

IK PROTECTION BY LOCAL COMMUNITIES AND EXISTING POLICY ENVIRONMENT IN INDIA

A Discussion Paper - II

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Local and indigenous communities have since time immemorial, shared a close and interdependent relationship with the elements of their environment. This proximity and deep understanding has developed into a knowledge system which over the years, handed down from one generation to the next, has aided their survival and constitutes their indigenous knowledge or IK. Over the years, in the Indian context, the direct dependence of several communities on the biological and natural resources in their vicinity has decreased as they have found new occupations and other means of livelihoods in their own areas and sometimes as a result of migration to other places. Yet there are numerous communities in all parts of the country even today that are directly and largely dependent for their sustenance and survival on these resources. Such peoples and communities have a stake in conserving and using the resources in a sustainable manner. For this purpose, these communities still adhere to a plethora of age-old, informal mechanisms (customary practices and law) governing the access and use of the biological resources and the associated knowledge, which have aided in the conservation of both the resource and the knowledge. For, a rich biological resource base leads to a prolific knowledge system, which in turn thrives and flourishes on the sustained availability or conservation of the former.

This policy brief seeks to review and highlight the strengths of these informal mechanisms which local communities employ to protect their biodiversity and associated IK. It then seeks to examine whether the present policy environment enables or curtails such practices. Finally, through this policy brief, an attempt would be made to recommend measures for strengthening these mechanisms, in the interest of IK protection and upholding the rights of local communities to their bioresources and associated IK.

Customary Practices of Local Communities and Protection of Indigenous Knowledge

Before going into the role of customary practices in protecting IK, it would be pertinent to discuss the finer points

of difference between customary practices, custom and customary law. A customary practice refers to a habitual form of behaviour within a given social group, which over a period of time, becomes a custom. When custom by its common adoption and long varying habit has come to have a force of law, it may be termed as customary law. For instance, the wisdom of community elders regarding the status of a resource may over time be translated into a practice which incorporates sustainable harvest or wise use of the resource. This practice over a period of time takes the shape of a custom, which passed over from generation to generation, gathers the force of law as it gets accepted as a norm. Conservation ethos, inherent in the customary system may take the form of belief systems, which guide people's relation with the entities around them, social taboos and stigmas as well feelings of kinship with the natural world.

There is an abundance of documented evidence¹ and experience on successful models of customary and community based resource management practices, which vindicate the fact that customary practices and laws are of contemporary relevance in protecting biodiversity and the associated IK. The reasons why customary laws of communities have an edge over statutory law in protecting IK of biodiversity and ensuring compliance are many. Customs and customary laws pertaining to biological resources have evolved over time for the management and utilization of these resources, depending on the degree of scarcity of the resource and have changed with the change in the demand over these resources. Thus, they are dynamic in nature which gives them flexibility; also, they are better adapted to local situations which evoke better compliance from the community members. Customary laws are culturally sensitive, resource specific and respond to the ecosystem approach to management of the resources.² When enforced through the traditional institutions, such as the village councils, they bring about speedier justice and settlement of dispute; the traditional institutions have greater accessibility to local people both in the sense of costs involved and eliciting more trust/faith in the system.³

- 1 Kothari, A., N. Pathak and F. Vania, 2000, Where Communities Care: Community Based Wildlife and Ecosystem Management in South Asia, Evaluating Eden Series No. 3, Kalpavriksh and IIED, India.
- 2 Tobin, B., 2004, "Challenges to Securing Respect for Customary Law in ABS and TK Regulation", presentation made in London, 4th -5th May, 2004, UNU/IAS, United Nations University.
- 3 Pant, R., 2002, Customs and Conservation: Cases of Traditional and Modern Law from India and Nepal, Kalpavriksh and IIED, India.

The role of customary beliefs and practices in protecting IK has been amply brought out in a field study conducted by Gene Campaign researchers in a remote village of Assam, named Pumakuchi. This village of Pumakuchi, situated in Karbi Anglong district of Assam is composed exclusively of people of the Hill Tiwa tribe. The Hill Tiwas of this village believe in innumerable gods, goddesses and deities. There are numerous shrines called thaans in the village dedicated to the numerous deities the people worship. A thaan is a small clearly demarcated area having a small altar and surrounded by a patch of forest. The thaan and the adjoining forest may be regarded as constituting a sacred grove. Such sacred groves have been acknowledged to be of great significance in the context of conservation of biodiversity, with the green patches constituting a unique example of in situ conservation of bioresources.

The mathines or spirits are believed to reside in the nearby hills and forests. For instance, the spirit named Kharine is believed to dwell in the khari (hill stream) and causes fever in a person if he or she displeases the spirit by making noise near the stream or by polluting the stream. The baghraja is a benevolent spirit residing in the forest and offers protection against the attack of tigers. The people of Pumakuchi hold in great reverence ancestral spirits collectively referred to as phitri who are believed to reside near the dwellings of their surviving kin in the bamboo groves. Thus, people have given different locations to spirits for residence in their belief system. In order to avoid risking the wrath of the supernatural powers, the Hill Tiwas observe numerous customary restrictions in the context of these places. Gene Campaign researchers were told of an incident when a person in an inebriated state, defecated in the hill stream where the spirit of the Sajaboroi is believed to reside and in a crude language, openly challenged the spirit to harm him. A few months later, he lost his wife in child birth and also his five-year old son fell sick.

The Tiwas of Pumakuchi revere all life forms as sacred. They believe that there is a jiu (soul) in all creatures like man, animals, birds, fish, insects and trees. Jiu is also believed to be present in water, rocks, hills and forests. They believe that the creator's soul resides in all its creatures, thus killing of animals and destruction of trees and forests is considered sinful by them. The Maiha Choma Rowa ritual is observed to seek forgiveness from the supreme powers for the sin they commit in killing many insects and pests while burning down the forest for jhum cultivation.

The Gaon Sabha, with its multifarious activities of settling disputes, maintenance of rules and regulations, welfare and ritual functions, serves as the apex political body of

Pumakuchi village. All disputes of the village are settled by this body. The punishments for different types of offences are imposed by the Gaon Sabha depending on the seriousness of the offence committed. The Gaon Sabha as well as religion customs forbids desecration and destruction of the sacred spaces, which is believed to bring about harm not only to the perpetrator but also to the entire village. With regard to the non-sacred spaces of the village, a person does not require any permission for cutting trees on his own property. However, custom requires that he plant a sapling in place of the tree that has been felled. In the context of the lands owned by the clans, permission of the clan elders is required to cut down a tree. In the case of village lands, the Gaon Sabha may grant permission to cut down trees subject to payment of a fee depending upon the economic condition of the party. Cutting down a tree without permission would entail a fine and generally the offender is made to plant five saplings in lieu of it and tend to them as well. In this manner, the Gaon Sabha shows remarkable conservation ethos.

Gene campaign researchers also conducted a field study in Mendha Lekha village in Gadchiroli district of Maharashtra which further vindicated the role of local communities in protecting their bioresources and the associated IK. It has been observed that the Gond people of this village have a deep sense of oneness with the environment and their customary norms and practices have an imbedded conservation ethos. The people of this village fall into 4 sub-tribes, each claiming affinity to certain totems. For example, the four-god Gonds have the tortoise and crocodile as their totems; the five-god Gonds have the monitor lizard; six-god Gonds have the tiger and the seven-god Gonds have the porcupine as totem. Members of a sub-tribe never hunt, kill or eat their particular totem animal, which is a cultural mechanism preventing endangering of a species. Although annual community hunt is traditionally practiced; however, a balance is sought to be achieved between fulfilling human needs and conservation of the species, by regulating hunting through customary norms. Though many of these traditional norms are no longer followed today, yet a few rules relating to sharing of the hunt still prevail. Under the tiksi sharing system, an animal hunted by a single individual is divided into two equal halves. One half is taken by the hunter and the other half is distributed in the village. Under the rim system, an injured animal or an unclaimed body of a fatally wounded animal found within the village boundary is taken to the village temple; cooked and eaten by the entire village.⁴ Such practices ensure that the traditional practice of hunting, while satisfying the requirements of all members of the village, do not lead to over-killing of animals.

4 Pathak, N., V. Gaur Broome, 2001, Tribal Self-Rule and Natural Resources Management: Community Based Conservation at Mendha Lekha, Maharashtra, India, Kalpavriksh and IIED, India, p.28.

Apart from traditional norms, considerable sensitivity to the environment is noted in the present day collective decisions taken by the village as a whole. The people of Mendha Lekha decided to construct one community well instead of several private wells, taking their cue from the fact that there was considerable depletion of ground water level in the neighbouring villages due to the construction of a number of private wells to water the orchards. A large community well was constructed and community rules discussed for regulated and equitable water supply to the villagers.

When the Joint Forest Management Programme was extended to the Gadchiroli district, in Mendha Lekha village, a Van Suraksha Samiti (VSS) was constituted, comprising of the village members and a Forest official. It is interesting to note that in Mendha Lekha, the villagers have laid down their own stringent rules for the management of the forest under their responsibility, in addition to the usual JFM rules being enforced in other areas. Realizing the necessity of protecting the forests in their vicinity, the villagers in the Gram Sabha meetings, with the help of a local NGO, Vrikshamitra, drew up strategies for the protection of forests. Rules were formulated and have since been strictly adhered to. The village rules only allow collection of dry wood from the forest for bonafide personal use. Permission of the VSS is required for each bundle collected. There is a rule relating to mandatory patrolling by two villagers on rotation basis daily. It was decided that no green trees, fruit trees and trees providing NTFPs would be cut. Villagers have also enforced strict regulation on outsiders entering the forest and extracting precious resources like teak and bamboo.

In order to ensure compliance with these rules, a system of fines was introduced by the Gram Sabha. When it proved to be ineffective, a new strategy was evolved to announce the names of the defaulters during Gram Sabha meetings. The other strategy was to socially ostracize the repeated offenders. Both these strategies have worked and have led to a decline in the number of violations and ensured better compliance with the rules. A major success for the people of Mendha Lekha in the late 80s has been the closure of a paper industry as a result of their agitation. The government had leased out a large chunk of these forests to the industry for extraction of bamboo, which was being extracted in a destructive, unregulated and unmonitored manner. In the 1990s, a strong opposition from the villagers led to the stalling of the forest department's intentions of engaging into a major teak-extraction operation. At another time, the villagers stopped the Forest Department from clearing the commercially useless species to make space for raising teak - timber plantations.

In Mendha Lekha, apart from the Gram Sabha and the Van Suraksha Samiti, one finds the presence of a number of vibrant institutions like the Mahila Mandals and Abhyas Gats

(study circles), which play an important role in conservation and protection of biodiversity. The case of Mendha Lekha has illustrated that forest protection is best achieved when communities play a pro-active role and that rules made by the community itself for the protection of the forests and the other forestry resources has better acceptance and compliance in the society. The role of non-state actors like Non-Governmental Organisations (NGOs) is noteworthy in assisting the community with information and boosting confidence. This has been the role of the NGO Vrikshamitra in Mendha Lekha. Also, a robust and empowered institutional structure is effective in governing and managing the community's biological and natural resource base and ensuring conservation. The Gram Sabha in the village, supported by the study circles and the NGO Vrikshamitra, is a suitable construct to deal with the matter of 'access and benefit sharing' as being promoted under the Convention on Biological Diversity.

Existing Policy Environment in India

In the preceding discussion, the overall picture which has emerged is that customary practices and laws of local and indigenous communities have played and continue to play a crucial role in the protection of biodiversity and IK. However, for customs and customary laws to be of continuing relevance, it is essential that they are given due weightage in the formal legal system and are recognized to be at par with statutory law. In this context, it is important to look into the constitutional and statutory provisions which give recognition to customary laws. Also, it is necessary to examine the jurisprudence or judicial precedents which deal with the judicial recognition of customs in India.

Although the British rulers of India acknowledged the importance of indigenous and local laws in matters which are commonly known as personal laws, they ignored the role that communities had been playing in conservational activities. A look into the colonial forest legislation brings home the point that during this period, customs and customary laws were never considered important enough to uphold or integrate into formal law. Customary rights, as opposed to legal rights, were reduced to the level of concessions, which could be granted or withdrawn by the state at will.

Sadly, this trend of centralized legal and policy systems ignoring and displacing or dominating customary laws, prevalent during the colonial period, continued after independence. The Indian Forest Act of 1927, which continues to be in force in independent India, has curtailed customary rights of people over forestland and produce and have transformed them into concessions to be enjoyed at the will of the forest officials. The Indian Evidence Act, 1872,

which is in force even today, demands high standards of proof or documentary evidence for proving or disproving customs⁵ which considerably negates their recognition in the formal legal system, as customs for the most part are oral.

In Independent India, the Constitution accords the highest recognition to customs when it says that all laws in force before the commencement of this Constitution shall continue in force therein until altered or repealed or amended.⁶ The effect of this provision is to continue the entire body of laws as prevailing in India before the constitution came into force, which includes not only statutory laws but also other laws like the law of torts, Hindu Laws, Mohammedan Laws, and custom having the force of law.⁷ In Article 13 of the Constitution, it has been expressly stated that the term 'law' includes 'customs' and 'usages' having the force of law, provided that such a law does not infringe any of the fundamental rights conferred by Part III of the Constitution. Thus, it may be inferred that a reasonable and certain ancient custom is binding on the courts just like an Act of legislature.

There are also other provisions of the Constitution which deal with customs and customary laws or accord recognition to the right of self- governance by a community, or recognize institutions through which customary law is enforced (which may be inferred as enabling provisions in favour of customary law). For instance, Part- IX dealing with Panchayats may be construed to be of high protective value to customary law in the sense that its provisions empower the village level institution (from which customary law emanates and is administered by) and place it at par with the law- making organ of the state in terms of powers and functions. Then again, the Sixth Schedule of the Constitution provides for administration of tribal areas through a plurality of legal systems, which includes traditional institutions and customary laws.

We also need to look into the provisions of certain new legislation like the provisions of the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA), which builds up a strong case in favour of customary law. With this enactment, the Constitutional provisions pertaining to Panchayats have been extended to the Scheduled Areas. Under the PESA, the Gram Sabha is acknowledged as competent to safeguard and

preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolutions. The Legislature of a State cannot make laws that are not in consonance with customary laws.

Despite the above specific constitutional and several statutory provisions granting recognition to customary laws and practices, it has been observed that the judicial recognition of customs and customary rights is difficult in India. For custom to be recognized as law, strict tests of antiquity, continuance, peaceful enjoyment, obligatory force, certainty, reasonableness and conformity with statutory law, are imposed by courts. The rules of evidence imported from the colonial legal system and imposed by statute and convention in court procedures are a major cause for the disappearance of customs, with strict criteria being imposed by courts to prove the legal validity of custom.⁸ Unfortunately, the demand for high standards of evidence is reflected in the latest Supreme Court judgements. In a 2001 case⁹, the Supreme Court has said that "a party relying on a custom is obliged to establish it by clear and unambiguous evidence..." In the absence of evidence and proof of alleged custom, the Apex Court in another 2001 case¹⁰ conferred no right. Noteworthy in this context is the recent judgement in the Dhimar case¹¹, which carried the implication that to assert any right (customary), the community has to do so in the context of the so called formal laws such as the system of lease or licence.

When a customary right is upheld by the court, it becomes customary law. Thus, customary laws are the creation of the courts – both formal and informal. Customary rights based on usage when upheld in the formal and informal judicial systems become customary laws. Customary rights have very rarely been found in written instruments. Nor were the principles of customary laws ever codified or customs listed out separately by legislation in India. This to a great extent over the years has been the main reason for the treatment that customary laws have received in the formal systems of administration of justice. As these are not codified in nature, the higher and formal judicial bodies have hardly taken cognizance of these rights and laws while deciding matters at their levels. The Godavarman judgment of the Supreme Court is a case in point where the court ruled on a matter relating to indiscriminate felling in the forests. The court in

5 Section 13 (a) of the Indian Evidence Act, 1872.

6 Article 372 of the Constitution.

7 Gopalan v. State of Madras AIR 1958 Madras 539.

8 Kane, P.V., 1950 "Hindu Customs and Modern Law", Sir Lallubhai A. Shah Lectures (1944), Bombay: University of Bombay.

9 2001 AIR (SC) 938.

10 Surajmani Stella Kunjur v. DurgaCharan Hansdah AIR 2001 SC 938

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

its interim order stayed all felling in the forests of India and any further felling was to be undertaken based on the work plans drawn up by the forest department and approved by the Central government. In this regard, neither the apex judiciary nor the various high powered expert committees formed thereby considered the uniqueness of states where forests are largely in the hands of the community and to date are governed by customary laws and practices which portray indigenous knowledge and traditional wisdom in the management of these biological resources. The court and the committees have completely ignored the traditional institutions present in these areas and their wisdom while deciding matters relating to the management of these forestry resources.¹² It is also important to note here the constitution of such expert committees by the Supreme Court. The role of forest dwelling communities and their immense knowledge related to these resources has been underscored and acknowledged on many occasions but when it comes to the constitution of expert committees for such states, the members are always elicited from the state governments or scientists from formal institutions. The state has so far failed to recognize the knowledge and wisdom of the forest-dwelling communities and to co-opt their representatives to such committees.

There are several other factors also which have undermined the role of customary laws and indigenous practices in recent times. According to Pant¹³, many of the social and religious value systems, of which the natural resource conservation formed a sequence, are getting eroded. This is taking its toll on the resource base and the social structure. 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. A similar situation occurs with the entry of foreign religions. In a similar vein, Nari K. Rustomji¹⁴ citing Elwin has remarked in the context of erstwhile North East Frontier Province (N.E.F.A.) or present Arunachal Pradesh that "...the attitude of some missionaries has been completely destructive of the tribal culture. To them everything which is not Christian is 'heathen' and some of the finest aspects of tribal life have been abandoned... The tribals have been taught to despise their past and as a result a strong inferiority complex has been created". In addition, the compulsions of a monetized economy have led to changes in perspectives among local communities. For example, their needs increase and their

aspirations change, making them less respectful towards nature and incapable of maintaining a sustainable lifestyle.¹⁵ This in turn leads to a loss of reverence towards customary norms, which demand restraint in the exploitation of resources.

Another problem facing customary law is that it is region specific and thus, multiple laws might overlap. There may be a customary law of one community, which is different to that of another community in the same or neighbouring locality. In such a situation, it becomes difficult to decide which law shall prevail. Also, when there is a dispute between a tribal and a non-tribal, including a government department, the village council cannot often adjudicate. Where it does, the decision could go in appeal by any one of the parties in the formal judicial set up.

It must also be mentioned that not all customary laws are pro-people and society or even biodiversity friendly. Although they have an inbuilt system of checks and balances to preserve their rich surroundings, there may be laws that are not very practical and advisable in the modern context. For instance, in Arunachal Pradesh, the large-scale killing of hornbills by the Nishi tribe for their beaks, which are used to adorn the traditional headgear, have led to considerable decimation of the population.¹⁶ Similar is the case of the Moon Bear, which is hunted in the Sujusha District of Arunachal for its skin and nails which are used in traditional healing systems.

Need to Strengthen Customary Law: Some Recommendations

Despite many constraints and factors contributing to its decline in recent times, advocates of customary law point out several advantages, which make it best suited to the local context. Justice in the tribal society is based on the concept of restitution that brings relief to the aggrieved. In the formal courts, litigation between two parties is adversarial in nature and relief is not guaranteed to the aggrieved party. The outcome of the case depends on the resources of the litigant and the skills of the lawyer. It is not necessary that justice is meted out and the truly aggrieved party wins. On the other hand, under the traditional system of justice, an accused remains an honourable member of the society once he or she has been punished and there is no stigma attached. Whereas, in the modern system, even after being punished

12 Pant, R. "Well intentioned but....", Letter to the Editor, Down to Earth., July 15, 2002.

13 Pant, R., 2001, op.cit.

14 Rustomji, N.K., 1988, Verrier Elwin and India's North-eastern Borderlands, Shillong: North- Eastern Hill University Publications.

15 Kothari, S., 1996, "Social Movements and the Redefinition of Democracy," Lokayan Bulletin, New Delhi.

16 Excerpts from the Report of the Project Launch Meeting of the Project "Protection of Indigenous Knowledge of Biodiversity", August 2004, New Delhi: Gene Campaign.

the accused finds it difficult to get rehabilitated due to the stigma society attaches to his or her crime or violation. Expenses in the formal court can turn out to be very expensive for the litigant. Village institutions that mete out justice are situated at an accessible distance and do not involve court or advocacy fee. In the village, parties in dispute often bring ceremonial gifts to the mediators and if it is a major dispute, the party offers a feast to the community. In the traditional system, even when penalties are imposed on an offending party, these are reasonable and take into account the paying capacity of the offender. If the offending party is financially handicapped, the penalty can be deferred to a later date. Since customary laws subscribe to a system of justice that is accessible, affordable and benign, it is far better suited to the needs of rural and tribal people. Instead of allowing such laws to get marginalized, the effort should be to revive and strengthen them.

For customary practices and laws to contribute effectively

to IK protection, certain changes are required in the existing policy environment in India. Most importantly, customs need to be accepted as law per se and to be recorded as state-sanctioned formal rights. They need to be treated at par with statutory laws. In certain contexts like the Sixth Schedule areas, central statutes could be exempted from extension. Oral evidence in forms like community knowledge should be considered adequate in itself to provide evidence. Under the PESA, evidentiary value could be given to statements made by the Gram Sabha which could further be given duty of codifying customs. There is also need for judicial bodies to recognize and internalize components of customary law. It is also imperative to ensure more effective participation of local people and for assimilating people's knowledge, customary laws and strengths of traditional institutions into formal structures. Customary law could be further strengthened by reading more into existing provisions. The Fundamental Rights and Directive Principles of State Policy may be construed in favour of it.