



## CUSTOMARY LAW AND THE PROTECTION OF INDIGENOUS KNOWLEDGE IN INDIA\*

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Indigenous communities have shared a very close and interdependent relationship with their surroundings since time immemorial. This relationship has helped them develop a very peculiar but sound understanding of their surroundings. Consequently, this symbiotic understanding, developed into a knowledge system which, when handed down from one generation to the next, came to be used for a vast number of activities like subsistence and conservation. Thus it is non-static in nature and dynamic and interpenetrating. This system of knowledge is today known as Indigenous Knowledge (IK)<sup>1</sup>. IK has a direct impact on biodiversity and vice versa. Since a rich biodiversity facilitates breeding of IK, most of the IK comes from environment and biodiversity.

### IK and Customary Laws

Any attempt at protecting IK will thus also look at protecting the biodiversity. Sustainable use of natural resources is amply reflected in the customs of most local communities. 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 as sacred. It is treated as an offence for anyone to cut timber in the grove, except for cremation purposes. 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.<sup>2</sup> Again, though the Nishi tribe of Arunachal Pradesh in northeast India hunts the hornbill for the use of its beak in their traditional headgear, there is an inbuilt conservation mechanism within their culture to protect the bird, in the form of customary prohibition on the killing of the bird during the breeding season.<sup>3</sup>

It is naturally imperative that local bodies and customary law be empowered, since by protecting biodiversity they contribute to the protection of IK. As a corollary, it needs to be emphasized that the extinction of local customs can thwart any attempt to restore sustainability into the modern development paradigm. National and international laws and policies, even if they do not promote, should at least refrain from adversely affecting customary laws and practices. In fact, as James D. Wolfensohn, former President of the World Bank insists, 'we need to learn from local communities to enrich the development process'.

Most of the Indian communities do not believe in holding their knowledge exclusively to themselves. This is due to two reasons mainly. Firstly, the individual based right system, not dependent on the community as a whole, is still not very much accepted in a large number of indigenous communities; Any ownership is generally seen from a community perspective and there is common ownership of land and

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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 Krishnan, B.J., Customary Law, undated

3 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.

resources. Secondly, the communities repose faith in the theory that knowledge increases with dissemination. It is against their values to jealously hide any form of knowledge from others who could similarly benefit from it. The emphasis therefore is primarily not one of exploitation for profit or personal aggrandizement.

Due to the above-mentioned reasons, we do not find easily either any customary laws or customary practices that give direct protection to indigenous knowledge, per se. However, most customary practices tend to conserve and protect biodiversity. Thereby, customary practices provide indirect protection to IK. It may be unwise to take a myopic view and look at Indigenous Knowledge in isolation. We must give equal attention to factors such as natural resources, livelihood, and education. Likewise, factors are both internal and external. For this purpose it becomes essential that we look at the place (or lack of it) that customary law currently enjoys in the Indian legal system.

## Customary Laws

To make any effort at understanding customary law, we must begin with looking at what custom itself is in the first place. Custom is not a term that can be constrained to one definition, though 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.<sup>4</sup> A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality is entitled to exercise specific rights against certain other persons or property in the same locality.<sup>5</sup>

The concept of rules and regulations developed with the evolution of a community into a society. Most of these principles were derived from usage or practices of the community for their subsistence. The long and continuous usage by the community of the natural resources of their locality evolved into localized and varied customary practices. As customs had their origins in the said usage and practices, the needs of the people were kept in mind while evolving them. The needs of neighbouring villages were also kept in mind before making any rules regarding the use of forest and forest produce.

### *Legal Custom:*

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. 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; Customs being in derogation of law are to be construed strictly. In Indian Jurisprudence, custom is an integral constituent of law. 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.

## Indian Legal System

### *Development of the legal system:*

In Pre British India there were innumerable overlapping local jurisdictions with many groups enjoying autonomy in administering justice. When British came to India, they tried to find a unified Indian law as in the west but they could not find a parallel. As a result the period before 1860 had extremely varied laws including Parliamentary Charters and Acts, Indian laws, English Common law, Hindu and Muslim laws and many bodies of customary laws.

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 (It is noteworthy here that matters such as natural resource management which had been with the community for long were not left with them anymore). 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 Colebrooke's digest. Subsequently it was realized that lesser bodies of customary laws governed many matters. But even customary laws were not found to be sufficient since the quasi-legislative role of tribunals restricted them and when the customs were recorded there were not enough rules in express terms. This resulted in elevation of textual laws over lesser bodies of customary laws. Although according to Hindu Law where there was a conflict between shastras and customs, custom overrode shastras,<sup>6</sup> strict rules of evidence provided for disappearance of customary laws, as it was very difficult to prove unwritten customs.<sup>7</sup> There also emerged a sense of individual right not dependent on community opinion or usage. The concept of

4 Garner, B.A. (Ed). 2004. Black's Law Dictionary, Eighth Edition. West Publishing Company.

5 State of Bihar v. Subodh Gopal Bose (A.I.R. 1968 SC 281)

6 Collector of Madurai v. Mootoo Ramalinga (1868) 12 M.I.A.397

7 Galanter, M. 1980. Displacement of Traditional Law. Law and Society in Modern India.

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 those 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.

#### *Justiciability of Custom:*

Customary Law, by definition, is a non-state legal system that parallels the substantive and procedural functions of the state made laws. 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.<sup>8</sup>

The following tests or essentials have been laid down, which a custom must satisfy for its judicial recognition:

**Antiquity** - A custom to be recognized as law must be proven to have been in existence from time immemorial. The English Common Law rule of the immemorial user is not required to establish a custom in India, and it has been held that it is sufficient if the court is satisfied of its reasonableness and certainty and that the use 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.<sup>9</sup>

**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' and not 'possession' that the claim to a custom is abandoned.

**Peaceable Enjoyment** – the custom must have been enjoyed peaceably. 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.

**Obligatory Force** – The custom must have an obligatory force and must have been enjoyed as a matter of right without stealth or force.

**Certainty** - A custom, which is vague or indefinite, cannot be recognized. The court must be satisfied by a clear proof that custom exists as a matter of fact, or as a legal presumption of fact.

**Reasonableness** – This test gives a wide discretion to the courts in the matter of recognition of the customs. It is for the courts to decide whether the alleged custom is reasonable or not. It has been held that a right being destructive of the subject matter itself would be unreasonable. If there is no restriction of any kind, then a customary right, which could produce such right, must be deemed to be unreasonable.

**Conformity with Statutory law** – Statute made laws are given precedence over customary laws. Therefore, even where the customs meet the requirements of being ancient, certain and reasonable, they being in derogation with general laws are to be construed strictly.<sup>10</sup> This hierarchy makes the position of customary laws very vulnerable in the legal system. Although the Constitution of India recognizes customary law, in reality it is subject to being in consonance with the statute made laws. The Supreme Court has emphasized upon this requirement time and again. Therefore it is of prime importance that when any legislature is passed, due consideration is shown towards existing customary laws. An effort to this effect has been lacking. The objectives of the enactment should not be such as to ignore the existence and need of customary laws. The effect of this would be the invalidating of customary laws. A fine balance has to be struck between the statutes and customary laws so that effects of certain statutes may not be so overriding that laws developed by the people for themselves as per their requirements lose their justiciability.

### **Statutory and Customary Law**

Now let us see what position customary law enjoys in the Indian legal system today - whether it is recognized as a law or is a mere source of law. Ever since the codification and formalization of Indian law started, 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 to 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 any analysis as to which is more advantageous and people friendly let us look at the provisions in the Constitution of India and other Indian

8 Upadhyaya, V. Customary Rights over Tank: Some Plain Talking on Limits of Customs, Economic and Political Weekly, November 1, 2003

9 Pran Nath Kundu v. Emperor A.I.R. 1930 Calcutta 286

10 Surajmani Stella Kujur v. DurgaCharan Hansdah A.I.R. 2001 SC 938

statutory law which deal with custom and customary law directly or indirectly.

*Evidence:*

Although rules of evidence make it difficult to prove customs, Indian Evidence Act, 1872 is the earliest legislation to formally recognize customs. 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. For example, if the fact that certain fishing rights were exercised as a matter of customary right then a *wajib ul arz*<sup>11</sup> stating to that effect can be taken into account

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 economic status. Unfortunately the Supreme Court in a recent decision<sup>12</sup> has not taken note of this factor and this was one of the reasons for denial of a customary right to obtain fishing rights for Dhimars of Parshioni.

*Easements:*

In India, there are three distinct rights of easement - First, there are private rights in the strict sense. Secondly, there are public rights for the benefit of all. Thirdly, there are rights belonging to certain classes of persons or certain portions of the public. Such rights commonly have their origin in customs. Under The Indian Easements Act, 1882, an easement may be acquired in virtue of a local custom. Such easements are called customary easements.<sup>13</sup> For example, a customary right of way on the part of a certain group of people to use a piece of land not theirs as a pathway.

*Forest Legislation:*

In the case of compact (meaning small and close) forest communities, there has been a close intermingling and overlapping between the vast repository of IK and customary use of natural resources enabling them to use these in a more judicious manner. Self imposed limitations on forest clearance, restriction on hunting certain species, protection of sacred groves for religious purposes, rotational use of catchment areas are some of the examples. On the whole customary and traditional practices were

conducive to conservation and preservation. Agriculture based rural communities are dependent on their neighboring forests for subsistence and a variety of products and services. These forests were considered to be common property of the locality. However this underwent a change with the forest laws in late nineteenth century and early twentieth century.

The first legislation for the regulation of forests was passed in 1865. It empowered the government to declare any land covered with trees or brushwood as government forests and to make rules to manage them. The Act of 1865 was replaced by a more comprehensive legislation of 1878, which was further replaced by the Indian Forest Act of 1927. The Preamble to the 1927 Act suggests that there have been no new laws, but only consolidation of the old ones. 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 were curtailed and transformed into concessions to be enjoyed at the will of the forest officials. More importantly, forests became a major source of revenue for the government.

The Indian Forest Act of 1927 does have a provision<sup>14</sup> under which management of a forest area can be assigned to village communities. 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) over 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 discussing commutation of rights<sup>15</sup> in declaring reserve forests, may not be of much use if the customary rights of the community do not get legal sanction. Moreover, in light of the powers conferred upon the Settlement Officers, it is necessary to see that the legal rights of the community are not lost in the cobweb of procedures.

The Forest Policy of 1988 focuses on requirements of communities but it has failed to give due recognition to the

11 Village administration paper that became a settlement record and statutory presumption and correctness is attached to it - S. 79 of 1920 Central Provinces of Land Revenue Code

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

13 Section 18, Indian Easements Act, 1882

14 Section 28, Indian Forest Act, 1927

15 Section 16, Indian Forest Act, 1927

customary practices and indigenous knowledge that communities, both rural and tribal, have been using for centuries for natural resource management.

#### *Constitution:*

The Constitution of India recognises customs and customary practices. It says that all laws in force before the commencement of this Constitution shall continue in force therein until altered or repealed or amended.<sup>16</sup> The effect of this provision is the continuance of the entire body of laws prevailing in India before the constitution came into force. Not only statutory laws but also laws like Law of torts, Hindu Laws, Mohammedan Laws, and Custom having the force of law. 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 custom or usage having force of law cannot infringe any of the fundamental rights conferred by part III of the Constitution

#### *Fundamental Rights:*

The Constitution of India nowhere confers specific 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, one of the most read into provisions. Right to Life does not refer to mere animal existence but life with human dignity.<sup>17</sup> 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. An 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 lifestyle. 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 Article 21.<sup>18</sup> In 1987 the Supreme Court took a 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 right to livelihood.<sup>19</sup>

#### *Directive Principles and Fundamental Duties:*

Article 39(b) enjoins a duty upon the state to direct its policy towards ensuring that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The term 'material resources of the community' as used in the article includes everything that is capable of generating wealth for the community. The term ownership of community goods to subserve the common good is not restricted to natural or physical goods but also movable or immovable property such as land or other such assets. The state should look into matters of adequate distribution and availability of raw materials, which have the potential to create wealth. Under Article 46, the State is under an obligation to see that Scheduled Tribes are not open to exploitation and deprived of their rights on account of their illiteracy and low status.

Just as the State is under a duty to take measures embodied in Part IV of the Constitution, Part IV-A imposes a duty on the citizens to value and preserve the rich heritage of our composite culture; and to protect and improve the natural environment including forests, lakes and rivers, which are great reservoirs of indigenous knowledge.<sup>20</sup> 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

#### *Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA):*

The institutions of governance at local level need to be strengthened so as to empower them for recognition and revival of customary laws. Under Article 40 of the Constitution, the state is expected to take necessary steps and endow powers with the Panchayats. The Constitution also states that a Gram Sabha may exercise such powers and perform such functions as the legislature of state may by law provide.<sup>21</sup>

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

16 Article 372, Constitution of India

17 Held by the Supreme Court in Francis Corallie v. Union of India, PUDC v. Union of India

18 Olga Tellis v. Union of India A.I.R.1986 SC 180

19 Banwasi Sewa Ashram v. State of Uttar Pradesh A.I.R.1987 SC 374

20 Article 51A, Constitution of India

21 Article 243 A, Constitution of India



cultural identity, community resources and the customary mode of dispute resolutions.<sup>22</sup> Under PESA, Gram Sabha enjoys a superior position in the hierarchy of self-governance by virtue of this section. The reason this provision has earned the appreciation of the people is that Gram Sabha comprises of the same people whom they represent.

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, stands empowered in the form of Gram Sabha to meet the challenges from within and without.

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.<sup>23</sup>

The most important outcome of this PESA, it was expected, would be the 'removal of dissonance between tribal tradition of self-governance and modern legal institutions'. 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.

#### *Legal Pluralism:*

Another expression of decentralized governance can be seen in the legal pluralist regions of the country. The North Eastern states of India, comprising of the seven states of Arunachal Pradesh, Assam, Manipur, Mizoram, Nagaland and Tripura, is the legal pluralist region where the indigenous folk laws govern different spheres of life within the society and formal law enacted at the Centre and State level is also extended to this region.

The Vth Schedule deals with administration and control of Scheduled Areas and Scheduled tribes in any state other than Assam, Meghalaya, Tripura and Mizoram. The Vth Schedule, sometimes 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.<sup>24</sup> As per Para 2 and 3 of the Schedule and Article 60 and 159, it is the duty of the President and the concerned governors to preserve, protect and defend both the Constitution, including this special feature concerning the Scheduled Areas, and the law including the customs and usage of tribal people. Subject to only one condition, namely that it does not affect the basic structure of the Constitution, the governor is given immense power to apply or not to apply any Act to the Scheduled Area, and make regulations for peace and good governance of any area of the state, which for the time being is a Scheduled Area.

The VIth 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 the 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 the 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. 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.

#### *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's history. 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. Institutions of self-governance are to constitute Biodiversity Management Committees for conservation and documentation of biodiversity and chronicling of knowledge related thereto. The Biodiversity Management Committees at the local level could have been very useful if only their role was more expansive. They have no powers vis a vis giving recognition to the customary

22 S. 4 (d) of PESA

23 S. 4 (m) of PESA

24 Sharma, B.D. 2001. Tribal Affairs in India: The Crucial Transition. Sahyog Pustak Kuteer Trust, New Delhi. pp. 514

<b>Difference between Statutory and Customary law</b>		
	Statutory Law	Customary Law
Form	Written thus usually codified	Rarely codified. It is an expression of positive will of the people handed over from one generation to another
Nature	Uniform	Varies from community to community and is usually area specific
Extent and Application	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)
Acceptance	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 it 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
Understanding	Often too complicated for the common man to understand	Simple and lucid therefore indigenous people have a better understanding of these
Awareness	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
Enforceability	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 courts. Recognition is 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
Dispute Settlement	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
Penalty	Uniform for all. Does not take into account the capacity of the person. 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/ penalty is paid

rights of the local people over the biodiversity as per the rules which have come out in 2004.

### **Advantages of customary law**

The biggest advantage of a customary law is that it comes from the community and is 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 courts of law. Any dispute that takes years to resolve in a formal court of law is resolved in comparatively 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 approach their traditional institutions for the administration of justice. Besides, cases are decided

keeping in mind the needs of the society and the victim and the capacity of the accused to withstand justice. A very fine example of speedy and flexible redressal under customary law can be found in the Nishi case from Arunachal Pradesh, 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 unclassified state forest. The volunteer committee beat up the labourers and seized their tools and cane.

Nyel, the traditional council of the Nishi Tribe, heard the case. 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 were to be borne by the contractor. After payment of a fine, and a warning on the repetition of the offence, 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 so there exist multiple laws that might overlap. There may be a customary law in one community, which could be different from that of 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 be friendly to people and society or even biodiversity. Although they have an inbuilt system of checks and balances to preserve their rich natural surroundings, there may also exist laws that may not be very practical or advisable.

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

Customary law is largely oral and the lack of any

documentation, especially precedents, often 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 development. With education, people have learned that customary law has little recognition in the legal system. This by no means implies that education is bad. But it is of note that there is not enough awareness amongst the youth about the value of their own customary laws nor are sufficient efforts being made at their revival.

### Conclusion

As mentioned earlier, customary practices play an important role in conserving and protecting the biodiversity, thereby providing an indirect protection to IK. Customary laws can be of great help and advantage in order to recognize and continue these practices. Therefore it becomes almost essential to strengthen the body of customary laws.

To revive customary law the first and the most important step is its recognition by the judiciary bodies of the country -at all levels. Recognition can also be given by reading more into the existing provisions of various legislatures, as well as being more tolerant to customary law.

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

Another effort 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 each other. Instead

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a realistic and practical approach should attempt 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 a position beneath judicial law. They have to be accepted as a law per se not merely as a source of law.

As we have noted, one of the constraints of customary law is that it is not always very good from the society's point of view. This is largely because many indigenous communities have vices like caste system, superstitions and unreasonable inequalities. Removal of traditional inequities can be a step towards solving this problem.

Many people believe documentation and codification will help save customary law to a great extent. However, it is not a very efficacious method. Once we make codification a feature of customary law, it will become very difficult for a lot of customs to be proved, as not all communities will have access to the documentation process.