the beneficiaries, not exceeding nine) has to be approved by the Divisional Forest Officer concerned on the recommendation of the concerned Range Officer (Rule 7(vii)). The D.F.O. will also monitor, supervise and review the functions of the Committee (Rule 7(viii)). Rule 11 confers wide powers to the D.F.O. regarding the termination of individual membership and dissolution of the Executive Committee.

ASSAM FOREST POLICY, 2004

The preamble to the Assam Forest Policy, 2004 states that Assam falls under one of the recognized mega biodiversity zones of the world. Despite having priceless treasure of flora and fauna together with the most suitable natural conditions for sustainable growth of forestry, the State has been progressively losing its biodiversity as well as a vast

expanse of forest due to various reasons including excessive biotic pressure. The protection and conservation measures deemed to be implemented with the sole responsibility hitherto vested in the Forest Department appeared to be inadequate due to the following reasons:

- (I) The aftermath of the great earthquake of Assam in 1950, annual recurring floods in the Brahmaputra and its tributaries, changing river courses and erosions resulted in lakhs of displaced people. The reserved forests of Assam throughout the 60's, 70's and even today seem to be targeted as the most suitable space for rehabilitation of human as well as cattle population.
- (II) Massive population increase and organized group encroachment in the reserved forests, at times backed by groups of armed militants from the 80's onwards.
- (III) Grazing and poaching in the protected areas.
- (IV) Inadequacy in addressing the needs of the people from the forestry sector. In view of diminishing natural resource base in the state which has become insufficient to meet the genuine demands of the people, illegalities thrived forming various nexus leading to forest destruction.

Therein, lies the need for a separate Forest Policy for Assam. The Policy while having maintenance of environmental stability, conservation of natural heritage of the state and checking denudation of forests and soil erosion etc. as some of its objectives, also aims at providing livelihood support to the fringe dwellers of Protected Areas by encouraging sustainable eco-tourism and eco-development (Section 2.1). It aspires to meet the bonafide livelihood needs of fuelwood, fodder, bamboo, canes, small timbers and other N.T.F.Ps of the rural poor and the tribals in particular, with due regard to the carrying capacity of the forests. It seeks to create a massive people's movement with special involvement of women for achieving the objectives and to minimize pressure on forests under the community based conservation programme. Important is the fact that the policy recognizes the need for **“symbiosis of traditional knowledge and modern technology”** to achieve the goals of forest conservation (Section 2.1) and has as one of its objectives **“encouraging conservation of genetic resources and development of traditional knowledge repository of Assam”** (Section 2.1). It also states that the mega-biodiversity existence of Assam will be protected and developed with the active involvement of the communities (Section 2.2.1) and that the forest cover of Assam will be progressively maintained through scientific sustainable forest management practices giving emphasis on the **traditional knowledge and understanding of the ethnic communities of Assam** (Section 2.2.3).

The Assam Forest Policy has many provisions which talks of the traditional or indigenous knowledge of the local communities, their customary rights and the need for the policy to reflect their needs and aspirations. Section 3.4 recognizes that N.T.F.Ps including medicinal and aromatic plants provide sustenance to the tribal and other people

residing in and around the forests. It provides that such produce would be sustainably managed and production enhanced with the objective of generating employment and income opportunities for the local people with emphasis on trade of bamboo and other N.T.F.P.s including medicinal and aromatic plants such as Agarwood and Patchouli etc. after adequate value addition (Section 3.6). Section 4.2.5 states that the abundant potential of people living in rural and forest areas would be tapped for sound participatory forest management and that efforts would be made to facilitate assistance from financial institutions to the forest dwellers engaged in forest based economic activities. Section 4.2.6 talks of the need of **benefit sharing**.

The Assam Forest Policy takes a sympathetic approach towards “encroachers who belong to the ethnic communities of Assam” who are traditionally and characteristically dependant on the forests who would be motivated to join the forest protection activities as economic stakeholders (Section 4.3.1.2). It says that providing sustainable livelihood support to the people who live in the fringe villages would be a major activity of the forest department so that the fringe villagers would work as real protectors of forests. It talks of the constitution of People’s Protected Area (P.P.A) inside forests where the settlers create community assets of forests along with the services required for their livelihood and that the Government of Assam should take necessary steps to convert the Forest Villages to Revenue Villages (Sections 4.3.1.4 and 4.3.1.5).

The Forest Policy exhibits remarkable sensitivity in the sense that it recognizes the customary practice of *jhumming* as “an emotional heritage mainly with the Hill tribes” and that the problem needs to be tackled with “due regard to local tradition and culture” (Section 4.3.5). Again, it seeks to arrest illegal grazing in forests by “raising awareness in the communities and with their active participation”.

As regards the rights and concessions of the communities, the policy states that these would primarily be for the bonafide use of the communities living within and around forest areas, especially the tribals, Scheduled Castes and other indigenous communities. While recognizing these rights and concessions, at the same time they are sought to be regulated in a manner which is in tandem with the carrying capacity of the forests. However, the policy seeks to ensure fulfillment of the requirements of the community when they cannot be accomplished by the rights and concessions by mandating that these “would be met by the development of Social Forestry outside the Reserved Forests” (Section 4.4.1).

The Assam Forest Policy talks extensively of the need for biodiversity conservation with one of the key areas being conservation of the Bio- Cultural Diversity recognizing that the diverse ethnic groups of Assam have mosaic of traditions and culture (Section 4.8.4), which are intrinsically associated with the biological diversity of the state thereby acknowledging the link between indigenous knowledge and biodiversity. One of the ways it seeks to achieve it is through intensification of survey and inventorisation of bio-cultural resources, with the survey including information on the distribution pattern of various species/ population/ community and the status of ethno-biologically important groups (Section 4.8.4). This provision can be interpreted as pertaining to the recognition

of documentation of Indigenous Knowledge of Biodiversity being as essential step towards protection of IK of biodiversity.

The Policy also focuses on the need for initiating a Forest Certification Process keeping in view global requirements so that export items produced by the local communities and artisans such as bamboo products, cane products, handicrafts and N.T.F.Ps have a greater value in the International market.

CONCLUSION

From the analysis of the forest legislation and policy of Assam, it emerges that the Assam Forest Policy, 2004 is far ahead of the rest in terms of the weightage it gives to Indigenous Knowledge, customary rights and local participation. It is a remarkable document committed to ensuring the livelihood security of local communities while ensuring forest preservation. It accords considerable importance to the indigenous knowledge of the local communities, the need for benefit sharing and suggest ways and means to bring about their welfare while always keeping the local paradigm and knowledge in perspective. It also recognizes the importance of documentation for protection of the bio-cultural diversity of the state and is attuned to the needs of the times in the sense that it talks of benefit sharing, the need for value addition of local products and for Forest Certification.

However, the drawback is that all these remarkable provisions are being contained in a policy document which lacks teeth as it is not legally enforceable. However, the hope lies in the fact that a policy document, though not legally enforceable, is a guiding legal document that influences the decisions of the courts⁷⁰.

It is imperative that if protection of biodiversity and the associated IK is to be achieved, the Government of Assam should take necessary steps to give effect to the policy decisions through amendment in the legislation (The Assam Forest Regulation) or by bringing forth new legislation.

CASE STUDY 2

CUSTOMARY PRACTICES RELATED TO INDIGENOUS KNOWLEDGE OF BIODIVERSITY: A CASE STUDY OF THE TIWAS OF ASSAM

INTRODUCTION

The theoretical knowledge on customary laws and practices acquired through the research was sought to be substantiated and supplemented with case studies based on

⁷⁰ . In the TN Godavarman case in the Supreme Court of India, the main petition has been filed in order to give effect to the Forest Policy of 1988

field studies among communities. One of such studies was undertaken among the Hill Tiwas of Pumakuchi village in Karbi Anglong district of Assam, which the researcher had visited in January, 2005. The Tiwas or the Lalungs constitute a Scheduled Tribe of the state of Assam, with a section of them known as the Hill Tiwas residing in the foothills and hilly areas of Karbi Anglong district. The Lalungs or Tiwas form a part of the great Indo- Mongoloid tribes who migrated from their original abode in Tibet and Western China to the north-eastern part of India prior to the birth of Christ.⁷¹ The village of Pumakuchi is composed exclusively of people of the Hill Tiwa tribe with the total population of the village being 191 persons and the total number of households is 36. The primary occupation of the people is sedentary agriculture though all the households also practice some limited amount of *jhum* cultivation as a remnant of their past culture.

OBJECTIVES OF THE STUDY

The field study was conducted with the purpose of achieving the following objectives:

(1) Identifying and studying those mechanisms in the traditional culture of the people which can be deemed to play an important role in the protection of the indigenous knowledge of biodiversity. The field study was conducted with the hypothesis that there are inbuilt mechanisms within the culture of local communities which protect indigenous knowledge of biodiversity.

(2) Also, the study aimed at looking into those elements of their culture which contribute towards protection of biodiversity as it is quite feasible that there may not be mechanisms to directly protect IK but which by ensuring protection of biodiversity indirectly contributes to the protection of the associated IK.

SCOPE OF THE STUDY

The field study primarily concentrated on three aspects of the culture of the tribe, namely:

- (1) Religious beliefs and practices. The study sought to include with its scope all such religious beliefs and practices in which there is a direct or indirect association with the conservation of nature.
- (2) Village organization and the institutions through which the customary laws and practices are administered.
- (3) Traditional healing, with special emphasis on the attitude of the traditional healers or knowledge holders towards protection of their knowledge.

RELIGIOUS BELIEFS AND PRACTICES ASSOCIATED WITH NATURE

The Lalungs of the hills do not have any idol or temple; they may be regarded as animists; animism is defined as the belief that natural phenomena are endowed with 'life' or 'spirit', or the tendency to attribute supernatural or spiritual characteristics to plants, geological features, and climatic phenomena and so on.⁷² However, Hinduism in its crude form has found its manifestation in their worship of gods, goddesses and deities. Some of

⁷¹ Gohain, B.K., 1993, *The Hill Lalungs*, Assam: Anundoram Borooah Institute of Language, Art and Culture, p.4.

⁷² Seymour-Smith, Charlotte, 1986, *Dictionary of Anthropology*, Delhi: Macmillan Press Ltd.

their traditional deities bear likeness to the gods and goddesses of the Hindu pantheon. Their supreme deity *Mahadeo* bears resemblance to the Hindu God Shiva. The Tiwas of Pumakuchi village believe in innumerable supernatural powers, both benevolent and malevolent. It is to propitiate these powers that they observe many religious rites and rituals throughout the year where the sacrifice of pigs, goats, fowl and use of *ju* (locally brewed rice beer) are indispensable. These powers may be broadly classified into three categories- *mindei* (deity), *mathine* (spirit) and *khetar* (ghost). Within the village itself, there are numerous shrines called *thaans* dedicated to the numerous *mindei* the people worship. A *thaan* is a small clearly demarcated area having a small stone altar and surrounded by a patch of forest. The *thaan* and the adjoining forest may together be regarded as constituting a sacred grove. Sacred groves are recognized to be repositories of biodiversity protected through religious practices such as the presence of a presiding deity with the area varying from a few square metres to 25 hectares or more. They have been recognized to be of great significance in the context of conservation of biodiversity with these green patches constituting a unique example of *in situ* conservation of our genetic resources. Such areas show micro climatic conditions with their own distinct floral and faunal values.

The *mathine* or spirits are believed to reside in the nearby hills and forests. For instance, the spirit named *Kharine* is believed to dwell in the *khari* (hill streams) and may cause fever in a person if he or she displeases the spirit by making noise in the vicinity or throwing rubbish into the stream etc. However, it is easily appeased through small offerings like *koi-phan* (betel- nut and leaf). Again, the *Baghraj* is a benevolent spirit who resides in the jungles and offers protection against the attack of tigers. The greatly feared *khetars* or ghosts are believed to live in the jungles where they scare people by creating illusions, breaking branches and making peculiar sounds. Disease, death and other evil happenings in the village are attributed to the same. In addition, the people of Pumakuchi hold in great reverence ancestral spirits collectively referred to as *phitri* who are believed to reside nearabout the dwellings of their surviving kin in the bamboo groves. Thus, it is seen that the different categories of supernatural powers which the Tiwa people believe in all have their abode on the earth itself: in the *thaans*, the hills, jungles, streams or bamboo groves near the village. In order to avoid risking the wrath of the supernatural powers, the people observe numerous restrictions in the context of these places. My informant Ronemai Agar reported to me a case of a young man of a neighbouring village who in an inebriated condition, defecated in the hill stream where the spirit *Sajaboroi* is believed to reside and in coarse language, openly challenged the spirit to harm him if it could. A few months after that, he lost his young wife during child birth and his five year old son fell sick. He then called the *ojha* or religious healer who through divination came to know that he had angered some deity or spirit. On the advice of the council of village elders known as the *Gaon Sabha*, before whom he openly confessed his crime, he asked pardon from the spirit by sacrificing a pig and two fowls and giving a community feast. Only then did his son get well. Again, the most sacred *thaan* in the village is believed to be the *Andhari than*, dedicated to the god *Andhari*. It could be learnt from hearsay that once a Bengali businessman from a neighbouring town tried to open a stone quarry at this site but had to abandon the project mid way as several

misfortunes befell him as he had incurred the wrath of the deity by violating the sanctity of its abode.

The Tiwas of Pumakuchi village believe that there is a *jiu* (soul)⁷³ in every living being like man, animals, birds, fish, insects, trees and the like. This *jiu* is also present in inanimate objects like water, rocks, hills, forests etc. It is due to the presence of *jiu*, which they regard as part of the creator residing in all his creations, that the Tiwas revere all life forms and all objects of supernatural creation as sacred. Thus, the killing of animals and destruction of trees and forests is considered sinful by them. A question arose in my mind that in this society where all living beings are revered, why are such a large number of fowls, goats and pigs sacrificed during all the rites and rituals. On raising this question before the *deori* (priest) Ram Malang, he explained to me that when birds and animals are sacrificed for religious purposes, it is the deities who take the blame as they demand sacrifices for their propitiation.

The inhabitants of Pumakuchi village regard it a crime to take the life of any living creature; whether it be a tree or an animal. Even when poultry or pig or goat is being killed for food or when a tree is felled down for some domestic use, they utter the following *manthra* (incantation) to ask pardon from the gods: “Tuk chana khak chana sekam chana korlom chana” (A rough translation would be as follows: O Almighty, may no crime befall us for taking the life of this creature of yours!). The people also observe many rituals to atone for this sin. The *Maiha Choma Rowa* ritual is observed to ask forgiveness of the supreme powers for the sin they commit in killing many insects and pests while burning down the forests for *jhum* cultivation. It is obligatory upon every household to perform this ritual; however as a means of reducing the expenditure, a number of families as a group or all the families of a particular clan perform it together.

Thus, from the above instances, it is obvious that the religion and world view of the Tiwas is closely intertwined with nature, with the gods and spirits whom the people revere believed to reside in the forests, jungles and streams within and near the village. Nature being the abode of their gods, the Tiwas abstain from destroying or desecrating these sacred places, which in turn is reflective of the fact that respect for nature and its conservation is very much a part of the cultural ethos of the people. While restrictions, fines etc. pertaining to these sacred spaces are imposed by the village council, the biggest deterrent however is fear of divine punishment. The very fact that the Tiwas believe in the same soul or *jiu* pervading all objects of creation both animate and inanimate is a reflection of the fact that their religion and culture is rooted in nature and thus its conservation is very much an inbuilt mechanism of their culture.

In the nearby hills and jungles, wild animals like *chamuma* (elephant) and *songkaiti* (tiger) are to be found. Elephants during harvest time rampage their crops but the people bear no ill will towards them. When the depredations go beyond tolerance, the only thing that they resort to is chasing away the wild animals by raising a hue and cry, beating drums, lighting fires and keeping all night vigil. Talking to the villagers, I could perceive that they had accepted the fate of their months of patient labour being stamped out in a

⁷³ The concept of soul is found in almost every human society like the *aatma* of the Hindu religion, the *netesen* and *nazael* of the Athapascan tribes, the *nekas*, *aruntam* and *nuisak* of the Jivaro head hunters of Southern Brazil etc. Among the neighbouring Karbi tribe, the equivalent concept of *karjong* is present.

single night's feeding frenzy with stoicism and bearing no ill will to the elephants. According to my informant Rupam Malang, elephants are Gods to the local people and that they could not deny the Gods their share of the harvest.

It is in the light of such conservation friendly practices of local communities that it can be argued that 'attempts for conservation of bio-diversity need to be integrated with the cultural ethos of the local communities developed through centuries of experience, one of the arguments for participatory conservation being that local or indigenous people have traditional concepts of oneness with the environment or of kinship with the natural world'⁷⁴. Again, it is pointed out that administrators, planners and conservationists must take into account the very large reservoirs of traditional conservation knowledge and experience within local cultures that provide a significant basis for sound management policies and environmental planning actions.⁷⁵

VILLAGE INSTITUTIONS AND ENFORCEMENT OF CUSTOMARY LAWS

The *Gaon Sabha*, with its multifarious activities of settling disputes, maintenance of rules and regulations, welfare and ritual functions, serves as the apex political body of Pumakuchi village. It is composed of seven members headed by the *gaonburah* (village headman). The other members are the *deori* (village priest), the *hadari* (assistant to the deori), *barika* (the deori's messenger) and the three *randhani* or *maisakar sowa* (persons selected to cook ritual feasts). All disputes of the village are settled by this body. The punishments for different types of offences are imposed by the *Gaon Sabha* depending on the seriousness of the offence committed. The *Gaon Sabha* as well as religion customs forbid desecration and destruction of the sacred spaces, which is believed to bring about harm not only to the perpetrator but also to the entire village. The patch of forest surrounding the *thaans* is the most zealously protected with it being totally forbidden to cut down trees here. Nor are the villagers allowed to collect fallen twigs or fruits from these areas. It is only for the cooking of the community feasts that trees could be cut down and the fruits may be partaken of by the small children after the *deori* first performs a ritual offering the first fruit of the season to the resident deity of the *thaan*. The village council punishes the offenders either by imposing a small fine depending upon the economic condition of the offender and where the offence is big, asks the offender to sponsor the ritual required to atone for his sin and/or ask him to give a community feast. Women and children who have taken fruits or twigs from the *thaans* are usually let off with a warning not to repeat the action in future. The villagers abide by these rules more due to fear of divine retribution than social sanction. Mothers warn their little children never to venture into the *thaans* scaring them with stories about the wrath of the deity.

⁷⁴ Sarma, U.K., "Experiences in Protected Areas, National Parks and Participatory Conservation with Emphasis on Kaziranga National Park, Assam", *Journal of North East India Council for Social Science Research*, Vol.28, 2004.

⁷⁵ *ibid.*

With regard to the non- sacred spaces of the village, a person does not require any permission for cutting trees on his own property. However, custom requires that he plant a sapling in place of the tree that has been felled. In the context of the lands owned by the clans, permission of the clan elders is required to cut down a tree. In the case of village lands, the *Gaon Sabha* may grant permission to cut down trees subject to payment of a fee depending upon the economic condition of the party. Cutting down a tree without permission would entail a fine and generally the offender is made to plant five saplings in lieu of it and tend to them as well. In this manner, the *Gaon Sabha* shows exemplary conservation ethos.

The village also has a Village Defense party, a registered political body for village protection. It is composed of thirteen members and these party hands over thieves, illegal timber loggers and other culprits to the police and where not possible alerts the police when such offences are being committed. It receives meager aid from the government in the form of blankets, torches etc. required to keep vigil at night. The role of the Village Defence Party in protecting their forests against logging is extremely laudable and they have been able to control it to a large extent. In particular, bamboo stocks have being overexploited in every corner of the Karbi Anglong district and the village of Pumakuchi is no exception. Bamboo fetches a price of about Rs. 890/- per ton (2004-05) and selling bamboo has become a lucrative occupation for the youths of the region. One would be surprised to see how deep inside the forest, climbing steep hills, trucks have penetrated for bamboo extraction!

TRADITIONAL HEALING

The Tiwa inhabitants of Pumakuchi attribute ailments and disease to three causes which are as follows:

- (1) Disease due to natural causes when there is a hindrance to the normal functioning of the body, mostly brought about by the individual's behaviour. For instance, the people attribute a cold to over exposure to the environment, a stomach ache to the over consumption of oil, chillies etc.
- (2) Disease brought about by malevolent supernatural powers like *mathine* and *khatar*.
- (3) Disease brought about through black magic and witchcraft.

When a person in Pumakuchi falls sick, the *ojha* or traditional healer is called upon for treatment and healing. An *ojha* needs to be adept at performing *soma* (divination), needs to possess indepth knowledge of the properties of various herbs plus expertise in the art of propitiation of the spirits and ghosts. He also needs to know the art of counter- magic in order to remove an evil spell cast on the sick person.

The *ojha* has a very sound knowledge of the various herbs found in the locality which he uses to cure different ailments. For instance, to cure epilepsy, a paste is made of *Brahmi*, a herb locally known as *manimuni* and seeds of a particular gourd along with *amla* which is then to be had twice a day for ten days. Again, the bark of the *Arjun* tree along with some other herbs is use to set fractured bones. For minor ailments like headache, fever or stomach ache, the *ojha* usually prescribes the locally brewed rice beer after he has chanted some incantations. All the villagers testify to the medicinal properties of their

traditional rice beer which they attribute to the fact that a number of herbs go into its preparation which have medicinal properties.

On interviewing the *Ojha*, I could learn that with respect to the indigenous knowledge of healing, there is no secrecy pertaining to the art of mixing and combining various herbs to achieve the desired result. In his words, this knowledge is known to all the villagers. The potency of his medicines lie in the incantations which he utters while preparing them or administering them to the patient. This knowledge is however a closely guarded one. An aspiring *ojha* needs to learn the art from a teacher and has to undergo rigorous training after the completion of which he offers a *kuruman* (token remuneration to the teacher). While performing religious healing, the *ojha* always needs to invoke the name of his teacher.

On questioning him regarding the interest of the younger generation in this art, he says that the youth are gradually losing interest in it as people nowadays are turning more to allopathic medicines and only those who cannot afford it turn to indigenous healing. Moreover, there is no economic gain in it as the *ojha* is only given a token or ceremonial remuneration. For instance, at a community feast, he is offered the head of the fowl as a sign of his high position in the society. In his words, to the youth of today, money matters more over such gestures of respect. While discussing and trying to inform him in a simplistic manner the problems of biopiracy and the invaluableness of their indigenous knowledge of healing, he expressed incredulity that their knowledge could have such demand but asserted confidently that nobody could steal their knowledge from them as the herbs would have no value without the incantations! The educated youths of the village however, were more successful in getting a rough idea of the problem.

Thus from this case study, it was clearly evident that the local community did not in any way guard its knowledge of biodiversity, except for the incantations and spells which they zealously guarded! However, conservation of biodiversity is very much ingrained in their culture and there is necessity for making the people aware of the need to protect their IK and the existing institutions in the society could be harnessed to do so, so as to achieve both conservation of the biodiversity as well as the associated IK.

CONCLUSION

From the theoretical research and case studies, the overall picture which emerges is that customary laws and practices of local communities have played a crucial role in the context of conservation of biological diversity and the sustainable use of its components. There may be a few exceptions; customary laws need not be always be people and society or even biodiversity friendly. Although they have an inbuilt system of checks and balances to preserve their rich surroundings, there may be laws that are not very practical and advisable. Nevertheless, the culture, religion and world view of most communities living in close interaction with nature have a deep sense of oneness with the environment or of kinship with the natural world. This is amply reflected in the case study of the Tiwas of Assam; their religious beliefs being based on the idea that the same soul permeates all life on earth. Their gods do not reside in a far away 'heaven' but in the surrounding hills, streams and jungles, which are conserved so as not to arouse the wrath of the deities. These religious beliefs are given effect to with the aid of customary laws

which are enforced by the village institutions. The customary laws of the community pertaining to the use and management of natural resources reflect a deeply ingrained ethos of conservation of nature. However, as reflected in this case study and the theoretical research, in the Indian context, it is very difficult to find customary laws which directly protect IK. For instance, the Tiwa medicine man had no inhibitions in sharing his IK of medicinal plants with all, believing that the potency of his medicines lie with his incantations which are a closely guarded secret. In India, we do not easily find customary laws and practices that give direct protection to IK, the reason being that in most communities, there is common ownership of land and resources. Any ownership-whether of the resource or associated knowledge- is generally seen from a community perspective. Again, the Indian tradition does not believe in withholding knowledge from others but insists on its free and wide dissemination. Thus, in the Indian context, it would be erroneous to look at indigenous knowledge in isolation. A holistic approach is called for: one must pay equal attention to factors that have a direct or indirect influence on conditions in which these knowledge systems are developed.

In the context of the place of customary law in the modern legal system, it is worth mentioning that customary laws relating to natural resources were never considered important enough to uphold or integrate into formal law during the colonial period. Sadly, this trend of centralized legal and policy systems ignoring and displacing or dominating customary laws continued after independence too as reflected in legislation such as the Wildlife Protection Act. Nevertheless, the saving grace is that customs and customary practices have been accorded recognition by the Constitution. Important in this context are the provisions pertaining to the Scheduled Areas and Panchayat. New legislation like the PESA, the Biological Diversity Act could be harnessed which could play a crucial role in removal of dissonance between tribal tradition and the modern legal institutions.

An unfortunate trend in recent times has been the requirement demanded by the courts of very high standards of proof regarding the existence of customary rights and laws. The Indian Supreme Court verdict of 2003 in the case of the Dhimar fishermen emphasis the point that customs are only a source of law and they become such a source only when they are recorded in statutes or are recognized by courts. Such a trend would be very detrimental to the protection of IK and biodiversity, which the communities strive to protect through their customs and practices.

Thus, it is imperative that customary law is accorded its due weightage in the Indian Legal System. To revive customary law the first and the most important step has to be giving it recognition by judiciary bodies of the country - from the highest to the lowest. Recognition can be given to them by reading more into the existing provisions of various legislations, being more tolerant to customary law.

Once all the existing provisions of the few Acts giving recognition are used to their best, one needs to look at what amendments can be made to give customary law a place in the legal structure.

Another move should be directed at enabling local bodies to evolve appropriate laws that recognize the customary rights. They should be free from the shackles of bureaucracy and be allowed to function on their own with more participation from the local people.

We do not have to make either statutory or customary law subordinate to the other. Instead a realistic and practical approach should be taken to handle the interface between the so-called formal and informal laws. A balance has to be struck where customary laws are not relegated to some position way beneath other laws. They have to be accepted as a law *per se* ,not mere source of law.