

Exploring the Role of Community and Customary Law in Natural
Resources Management in the Legal Pluralist Societies of North
East India

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A large matrix of laws governs biodiversity and natural resource conservation in India. There is a large body of documentary and scientific evidence to show that concentration of biodiversity is higher in rural and tribal belts of India than in the urban spaces. In this context, it becomes imperative to look at the legal systems prevailing in the rural and tribal parts of India with respect to conservation of biological resources. Unlike urban areas, which are largely governed by codified statutory laws, the rural and tribal parts of the country are governed by a wider range of laws which could be termed as folk law, indigenous law, unofficial law, customary law, traditional law or norms formulated by local communities in addition to the statutory laws. Although there is a slight difference in the connotation of these terms, we could club these as people made laws, as against the law, which is enacted by the Parliament or the State Legislatures. The latter, however, are also legislated by people- representatives of people. The laws we are referring to in this paper are the ones drawn by communities for the effective governance or management of resources under their stewardship.

Official statutory laws related to biodiversity conservation are applicable in most parts of India, but instances of legal pluralism have come to light in the past and have also been documented in some cases. Legal pluralism means a situation or an administrative unit where official statutory and unofficial folk or community/ customary laws are simultaneously being implemented for the management of the biological resources. This happens due to several reasons including acknowledgement by the official state agency of better management of resources by enforcement of folk laws. At times, some areas are so remote that the government machinery is unable to manage the biological diversity whereas people residing in such areas have better proximity and a higher stake in the conservation of the resources. In such cases, official laws become ineffective and people frame their own rules and regulations (unofficial law) for the management of the resources. These rules are largely developed for the governance of micro-areas and differ from place to place. It has been observed that in some cases these rules are new in nature; in other cases, rules have been found to be emanating from traditional and indigenous practices in resource conservation.

Instances of folk law being instrumental in several successful community based conservation cases have been revealed but very few have been documented in a systematic and detailed manner. This paper was supposed to look at role of community and customary law in biodiversity conservation for the country but due to paucity of time and resources had to be limited to the North east region. North east region is unique in the sense that it is one of the few regions in India where customary laws have been given formal recognition by the state statutory laws. There are specific state laws in the different states that uphold the decisions of the village councils in those states.

Introduction

The North Eastern region in India encompassing the seven states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura is a legal pluralist region implying prevalence of plural legal regimes within a given political system. Indigenous communities inhabit this region and indigenous folk law governs different spheres of their lives within the society. At the same time, formal law¹ enacted both at the Centre and at the state level in the country is also extended to the region.

The management of natural resources in this region is largely vested in the local communities, unlike the rest of the country where large tracts of forests, water bodies and mineral reserves -are under government control. The process of nationalisation of forests in India began during the late nineteenth century during the British reign. Water as a resource for uses including navigation, fisheries, drinking water, irrigation and river conservancy, too came under the control of government authorities during the same period². However, when parts of North east India came under British regime, the British rulers preferred to follow the policy of non-interference for this region in administrative matters. They did not alter the basic structure of the authorities, which dispensed justice, nor did they affect general customs³. They merely promulgated procedural rules for administration of justice. Thus, management of natural resources remained with the community to be governed by social practices and traditional customary laws having the consent of the community. During the British time and even later in the post colonial era formal laws were made to enable and recognise the authority of village councils and the folk law.

After independence and with the adoption of the Constitution in 1950, the tribal areas of the North eastern region were given a special status and placed under the sixth schedule thereof to provide for the administration of tribal areas in North east India by creation of Autonomous districts/ regions and Autonomous District Councils. Some states in North east India opted out of this. According to the provisions of the sixth schedule of the Indian Constitution, village councils or courts established or recognised by the Autonomous District Councils could try certain categories of criminal offences and civil disputes.

During the British period, the tribal areas of North east region except those of Manipur and Tripura, formed a part of the province of Assam⁴. In the present day, the sixth schedule status is applicable to four states of the North east, viz., Assam, Meghalaya,

¹ India being a federal country enacts laws at two levels: one, at the Centre by the Parliament; and two, at the State level by the State Legislature.

² Siddiqui, I.A. 1992. 'History of Water Laws' in Water Laws of India, Editor C. Singh, ILL, New Delhi . Pp 296-306

³ Das, J.N. 1987. A Study of Administration of Justice Among the Tribes and Races of North Eastern Region. Law Research Institute, Guwahati.

⁴ In 1971, the state of Assam was reorganised under the North-Eastern Areas (Reorganisation) Act, 1971 and new Union Territories and states were carved out of Assam: Arunachal Pradesh, Manipur, Meghalaya, and Mizoram, and Tripura. Nagaland became a state in 1962 vide the State of Nagaland Act, 1962.

Mizoram and Tripura. Most of the tribes of Arunachal Pradesh and Nagaland have been declared as Scheduled Tribes.

Legal Pluralism in North East India

As a result of the special status accorded to the states in North east India both in the pre- and post- independence era, a number of new institutions were created in addition to the continuance of the recognition accorded to the existing traditional village and community institutions. This led to a plurality of legal systems being followed in ~~most~~ some parts of North East India, ~~especially those forming part of the sixth schedule areas.~~ On the one hand there are the formal modern central laws that are extended to these states; besides, there are traditional customary laws emanating from within the community, which are being recognised by the modern institutions as well, ~~and in addition,~~ And with the creation of with the Sixth Schedule states creating the Autonomous District Councils in the Sixth Schedule States, which have been empowered⁵ to enact laws for the region within their jurisdiction, there is a third set of laws ~~applicable to enforced within~~ the same region. The laws made by the Autonomous councils are closer to customary laws and social practices of local communities in nature and are applicable in cases where both the parties in a dispute are tribal.

~~At present there are a This also leads to the formation of a~~ number of institutions associated with administration offering justice or dispute settlement in North east India the given region. On the one hand, we have the traditional institutions dealing with customary and folk laws. We have the formal administrative body like the Deputy Commissioner in some of the North Eastern states, which administers both where the Executive and Judicial functions are still not separate. At the same level for certain other states, there is a formal judiciary with the High Court bench as the apex body within the state. And the third body at the intermediary level, found in the sixth schedule states is the Autonomous District Councils, which are also vested with judicial powers.

North East Indian states that do not fall under the sixth schedule continue to be governed by the Rules for Administration of Justice⁶ framed by the British in the late nineteenth century⁷. This is true for the states of Arunachal Pradesh, Nagaland and Manipur where no Autonomous Councils exist. Manipur too had enacted its own special rules⁸ for administration of justice in the hill areas.

A major distinction between the Sixth schedule states and ~~non sixth schedule states is a non-sixth schedule state is~~ regarding the application of Acts of the Parliament and the State Legislatures in these states. The sixth schedule bars the application of the Acts of the Parliament and the State Legislatures to the Autonomous Council areas in the subject matter where the latter are authorised to make laws (See para 3 of the Sixth schedule as

⁵ Para 3 of the Sixth Schedule of the Indian Constitution, 1950, empowers District Councils and Regional Councils to make laws relating to certain subjects enlisted in the same para.

⁶ Rules of Administration of Justice were promulgated at different times for different areas, superseding the previous ones. The first set was issued in 1872 under the Garo Hills Act 1869 that was extended to the Naga Hills.

⁷ Supra note 3

⁸ Manipur Hill Areas Village Authorities Act, 1956.

Annexure 1). Management of forest (excluding reserved forests), which would include wildlife, and use of any canal or watercourse for the purpose of agriculture are some of the subjects in which the Autonomous Councils are authorised to legislate. ~~form a part of this list.~~

This implies that the Indian Forest Act, 1927, the Forest (Conservation) Act 1980 and the Wildlife (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.

Biodiversity of North East India

The North East India is rich in biological diversity and contains more than one-third of the country's total biodiversity. The region is considered one of the 18 hotspots of the world. The region has at least 7500 flowering plants, 700 orchids, 58 bamboos, 64 citrus, 28 conifers, 500 mosses, 700 ferns and 728 lichen species. The region is equally rich in faunal diversity. An estimated 3624 species of insects, 50 molluscs, 236 fishes, 64 amphibians, 137 reptiles, 541 birds and 160 mammalian species have been identified so far⁹. The region is also rich in terms of genetic and ecosystem diversity. Some of the important gene pools of citrus, banana and rice are reported to have originated from this region. The ecosystem diversity of the region ranges from tropical ecosystems to alpine ecosystems in the Himalayan ranges and also includes wetlands, flood plains, riverines and aquatic ecosystems. A wide variety of man-modified ecosystems such as jhum agroecosystem, wet rice agroecosystem and alder based agroecosystem contribute towards the rich ecosystem diversity. An estimated 33% of the total biological diversity of the region is endemic.¹⁰

Folk Law in Natural Resources Management in NE India

Natural resource management practices in North east India are not of recent origin. These have been age-old practices being refined over the years and handed down from one generation to another. To reiterate, large tract of land, forests, water bodies ~~Since ownership over land, water~~ and resources therein including mineral reserves in these states have been under the management of local communities, clans, and families~~were considered to be common property,~~ hence people had framed their own social norms, rules and regulations for the utilisation of the resources based on the resource requirement and availability.

Based on the socio-economic needs, people followed a practice of setting aside certain areas as forest and river reserves. The practice of maintaining sacred areas or groves and lakes was to a great extent related to watershed conservation and also to meet the religious needs to a certain extent. Certain practices have been developed to provide for livelihood security. And in more recent times, it has been noticed that some communities

⁹ Barik, S.K and V.T.Darlong in Sustainable Management of Forests – India; editors A. Arunachalam, M.L. Khan (2000), International Book Distributors, Dehra Dun.

¹⁰ Ibid Barik, S.K and V.T.Darlong in Sustainable Management of Forests – India; editors A. Arunachalam, M.L. Khan (2000), International Book Distributors, Dehra Dun.

are involved in regeneration of degraded forest stretches by formulating their own rules and regulations, which have the sanction of the community members.

1) Religious Needs

The concept of sacred groves is common in Meghalaya (*Law Lyngdoh*, *Law Niam*, *Law Kyritang*) and Manipur (*Nag Vans*). In Meghalaya, approximately 1000 sq. kms. is under sacred forests and in big patches¹¹. This also provides protection to water sources, enhances the quantity and quality of ground water, conserves soil and serves as habitat to many species of flora and fauna¹². Degradation of these sacred forests is now being observed. Those that are still well preserved are the ones close to the state capital, Shillong and serve as water sources for the township.

The Monpa tribe in Arunachal considers certain lakes and water bodies as sacred because they believe that their deities reside there. One is not supposed to defile the sanctity of such areas. Speaking loudly, throwing garbage or defecating in the vicinity of such areas is prohibited. Violation of these beliefs and rules has been found to be fatal in cases as recent as seven years ago in 1994¹³.

During festivals and religious ceremonies, parts of different animals and plants are used. For example in the Mloko festival of the Apatanis [in the Lower Subansiri district of Arunachal Pradesh](#), paw of a monkey is required each year. To procure this, one village goes on a community hunt and does not kill more than one monkey, thereby ensuring availability of this resource for the years to come. The Adis [of Arunachal Pradesh](#) consider the tiger to be their elder brother; hence even an accidental killing of the animal is followed by a rigorous penance.

2) Need based reserves

This is apparent in the concept of Asha Ban amongst the Jamatia tribe in Tripura and the Village safety and supply reserves amongst the Mizos in Mizoram. The concept of safety and supply reserves in Mizoram dates back to as early as 1872. The safety reserves were maintained to protect the water source of the village. No extraction of any kind is allowed from such forests. As a result these forests are rich in flora and fauna diversity. A supply reserve forest is maintained to meet the personal *bona fide* needs of the community members. Approximately 2648 sq. km. of forests are under village safety and supply reserves¹⁴.

Asha Van: This concept has its origin in the resource needs of the villagers. Each Jamatia village used to maintain a forest surrounding its village as a protective barrier from their enemies. Gradually, this forest began to be used to meet some needs of the local people

¹¹ Tiwari, B.K., Barik, S.K. and Tripathi, R.S. 1998. Biodiversity value, status and strategies for conservation of sacred groves of Meghalaya, India. *Ecosystem Health* 4:20-32.

¹² These sacred forests in Meghalaya are home to more than 514 plant species of which at least 50 are rare and endangered (Tiwari et al).

¹³ Personal communication with Tsering, an educated Monpa youth from Dirang, in March 2001.

¹⁴ Supra note 119

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such as fuelwood, small house construction, etc., though in a sustained manner; extraction was regulated as per the rules framed by the local communities¹⁵.

3) *Livelihood security needs:*

Livelihood security needs are inherent in the practices of indigenous communities. One such practice is noticed among ~~This can be noticed in the practices of~~ the Apatanis ~~community~~ in Arunachal Pradesh. The Apatanis are known worldwide for their natural resources management practices, which encompass an integrated approach to agricultural land, water and forest management that includes pisci-culture and livestock management¹⁶. Wet rice cultivation is practiced along with pisciculture on the same fields. Bamboo-pine groves of the Apatanis provide the raw material for their household needs. The homestead gardens provide rich nutritious well-balanced food. This practice of home gardens is common all over the North East India.

Another interesting practice seen amongst the Nagas of Nagaland is modification of the traditional jhum (shifting) cultivation. Unlike in the traditional jhum where all the vegetation of a plot is slashed and burnt, in this practice where alder trees are also growing, these trees are pollarded (i.e., cutting the entire canopy including primary and secondary branches from the main trunk at a height of about 2 m from the ground) and trunks are retained even during the cropping periods. The pollarded branches are either used as fuelwood or are burnt in the field along with other slashed vegetation to enhance the fertility status of the soil. Besides, the roots of the alder trees develop nodules for nitrogen fixing bacteria, thereby increasing the nitrogen content of the soil. Alder stumps of more than 200 years of age with a lot of root nodules are common in many alder jhum fields. This art of restoring fertility within a single jhum cycle ensures the repeated cultivation of a particular plot for a long time and at the same time it discourages a farmer to go to a new forested plot for clearing and cultivation¹⁷.

Amongst the Adis and also the Monpas of Arunachal Pradesh, rivers are under family or community ownership. Fishing rights can be sold on stretches of the river within the community. Stringent rules apply to fishing regarding use of fish traps. Among the Monpas, fishing is strictly prohibited on certain stretches of certain rivers and anyone violating this norm would die¹⁸.

4) *Regeneration of degraded forests*

A new trend of allowing for regeneration of degraded forest patches is being observed in different parts of NE India. People especially the youth is organising themselves and by following self restraint on resource use from such degraded patches by imposing self framed rules and regulations, they are regulating their resource needs. This has been observed in parts of Arunachal and also in Melaghar in West Tripura. In the former

¹⁵ Supra note 119

¹⁶ Pant, R. 2001. Customs and Conservation: Traditional and Modern law in Arunachal Pradesh, India and Annapurna, Nepal. Kalpavriksh and IIED.

¹⁷ Supra note 119

¹⁸ Supra note 13.

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situation, the youth have very innovatively tried to revive old practices of *dapo*¹⁹ to conserve their resources and with their own initiative. Whereas in the latter case, one local forest officer along with a local NGO mobilised the community to initiate this conservation effort and have succeeded in regenerating 15,000 ha of degraded sal forest.

In most of the above mentioned instances the community has been successful in natural resources management based on their own norms and regulations, which were acceptable to the members of the larger community. Such indigenous practices and regulations are spread over North east India but documentation thereof is limited.

Folk Law versus Formal law in Natural Resource Management

This section highlights how and why the formal laws legislated ~~in~~by the Parliament and often ~~at~~by the State ~~Legislature level~~ too become redundant and do not work in the North Eastern milieu. We shall look at ~~the~~ three national level laws relating to forestry and wildlife to understand this.

The basic reason for the formal law not to work in the NE India particularly in the field of natural resources management emanates from the fact that large tracts of forests and water resources to date are under community management. Whereas the formal laws in this field were framed to nationalise the resources and to govern the ~~ir~~ management of the nationalised resource thereafter. How could such formal laws work for forests under community management when the law has made no provision therefor? The ~~forest in NE were~~forests in NE were not brought under government control during the colonial rule and even to date a very small percentage of the total land is under government's control in this region in the form of reserved forests and protected areas (see table 1). Some examples of community management of these natural resources are mentioned above. The **Indian Forest Act 1927**, a colonial legislation was enacted for increasing government sovereignty over forests to exploit the resources therein. To ease this process, it was imminent to terminate all rights of local people on the resources including the land. It was formulated for regulating and managing government forests thereafter.

The bureaucracy of Independent India should have given more thought while pushing for the more recent enactment in the forestry sector, the **Forest (Conservation) Act 1980**. This enactment has overlooked the fact that the proportion of government forest is very little in the North east India. So how could one possibly try to enforce this in a state such

¹⁹ The earlier practice of *dapo* as narrated by Dr. Furer Haimendorf in his works was more in the form of a peace treaty. This practice began at the time of the earlier settlement of the Apatanis in the plateau. As the Apatanis were surrounded (geographically) by the Nishis tribesmen, Apatanis wanted to keep the inter-village and inter-tribal disputes to a minimum. The Apatanis are of the belief that formal treaties of friendship between the villages formed an integral part of their political system and assured peace. This treaty still holds the same meaning today, except that an element of warning has been added to it ever since they have started experiencing a natural resources crunch. In any forest land, irrespective of the ownership, if there is a likelihood of a dispute arising, a structure with three bamboos standing vertically depicting a *dapo* is erected at the boundary of such areas to reinforce the message. These days the literate in the community have started writing a note on a wooden plaque affixed at the centre of the structure. This is a note of warning that mentions the punishment and fines a violation would attract.

as Arunachal Pradesh where above 60% of the recorded forest is with the people and community²⁰. In a state such as Arunachal, where very little development has taken place and to even construct a small shop by clearing a private forest may attract the provisions of the Forest (Conservation) Act²¹ which entails seeking permission from the Central Government to do so.

If one tries to understand the culture and ethos of the indigenous people in North East India, one will realise the futility of the **Wild Life (Protection) Act** which was enacted by the Parliament in 1972 due to surmounting international pressure. This Act provides for the protection of wild animals and birds by enlisting these on schedules of Protected Species and by protecting their habitat by creation of protected areas such as Wildlife Sanctuaries, National Parks and Closed areas.

The proviso to Section 17A allows members of Scheduled Tribes to pick, collect or possess a specified plant in the district he resides for *bona fide* personal use.

Section 65 of the same Act, deals with rights of Scheduled Tribes to be protected. This section only exempts the application of the provisions of this Act to the hunting rights of the Scheduled Tribes of Andaman and Nicobar Islands. This concession can be extended to other tribes as well, in view of the fact that indigenous people have their own rules and regulations governing sustainable harvesting of animals and birds, as they need some of these for performance of rites and rituals.

A careful analysis of the formal and the folk law brings out a lot of inconsistencies between the two. And these contradictions are not limited to the law. Many policies and programmes of the government are also extended to the region without any application of mind. The Forest Policy of India 1988 is a case in point. It ~~does~~^{has} not taken into consideration the uniqueness of the NE region. It ~~was~~^{now} only in 2001, 54 years after attaining independence that the government is in the process of getting a forest policy drafted for the North East region. It is very refreshing to note that the policy in its present form has taken into account the uniqueness of the region and the requirements of the people thereof. The policy has specifically recognised the presence and existence of different kinds of ownership over forests – private, community, district council and states. The policy has also acknowledged the need to judiciously conserve the forests accommodating the rights and privileges of the local people.

The draft policy, keeping in mind the limited employment opportunities in the region, has stressed upon the need for qualitative improvement of forests for increased productivity leading to improved incomes; also by enhancing value addition opportunities within the

²⁰ Refer to Table 1.

²¹ One of the main objective behind the enactment of the Forest (Conservation) Act 1980 was to check the diversion of forest land for non- forest purpose, which includes cultivation of tea, coffee, spices, rubber, palm, fruit-bearing trees or oil-bearing plants or medicinal plants. Planting of the latter three shall not require permission from the Central Government if the species to be planted are indigenous to the area and such planting activity is part of an overall afforestation programme for the forest in question.

region. The policy has categorically said that bonafide use of tribal people should mean to include their bonafide livelihood requirements also.

The policy emphasises the involvement of the people and their traditional knowledge and use of efficient technologies in enhancing the quality of forest in denuded areas. For the first time, any forest policy has ever referred to empowering the tribal village councils (traditional institution) in forest harvesting. Normally any good effort on the part of the government comes out in the form of a policy; in this case, it is already two years and the policy hasn't proceeded any further than the draft stage and is probably gathering dust on some table.

The introduction of Joint Forest Management Programme in these states is mainly an attempt of the government to extend their governance over larger forest tracts. It is silly to expect people to accept JFM in areas where people enjoy 100% of the benefits. Past ill experiences of the local people with the forest department has made people lose ~~Why will the people want to share it with the government when they (people) have lost~~ all faith in the Forest Department.²² In states like Arunachal Pradesh, the State Forest Department agreed to extend JFM in the state in 1996 when all timber operations stopped, following the Supreme Court ban, and state was left with no other sources of earning revenue. The intention was to pump some money into the states by way of the Centrally Sponsored Schemes supported by the World Bank. The Centre made it mandatory for states receiving funds under the Centrally Sponsored Schemes in the forestry sector, to pass JFM resolutions in their respective states²².

The homogenous nature of the formal law is the major inhibiting factor in its efficacious application to the region, whereas there is plenty of scope for being creative about solutions in the law. -Forest and wildlife form a part of the concurrent list, where the Constitution empowers both the Centre as well as the State to legislate. States should legislate on such matters keeping in mind the uniqueness both vis-à-vis the availability of the resource and the ownership status of the resource. The Central law should provide these exemptions to the State so that it enables the State to legislate on matters even if these are in contradiction with the provisions of the Central laws.

Table 1: Status of Forest Cover in Northeast India (area in sq km)

State	Geographical area	Total forest cover (FSI, 2000)	Recorded forest cover (as per State Govt record)	Government forest*	Community used/controlled forest**
Arunachal Pradesh	83,743	68,847	51,540	18,593	32,949

²² Personal communication with CF, Sikkim Forest Department, March 1998.

Assam	78,438	23,688	30,708	21,520	9,188
Manipur	22,327	17,384	15,154	5,634	9,520
Meghalaya	22,429	15,633	9,496	903	8,593
Mizoram	21,081	18,338	15,935	7,077	8,858
Nagaland	16,579	14,164	8,629	1,163	7,462
Tripura	10,486	5,745	6,293	4,097	
				+	--
				2,195#	
Total	2,55,083	1,63,799	1,37,755	61,180	76,570

(Source: MoEF, NE RO, Shillong, 2000)

N.B.: (a) * Government forests are classified or recorded under three categories, viz., Reserved Forest, Protected Forest and Unclassed Forest.

(b) **Community used/controlled forests as in Arunachal Pradesh are generally termed as Unclassed State Forests (USF) in the official parlance.

(c) #Unclassified Government Forests in Tripura are not necessarily owned or controlled by the communities; hence shown as Govt. Forest.

Traditional Village Institutions versus Formal/ Modern Institutions

In this section, the author has dealt with the institutions associated with enforcement of the formal and folk laws. The formal institutions²³, the author refers to in this section are the two main judicial bodies created by the Indian Constitution: the Supreme Court at the Centre and the High Court at the State level, for the administration of justice in the field of natural resources management. In addition, the Deputy Commissioners and the State Forest Departments are also considered as formal institutions involved in forest resource management by way of dealing with violations relating thereto.

Strengths of the Traditional system

Indigenous and traditional village institutions have an edge over the modern formal institutions and more specifically in legally plural societies. Rule making, conflict resolution and imposing penalties and punishments are inherent functions of all people's

²³ The District Magistrates (DM) or any other magistrate of the first class are also empowered by the state governments to summarily try under the Code of Criminal Procedure 1898, any forest offence punishable with imprisonment for a term not exceeding six months, or fine not exceeding Rs.500, or both, but the author has not included any case from this level in this report due to insufficient information. In addition, the Forest Act empowers a forest official to compound offences and accept compensation for certain forest offences.

institutions. Natural resource management is also central to the people's institution. Some of the strengths of these peoples' institutions are mentioned below:

- 1) The basic advantage is that the traditional institutions constitute the local people, which help in two ways. Firstly, the local people are aware of the social systems within their society and are well versed with the social norms. Secondly, the members of the institution are a part of the same society and residents of the same locality, and hence would not delay in delivering decisions/resolving disputes. On the other hand, the members of the formal/ modern institutions are rarely from the same society. They find the ways of the local people strange and alien. These officials do not want to get involved in resolving disputes that may have major repercussions. Hence they merely try to postpone the decisions awaiting their transfer posting.
- 2) The procedure under the formal judicial system is normally complex and time consuming. Justice is delayed, thus depriving the aggrieved party of timely reprove. Justice is speedy in local and traditional courts²⁴. In cases of disputes and violations relating to natural resources management, speedy trial is preferable.
- 3) Rules formulated by the society and enforced through the traditional institution elicit better compliance. (Pant, 2002).
- 4) In traditional institutions, there is no system of appeal from the decision thereof. The decision is final and acceptable to the community and is binding. Supernatural powers are considered to be the only court of appeal and this is resorted to with the help of oaths and ordeals, which are very severe. In the case of the formal judicial system, there are several appellate levels and the order of any of these levels can be challenged further at the higher level, which prolongs justice/ the final decision.
- 5) The tribal communities are unaware of the different forums available for redress of their problems. Whatever little exposure these communities have had to the modern system of judiciary is usually not very amenable, hence these people prefer not to go to the formal sector.
- 6) Justice in the tribal society is based on the concept of restitution that brings relief whereas in the formal courts the litigation is normally adversarial in nature and relief is not guaranteed to the aggrieved party. The case normally depends on the strength of the party and the lawyer. It is not necessary that justice shall be meted out and the truly aggrieved party may win.
- 7) Under the traditional system of justice, an accused remains an honourable member of the society once he has been punished and there is no stigma attached. Whereas in the modern system, even after being punished the accused is not able to get reformed or rehabilitated due to the stigma society attaches to his crime or violation.
- 8) Court expenses can turn out to be very expensive for the litigant which includes the lawyers fee, court fee, travelling expenses etc; whereas the village institutions are situated at a more accessible distance and do not involve any court or advocacy fee. Sometimes the disputing parties have to bring some ceremonial

²⁴ For examples read Pant, R. 2002. Customs and Conservation: Traditional and Modern Law in Arunachal Pradesh, India and Annapurna, Nepal. Kalpavriksh and IIED.

gifts to the mediators and often the triumphant party offers a feast to the community if it is a major dispute.

- 9) Forum shopping: In instances where the aggrieved party has an option to chose from a number of forums for conflict resolution, pPeople prefer to go to traditional institutions for resolution of conflicts; one reason being that the penalty is many a times set according to the paying capacity of the violator; or else at times need not be paid immediately or can be deferred to a later date.

Decisions of the Modern formal institutions: the implementation process and its implications/ impact

In this section, the author with the help of two Supreme Court cases tries to illustrate the manner in which the highest judicial body in India has completely disregarded the traditional and customary practices of local communities in resource management. The Court has without due application of mind delivered orders which have had major repercussion at the national level. The orders in these cases reflect an oversight on the part of the judiciary in recognising the communities' role in natural resource management. Folk laws governing such efforts and indigenous practices in North East India have been ignored completely.

- (1) T.N . Godavarman vs. Union of India

This case has had far reaching implications on the forests of the entire country. The first interim order of the Supreme Court on 12th December 1996 granted a blanket ban on felling of timber in all forests and directed the application of the Forest (Conservation) Act, 1980, to all forests irrespective of ownership or classification. In some areas, the Court issued a ban on felling of any tree. The Court even issued a ban on the movement of cut trees and movement of timber from the northeastern states of India. Functioning of all saw and veneer mills were halted in some parts of Arunachal. Implementation of such an order in the state of Arunachal is nearly impossible considering the vast stretches of remote forests in the State and the limited resources at the disposal of the Forest Department for the implementation and monitoring of the order. The enforcement of provisions of the Forest Conservation Act, which this order seeks to reinforce, is a difficult task in a state such as Arunachal Pradesh, as the liberal definition accorded to forests by the Court, would practically cover 80% of the State. In pursuance of the Forest (Conservation) Act, seeking permission from the Central Government for the diversion of forest land for non-forestry purpose would flood the office of the Ministry at the Centre by applications from Arunachal Pradesh and this seems a bit impractical.

There is no doubt about the fact that legal felling in most forests of the country has been stopped with the application of the Forest Conservation Act and the reinforcement thereof. But this has had little affect on arresting illegal felling. Rather illegal felling has increased in many areas as this SC order has rendered many forest villagers and workers jobless especially in the states of Assam and Arunachal Pradesh. The ban has been effective in stemming illegal felling of timber species in the forests of Arunachal Pradesh to a certain extent, but in the last 2-3 years people have found new and ingenious ways of

felling and transporting timber despite the court order. This has given rise to another trend of illegal extraction of highly valuable medicinal plants in huge quantities from the state. Instances of over exploitation of other NTFPs such as cane from West Siang district and of star spice from West Kameng district of Arunachal Pradesh have been noted.

The court in the entire judicial process has overlooked instances where local people have succeeded in resource management through on going traditional practices and in some places through the revival of traditional/customary forest management practices. The court has completely ignored the fact that at the micro level in many parts of the county, communities have either framed new rules or adapted earlier ones for protection and regeneration of natural resources. The SC has undermined the authority and efficacy of the traditional institutions in resource management. The Court in its order could have delegated the authority of monitoring the implementation of this order to the traditional and peoples' institutions, which are the most decentralized agencies in the state.

(2) Centre for Environmental Law (WWF – India) vs. Union of India, W.P. © No. 337 of 1995

This petition filed by WWF – India in 1995, prayed that the Collectors be directed to discharge their statutory duties as entrusted under Section 19 – 25 of the Wildlife (Protection) Act 1972, which included enquiring into and determining the existence, nature and extent of the rights of any persons in or over the land comprised within the limits of sanctuaries/ national parks. The collector is to issue proclamations and dispose of claims as expeditiously as possible. The Supreme Court, in its order dated 25th August 1995 directed the state governments to complete legal formalities. In another order dated 22nd August 1997, the Court directed the state governments to complete the procedures for settlement of rights within a year's time.

This decision of the Supreme Court had a negative impact. The bureaucracy got an opportunity to denotify protected area under the pressure of industrial lobby in some parts of the country and in other parts, the procedure for settlement of rights was summarily **dismissed** and rights abridged. Whereas, forest officials or collectors in areas where communities have shown success in resource management could have recognised these efforts of local people. If the officials were convinced regarding the conservation efforts of the people, they could have while determining rights, allowed the existing rights of people which is possible under the Wildlife (Protection) Act.

There was space for the Judiciary to be wiser in delivering its verdict especially with respect to North east India knowing the uniqueness of the region. For areas where customary laws could have governed management of the region, the administration could have given official recognition to these.

Settlement of Disputes in the traditional institutions; the implementation process and its impact

Very few disputes relating to forestry and water resources come to the High Court level (which is the highest body and the only independent body of judiciary available at the state level in most of the states of North east India) especially in states such as Meghalaya, Nagaland and Arunachal Pradesh as large stretches of these areas are still under local governance and disputes thereupon are dealt with by the peoples' traditional institutions. In the case of an intra village dispute between two tribals of the same ethnic group, the local village council deals with the matter. In the case of an inter village dispute if it is between two tribals hailing from two different ethnic groups, then normally the case goes to the Deputy Commissioner (which is the executive cum judicial functionary at the district level), who tries to resolve the problem with the help of the head men and political interpreters. In the Sixth Schedule states, it is the District Autonomous Council, which decides matters between a tribal and a non-tribal party.

It is evident on looking at the few cases related to forestry that have reached the High Court from Arunachal Pradesh that the dispute never gets resolved despite a decision from the Court²⁵.

Also looking at certain disputes or violations, which have either come to the Deputy Commissioner or a Forest Department official in Arunachal Pradesh at the district level, it is clear that cases, which involve major political ramifications, are often not taken up immediately and the officer tries to postpone the hearing of such cases till his/ her transfer posting²⁶.

As against the two decisions of the Supreme Court mentioned in the previous section, one finds that some traditional institutions have succeeded in giving a quick decision and stemming the problem altogether. Two such decisions by the Nyels, the traditional village councils of the Nishi tribes, are given below:

In a case of over-extraction of cane from a community forest, the *Nyel*, adjudicated that an individual can extract cane from the community forest only for personal use and not for commercial purposes. Similarly in another incident in another Nishi village, a person was raising a mustard plantation in a degraded community forest. The *Nyel* decided that no one would start a plantation in a community forest area. The forest should be allowed to regenerate and grow into a mixed forest. Monocropping is not good for the health of the forest.

The decision of the *Nyel* shows the wisdom and the understanding of the members of the traditional institutions with respect to natural resources management. These decisions are comparable to the provisions of the two statutory laws – Wild Life (Protection) Act 1972 and the Forest (Conservation) Act 1980. The former allows members of scheduled tribes to extract or pluck certain species from the forest in their district for personal *bona fide* use and not for sale. In the second case, the Forest (Conservation) Act does not permit

²⁵ For details on cases, read Pant, R. 1996. Legal Appraisal of Unclassed State Forests of Arunachal Pradesh, India: A Case Study of the Lower Subansiri District. WWF-India.

²⁶ Personal communication with ADM, Lower Subansiri District, Arunachal in August 1995.

raising of a plantation in a forest area without the permission of the central government as a plantation is considered to be a non-forest activity.

Many such decisions of similar nature reflecting the indigenous knowledge of the people can be found, but a detailed field work is required. This is certainly not to say that this knowledge system continues to prevail in all parts of the North east India now, as some degree of degradation in the social and natural systems has set in.

Factors for the decline of folk law and the weakening of the traditional institution in the region

Many of the social and religious value systems, of which the natural resource conservation formed a consequence, are eroding in the present days and taking its toll on the resource base and the social set up. The modern education system looks upon all taboos and traditional values as superstitions; this gives the local educated people in the younger generation a feeling of inferiority regarding their culture and social practices. Same is the case with foreign religions entering the state. Most of the tribes in Arunachal were animists and believed in the different elements of nature such as trees, streams, rocks, soil, etc., including the *Donyi Polo*, the Sun and the Moon God. With other religions gradually infiltrating the land, people are being made to ignore their indigenous beliefs in nature. Moreover, in earlier days natural resources had no commercial value; resources were extracted only for personal use. People were following barter till very recently. Even to date, barter is common in some parts of the state. People had no use for money. But now with the influx of media and TV, people's wants have increased; they would like to buy things and this could only be done by selling their assets – their valuable trees and whatever else could bring them easy and quick money. Arrival of outsiders including timber merchants and realisation of the value of some of the timber species amongst the tribals, are factors that have made the younger generation overlook their values in the desire for consumer items.

Constraints of the Traditional System

1. In states like Arunachal, Nagaland, Manipur, Tripura etc, where several tribes and sub-tribes reside, the customary laws and social norms differ from tribe to tribe. In such a case many times, the tribal or village institutions are not in a position to deal with the case.
2. When it comes to a dispute between a tribal and a non-tribal (could include a government department as well), the village councils often cannot decide matters. There have been some instances where the village council did adjudicate and the decision was agreeable to both the parties. But such decisions could go in appeal by any one of the parties.
3. The educated and the elite populace (in rural areas) are also aware that the rules and regulations framed by the community are not enforceable and can be challenged in the formal judicial set up.

4. The decision of the village council is not always without prejudice. Persons having larger and stronger clans or those hailing from a well to do or political family could at times be in a better position to influence the decision of the council.
5. The efficacy of the customary laws depends upon conscience and reverence. With the spread of education and new ideas, the reverence to the customary laws is declining. In the recent times, people have found ways and means to circumvent these restrictions, which is affecting sustainable harvest of community managed resources. With the advent of hand saw-mills²⁷, extraction of timber on days other than those of restrictions, has increased. Also, the locals have started employing non-tribal labour²⁸ to do the extraction on days when this activity is restricted for the tribals. In many instances use of explosives and bleaching powder for catching fish has been witnessed in the recent times.
6. Growing ~~social~~ individualism in the community is a reason for the traditional system being less effective. With the monetisation of economy and the forest resources, greed and the trend for easy money is leading to individualism in the society. People want to sidestep the customs and not face the village councils in cases of violations of the customary laws.
7. Village authorities do not keep any written records of the decisions taken. The trend of maintaining records is very recent.

Suggested Recommendations

- 1) Recognition of folk law by all and especially by the highest judicial body. If this doesn't happen a person may be ~~convicted~~~~acquitted~~ twice for the same violation. For example in a case where an Adi tribal from West Siang, Arunachal, killed a tiger in self-defence was doubly punished for the same crime. In the Adi society, tiger is considered like an elder brother killing whom is considered the biggest sin. Killing of a tiger either by mistake or even in self-defence attracts very serious punishment in the form of a year long period of penance during which the person has to live in isolation, cook his own food and is not allowed to join the community in various festivals and rituals including hunts. In this particular case, the person had to first undergo the punishment decreed by the traditional village council, *kebang*, and then the department also harassed him by pulling him to judicial remand²⁹.
- 2) Proper documentation of folk law relating to natural resources management in the most participatory manner should be undertaken with the help of local people. It is also pertinent to assess the conservation values in these indigenous beliefs and practices. This will help the non-local officials ~~in-gain~~~~ing~~ a better understanding of ~~a~~ local matters while administering justice or while looking at violations.
- 3) Amendment of statutory laws to incorporate the unique position of customary laws in North east. An analysis of both statutory and customary laws of this

²⁷ This itself sounds like a primitive technology, but it is still very common in Arunachal.

²⁸ Labour from Nepal and the Indian states of Bihar and Assam is available in the region now.

²⁹ Personal Communication with former Deputy Wildlife Warden (also happens to be an Adi), Arunachal Pradesh Forest Department, October 2001.

region with respect to natural resources shows that there are a lot of inconsistencies between the two. In such a situation, as our Constitution avers, customary laws will always be in derogation of the statutory laws when it comes to any contradictions between the two. Else the existing central statutes relating to the management and protection of natural resources should be exempted from extension to the North east India. And new laws should be legislated which are more in harmony with local social practices and customs related to natural resource management. There is also provision under the statutes for certain provisions of each statute to be exempted from application to certain regions. For instance Section 65 of the Wildlife (Protection) Act 1972 deals with the protection of the hunting rights of the scheduled tribes of Andaman and Nicobar Islands. In this manner, this as well as other provisions that are not suitable to North East India could be exempted from application there.

Similarly the same Act could give recognition to the rights of other tribes of North east India by inserting provision similar to Section 17A, wherein it could allow members of Scheduled Tribes to hunt or collect scheduled faunal species from within the district they reside in for their *bona fide* personal use (regulated by their customary rules).

In this context too documentation of these tribes customs and social practices becomes important to assess what to exempt from the purview of the central statutes. There need not be a single wildlife statute uniformly applied all over the country graced with such diversity.

- 4) A mechanism should be developed to bridge the gap in the provisions of the statutory and customary laws vis-à-vis natural resources management of a region. This can be done by making a concerted effort to take the statutory law to the people and vice-versa by making the government departments through their line agencies aware of the legal regime prevailing at the micro-level. This will lead to better conservation of natural resources with both the parties giving better regard to the laws made at different levels. Differences between the formal and folk law need to be ironed out.
- 5) Transmission of folk law from the earlier generation to the younger generation and to inculcate regard and pride in the new generation for their customs. The younger generation should be prepared by proper education to distinguish between superstitious and sound conservation practices. In the present context, it is being observed that gradually the younger generation has little knowledge and regard for their customary social practice. The youth is gradually getting away from some of the sound practices followed by their earlier generation under the influence of modern education, which looks at many old practices and beliefs as superstition.
- 6) It is also important to have a separate forest management and wildlife conservation policy for the North East region with special focus on the region

especially keeping in mind the ownership patterns over the resources and the culture and ethos of the region. Policies are basic guideline, which normally provide the basis to a statute. Although this does not happen most often.

- 7) Folk law is better accepted within the society as it is made by the local people for the governance of their own resources. Thus it elicits better compliance from the local populace. As punishments related to the violations in many cases are very severe, it also serves as dispute prevention mechanism in the society.
- 8) Similarly traditional institutions have an edge over modern formal institutions. The members of the former institution are local and would prefer to see the end of a dispute whereas in serious matters, it has been observed that often government agencies prefer to procrastinate judgment.
- 9) Presence of Autonomous District Councils and Village councils help reduce the burden of the formal judiciary in these states. The Deputy Commissioners and in states that have a formal judiciary, the judicial magistrates and High Court have that much less to deal with. If these bodies at the lower level can remain apolitical, they will be more efficient in fulfilling the objectives of democracy: equity, social and economic justice.
- 10) Panchayat (Extension to Scheduled Areas) Act 1996 is being looked upon as a panacea to all problems of tribal areas. But the empowerment of local traditional bodies in the Fifth Schedule Areas, to which this Act has been extended so far, is yet to be witnessed. This Act is not yet extended to Sixth Schedule Areas. Discussions are on way. Though many officials and lawyers in the Sixth schedule states are of the opinion that it may not be necessary to have to have Panchayats in these states as there already exists a good network of traditional village and district level councils whose authority is recognised by these states. Proper delegation of authority and clear distinction over subject matter between the state and district autonomous councils is required. Moreover, these bodies at the lower level will be more efficient if these remain apolitical and have no political affiliations.

Reference:

Tiwari, B.K., Barik, S.K. and Tripathi, R.S. 1998. Biodiversity value, status and strategies for conservation of sacred groves of Meghalaya, India. *Ecosystem Health* 4:20-32.

Pant, R. 2002. Customs and Conservation: Traditional and Modern Law in Arunachal Pradesh, India and Annapurna, Nepal. Kalpavriksh and IIED.

Annexure 1

Sixth Schedule to the Constitution

Provisions as to the Administration of Tribal Areas in [[the States of Assam, [Meghalaya, Tripura] and Mizoram]]

1. Autonomous districts and autonomous regions

(1) Subject to the provisions of this paragraph, the tribal areas in each item of [[Parts I, II and IIA] and in part III] of the table appended to paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

2. Constitution of District Councils and Regional Councils: -

[(1) There shall be a District Council for each autonomous district consisting of not more than thirty members, of whom not more than four persons shall be nominated by the Governor and the rest shall be elected on the basis of adult suffrage.]

3. Powers of the District Councils and Regional Councils to make laws:-

The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Council, if any, within the district shall have power to make laws with respect to –

- (a) the management of any forest not being a reserved forest;
- (b) the use of any canal or water-course for the purpose of agriculture;
- (c) the regulation of the practice of jhum or other forms of shifting cultivation;
- (d) the establishment of village or town committees or councils and their powers;
- (e) the appointment of succession of Chiefs or Headmen;
- (f) the inheritance of property;
- (g) marriage and divorce; and (h) social customs.

4. Administration of justice in autonomous districts and autonomous region:-

(1) May constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District

Council, shall exercise the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over the suits and cases.

(3) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating-

- (a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph;
- (b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;
- (c) the procedure to be followed by the Regional or District Council or any court constituted by such Councils in appeals and other proceedings under sub-paragraph (2) of this paragraph;
- (d) the enforcement of decisions and orders of such Councils and courts;
- (e) all other ancillary matters for the carrying out of the provisions of sub-paragraph (1) and (2) of this paragraph;

5. District and Regional Funds:-

(1) There shall be constituted for each autonomous district a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution

[(2) The Governor may make rules for the management of the District Fund, or, as the case may be, the Regional Fund and for the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

(3) The accounts of the District Council or, as the case may be, the Regional Council shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

(4) The Comptroller and Auditor-General shall cause the accounts of the District and Regional Councils to be audited in such manner as he may think fit, and the reports of the Comptroller and Auditor-General relating to such accounts shall be submitted to the Governor who shall cause them to be laid before the Council.]

6. Publication of laws, rules and regulations made under the Schedule:-

All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

Annexure 2

SUPREME COURT ORDER DATED 22nd August 1997 W.P. (C) No. 337/ 95

Centre for Environmental Law, WWF – India versus Union of India & Others

A perusal of the affidavits that have been filed on behalf of the States and the Union Territories show that in some of the states, Wild Life Advisory Boards have either not been constituted or were constituted earlier, and after the expiry of the term of the Board, that was constituted, there has been no reconstitution of the Board. In the states in which Wild Life Advisory Board has not been constituted or where the Board had earlier been constituted but the term has expired and the Board has not been reconstituted, necessary steps should be taken to constitute/reconstitute the Wild Life Advisory Board within a period of two months.

As regards the appointment of Wild Life Warden, we find that in some States, Wild Life Wardens have not been appointed at all while in some States, Wild Life Wardens have been appointed for some areas but have not been appointed for other areas. It is directed that the concerned State/Union Territory shall take the necessary steps to appoint Wild Life Wardens for all the areas within a period of two months.

Even though notification in respect of Sanctuaries/ National parks have been issued under section 18/35 in all States/ Union Territories, further proceedings as required under the Act, i.e. issue of proclamation under Section 21 and other steps as contemplated by the Act have not been taken. The concerned State Government/ Union Territories are directed to issue the proclamation under Section 21 in respect of the Sanctuaries/ National Parks within two months and complete the process of determination of rights and acquisition of land or rights as contemplated by the Court within a period of one year.

As regards denotification of any area which is included in a sanctuary/national park, it is directed that before placing the proposal before the Legislative Assembly the concerned State Government shall refer the proposal to the Indian Board for Wild Life for its opinion and the proposal shall be placed for consideration before the Legislative Assembly along with the opinion of the Indian Board for Wild Life.

In order to effectively control the growing increase of poaching in the Sanctuaries/ National Parks, the Central Government as well as the Governments of the States/Union Territories are directed to ensure that the forest guards in the Sanctuaries/ National Parks are provided modern arms, communication facilities, viz. wireless sets, and other necessary equipments in that regard. Necessary steps for that purpose shall be taken within six months.

~~ADD: 1) Definitions of Customary and statutory law; other terms such as indigenous, folk, traditional law etc; institution.~~

