CUSTOMARY LAW AND MODERN GOVERNANCE OF NATURAL RESOURCES IN INDIA – CONFLICTS, PROSPECTS FOR ACCORD AND STRATEGIES.

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In present times, the stakeholders in natural resources use and management in India occupy a broad spectrum stretching from the localized community to international entities. The determination of the size of this spectrum is itself a political decision, reflecting the environmental ideology of the State, a primary, though not the only, stakeholder in the issue. On the human side, at a minimum, stakeholders include individuals, groups, communities, institutions, and the State. Nature is itself a stakeholder, sustaining and promoting innumerable vegetative, animal and other life forms.

Sustainable and equitable use and management of natural resources requires an appropriate conceptual, functional and creative governance framework to accommodate the interests and activities of this range of stakeholders.

Underlying the choice of particular frameworks of governance of natural resources, are specific politico-economic, socio-cultural and environmental ideologies. In India, frameworks of natural resource governance have changed and evolved over time in response to the characteristics of different historical periods. One of the tools that may be used to investigate and analyze our recent past and the present is the legal perspective. In investigating the traditions of governance of natural resources in the Indian context, jurisprudentially, two distinct frameworks emerge – law and custom.

The formal legal framework relating to natural resources has its origin in the Anglo-Saxon legal system, introduced during colonial rule. It has been carried forward into the post-Constitutional period in a substantially identical form and is the foundation of the Indian legal system today. The modern formal legal framework on natural resources is entirely statute-centred. This is of particular importance in the realm of natural resources management in India, where there prevails a significant level of combination of old and new technologies and institutions.

Natural resource use in India and its associated technologies, institutions, and law have their origin in a much earlier and entirely different jurisprudential base. The governance of natural resources, which was essentially decentralized in character, had its legal basis almost entirely in Custom. In traditional Indian jurisprudence, custom constituted a source of law independent from all other known sources i.e. religious or ethical doctrine, texts, or royal decrees. The place that custom then occupied vis-à-vis other sources of law enabled and ensured a decentralized governance of natural resources, which is being attempted in modern times.

Custom is of current relevance because of the persistence of customary practices or local laws in the use of natural resources in the country. This may be observed in current forest use practices, traditional water technologies, landholding patterns, agricultural practices, fisheries, common land uses for agricultural and non-agricultural purposes, etc. Such customary legal frameworks provide a wealth of information on sustainable natural resource use and management. At the same time custom sustains social practices that promote and sustain social, economic and political inequities, which need to be addressed.

The co-existence of the dual frameworks of custom and formal law is not peaceful, but fraught with tension and contradictions, with adverse impacts not only on societal relationships but also on the natural resource base.

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The paper that will be presented explores the historical basis and current status of these two dimensions.

The relevance and scope of custom in natural resource management in India is firstly explained.

Secondly, the conflicts and adjustments between Customary and formal legal frameworks is reviewed through an exploration of the status and role of custom in traditional Indian Jurisprudence, the process of its being subsumed under Colonial Law, and its place in post-Constitutional natural resource law in India – in the Indian Constitution and other statutes. The impact of the formal legal framework on custom and its implication in natural resource management is assessed.

There prevails a general understanding that sustainable management of natural resources is better achieved under decentralized governance frameworks. Such frameworks need to be encapsulated in law that permits and enables such decentralization. The question therefore arises as to the nature of a legal framework that accommodates a balance of law making, enforcement and dispute resolution both at local and higher levels, thereby promoting a harmony between harmony between macro-legal and micro-legal frameworks. The author reiterates that community-based legal systems with an appropriate and supportive role of the State may better succeed in reversing environmental degradation, while at the same time eradicate poverty through ensuring equity.

The paper explores the problems and difficulties inherent in evolving such a harmonious legal framework – from legal, political, social-economic and civil-society perspectives. The author also suggests some strategies for addressing these problems.

1. INTRODUCTION
The use of natural resources is an integral part of human life, as old as civilization itself. They are used not only for sustenance, but also as a medium for human endeavour in many forms.

In present times, the stakeholders in natural resources use and management in India occupy a broad spectrum stretching from the localized community to international entities. On the human side, at a minimum, stakeholders include individuals, groups, communities, institutions, and the State. Nature is itself a stakeholder, sustaining and promoting innumerable vegetative, animal and other life forms.

Underlying the choice of particular frameworks of governance of natural resources, are specific politico-economic, socio-cultural and environmental ideologies. In India, frameworks of natural resource governance have changed and evolved over time in response to the characteristics of different historical periods.

The issue of natural resources management may be perceived from several angles - environmental, economic, socio-cultural, historical, anthropological. There is another dimension, as well, that subsumes all its other identities – that is the legal.

Most societies possess some form of operative frameworks of rights, powers and obligations relating to natural resources. Such frameworks are usually embedded in the legal structures and processes – whether formal or informal – operating in the particular societal context. State policy frameworks also serve to implement specific societal goals relating to the distribution of rights, powers and duties in the use and management of natural resources. Thus, one of the tools that may be used to investigate and analyze our recent past and the present is the legal perspective. Legal frameworks are utilized to define the types and nature of rights, the institutions required to manage resources, the respective powers and obligations to be exercised by such institutions, and the procedures or processes that are to be followed in the management of such resources.

An investigation of legal frameworks relating to natural resources represents a complex task. Law may be generally understood to be formal laws enacted by the legislative or executive organs of the State in the form of statutes, rules and regulations, or in the nature of law emanating form the judiciary, in the process of resolving disputes. While all these legal instruments constitute the formal legal system that generally defines the political, economic and social contexts that encompass societal behaviour, it is by no means the only frame of reference. A vast range of human activities lies outside the reach of the regulating arm of the State. Much of human inter-relationship is regulated by “non-state legal systems”, a complex system of “norms, institutions and culture” which parallel the substantive and procedural functions of State-made law. This body of law is variously defined as customary law, traditional law or local law-ways. Distinguished from actual behaviour or practices, the term refers to norms and rules underlying or determining behaviour, as well as procedures that enable their application. Custom is generally understood to be that body of law, which is predominantly oral rather than
written, and which derives its authority from sources other than the State.².

Law and Custom are not clearly defined, mutually exclusive, controlled phenomena offering themselves to conclusive, distinct, and unassailable analysis. Customary law does not constitute a single body of law, but is an adaptive, flexible, evolving body of norms and rules governing the behaviour of communities over long periods of time. So too the official black letter or formal law, in its actual operation adapts itself to the socio-political contours of society. Thus, the law - in - action may well be quite distinct from the law - in books.

The simultaneous operation or co-existence of several systems of law in the same social field is generally defined as legal pluralism.³ Not only is customary law of infinite variety, but "formal" law is also multi-faceted. Neither custom nor other formal and non-formal normative orders function in isolation, but are in constant interaction with each other. Extensive legal anthropological research on such normative orders in a variety of national settings have as yet not yielded any clear definitions of these several phenomena nor the boundaries that separate them.⁴

The reflection of this complexity may be observed in manner of the use and management of natural resources as well.

The modern or formal legal framework relating to natural resources in India has its origin in the colonial period, which has been carried forward into the post-Constitutional period in a substantially identical form. The jurisprudential framework underlying formal natural resources law is the Anglo-Saxon legal system, the foundation of the Indian legal system today. Under this system, the three identified sources of law are statute, precedent and doctrine in that order of precedence, with statute bearing over-riding authority over the other sources. Wherever precedent or doctrine contradicts statute, however old the former, the latter will prevail.

The modern formal legal framework is entirely statute-centred. This is of particular importance in the realm of natural resources management in India, where there prevails a significant level of combination of old and new technologies and institutions.

Natural resource use in India and its associated technologies, institutions, and law have their origin in a much earlier and entirely different jurisprudential base. The governance of natural resources, which was essentially decentralized in character, had its legal basis almost entirely in Custom. In traditional Indian jurisprudence, custom constituted a source of law independent from all other known sources i.e. religious or ethical doctrine, texts, or royal decrees.

However, in the modern legal framework, customary law has been relegated a status

³ Ibid, p.870
⁴ Ibid, p.879.
subsidiary to statutory law. Combined with a shift in rights and powers over natural resources in favour of the State, the law of local communities has lost much of its authority.

Custom is of current relevance because of the persistence of customary practices or local laws in the use of natural resources in the country. This may be observed in prevailing community forest use practices, traditional water technologies, landholding patterns, agricultural practices, fisheries, common land uses for agricultural and non-agricultural purposes, etc. Innumerable studies on these practices have revealed that they reflect sound principles of environmental sustainability. Contrary to State law, customary laws emerge from the community, and command social acceptance and observance or compliance. At the same time, local laws are found to either endorse or ignore local social and economic inequities. In this context, the question arises as to what should be the desired macro-approach towards customary practices and customary law? In what manner are these phenomena to be taken into account in modern governance of natural resources? In what ways are formal and non-formal laws to be brought into harmony from the dissonance that presently characterizes their relationship?

This inquiry is critical as in the modern context, custom can serve as a resource or base for the evolution and strengthening of local law-making and law enforcement that is sorely required for the sustainable and equitable management of natural resources. At the same time, efficiently implemented statutory law is required to protect and strengthen rights of socially, economically and politically disadvantaged groups in society.

It becomes necessary therefore to explore the relationship between formal and non-formal legal frameworks in natural resources management.

2. CUSTOMARY LAW AND FORMAL LEGAL FRAMEWORKS IN NATURAL RESOURCES MANAGEMENT IN INDIA.

In the investigation of the traditions of governance of natural resources in the Indian context, thus, two distinct jurisprudential frameworks emerge – law and custom. The relative roles of formal law and custom in traditional Indian jurisprudence and under the Anglo-Saxon legal system requires to be viewed as a necessary prelude to assessing their implication in natural resources management.

2.1 Traditional Indian Jurisprudence and the Anglo-Saxon Legal System – Relative Roles of Law and Custom

The most significant difference between these two systems of law which has a bearing on the subject under review is the relative importance giving to the sources of law. The significance of the imposition of Anglo-Saxon jurisprudence on the Indian legal environment lies not only in the characterization of the sources of law, but also in the inter-relationship between them.
In modern law, the three identified sources of law are *statute, precedent* and *doctrine* in that order of precedence, with statute bearing over-riding authority over the other sources. Wherever precedent or doctrine contradicts statute, however old the former, the latter will prevail.

In the traditional Indian jurisprudential framework, Dharma, Royal Order and Custom were the three sources of law. A delicate balance was maintained among the three sources, which reserved a distinct and specific *authority* for each, vis-a-vis the others.

The latter system confers overriding authority on statute over other sources of law.

The concept is briefly discussed below.

### 2.2 Dharma, Royal Order and Custom

The concept of **Dharma** has been defined exhaustively by several writers. It is said to signify the eternal laws, which maintain the world.

It is:

“what is firm and durable “, what sustains and maintains, what hinders fainting and falling “.

It is:

“-- the action which, provided it is comfortable to the order of things, permits man to realize his destiny to the full, sustains him in this life and assures his well-being after death “

It constitutes:

“totality of duties which bear upon the individual according to his status (varna ) and the stage of life at which he stands, the totality of rules to which he must conform if he does not want to ‘fall’, if he is anxious about the hereafter”

This central concept of ‘duty’ is corroborated by the epics.

From the perspective of *law*, the following definition of Dharma explains the concept succinctly:

“Dharma is a code of conduct supported by the general conscience of the people. It is not subjective in the sense that the conscience of the individual imposes it, nor external in the sense that the law enforces it. Dharma does not force men into virtue, but trains them for it. It is not a fixed code of mechanical rules, but a living spirit, which grows and moves in response to the development of society.”

The sources of **dharma** were enumerated to be the Veda, Tradition and Good Custom.

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The Vedas were ‘Revelations’, or revealed texts gathered directly by inspired savants or rsis. Several schools of interpreters were established and functioned through the ages, each developing its commentaries and philosophical treatises on the Vedas. While the Vedas themselves did not contain any prescriptive rules of behaviour, but only ‘references to usage’ which constituted dharma, commentaries and treatises contained numerous precepts, which prescribed rules for governing behaviour. The interpretation of the Vedas was thus a continuous exercise involving the examination and assessment of human conditions and behaviour from the perspective of dharma, the sum of all moral and religious truths, only some of which were revealed in the form of srutis or the Vedas.

More than the Vedas, it was from smrti or Tradition - perception founded on the memory of sages - that rules of dharma were to be found. The entire sacred literature of the Hindu religion – Vedangas, Puranas, and the epics Mahabharata and Ramayana constituted the smriti and incorporated all such rules as could be derived from the Vedas.

Where there was inconsistency, or lack of clarity on any rule, recourse was had to “Good Custom”, the third source of Dharma.

“Good Custom” referred to the way good people lived, i.e. the custom of the good or the custom of those who had undergone good instruction in the virtuous or spiritual life. It was to be distinguished from the ordinary, habitual practices of people, which is also called custom. It was the former, which was the source of dharma, and not the latter, which however, could be a source of law.

Generally, Dharma was thought to override all other sources of law, though the Arthasastra maintained that the royal ordinance overrides the others. However, this doctrine is ascribed to the totalitarianism of the Mauryas, which few jurists would have supported.

Royal Order

Kingship was regarded as an institution necessary for the maintenance of the social order. The King’s function was to protect his subjects and guarantee their security. This was his dharma, and it was a religious duty to maintain public peace and harmony, for which he passes ‘orders’.

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7 Lingat, ibid., p.8.
9 ibid.
10 Lingat, op.cit., p.207.
Custom

Custom is distinguished from both Dharma and Royal Ordinance; dharma has a transcendental character, the law that ‘ought to be’, while custom was a purely social phenomenon.\textsuperscript{11}

\textit{The rule of dharma did not become ‘law’ until it entered into behaviour and was accepted by the population as a customary rule.}\textsuperscript{12}

The place of custom in the scheme of things is unambiguous. Custom was known to have formed a ‘special law’ regulating the various social groups, castes, corporations or guilds, families or the different regions of India.\textsuperscript{13}

2.3 Inter-relationship Among the three Sources of Law

The ‘duties’ recommended to the king with regard to custom reveals the position of the later vis-à-vis the legislative power of the king.

Lingat points out that the texts recommend that the King, for the protection of his subjects, must pass ‘orders’; the duty to be impartial, not to be “carried away by anger or cupidity“ was enjoined upon him. The King’s ‘authority’ to order was coupled with the power to impose fine and corporal punishment (even the death penalty) on anyone who transgresses royal order. However, this undisputed law-making and judicial authority of the king did not permit him to modify dharmic laws or divine commandments regarding the rules of conduct enjoined on all human beings. In other words, the King ‘should not and cannot legislate in the domain of -- dharma in general “\textsuperscript{14}

A similar restriction prevailed in matters relating to common customs of localities and groups. Dharma and established custom were usually looked on as inviolable\textsuperscript{15}. Since it was the duty of the King to support Dharma, to maintain public peace, he could not abrogate any custom, if such abrogation would lead to disorder in society. The custom may be contrary to smriti (Traditions or knowledge of the rules of dharma which are remembered and transmitted by sages and which are the means of acquiring wisdom) or sastras (recorded literature or treatises inspired by the smriti), but the king was not to intervene unless the usage was likely to create stress and discontent by reason of its immorality or unjustness among the subjects. Lingat reports that such interventions by the king in ‘dharma’s domain ‘ were very rare. Where strict observance of the rules of dharma would lead to disorder, the king must abstain from intervention and allow his subjects to continue to observe their customs. Thus customs of countries, castes and families and other groups were to be maintained intact. Otherwise the public would revolt, the subjects would turn against the king, and the army and the treasury would be

\textsuperscript{11} Ibid. at 177.
\textsuperscript{12} Ibid. at 202.
\textsuperscript{13} Ibid. at 195.
\textsuperscript{14} Ibid.224-25.
\textsuperscript{15} Basham, A.L., supra note 7, p.100.
destroyed. The King was bound to respect, and to cause to be respected by others, the customs of populations living on the frontiers or in the mountains.

Certain acts of commission by the king also illustrate the same principle. Extensive autonomy in the functioning of guilds, corporations, artisans, religious fraternities, local governing bodies etc. characterized the structure of the State. The conventions of these bodies were recorded in writing, constituting their statutes or by-laws. The King was bound to accord his royal seal to these agreements, when called upon to do so, as well as insist upon these conventions or regulations being respected by all sections of the society. Archeological evidence of South Indian history is replete with evidence of this kind, relating to various spheres of function of local bodies.

The royal sanction gave official recognition to such local regulations; the king was to cause them to be observed; he could prohibit any regulations only if they were likely to breed disorder or if they were contrary to the interests of the State. This activity of the King was interpreted, not as “legislative” in the domain of custom, but as “administrative”, the objective being the maintenance of peace. In theory, neither the king nor his council were legislative bodies in the modern sense of the term. The royal decrees that they issued were not new laws, but orders referring to special cases.

The Arthashastra, an important source of information on the role of the ancient Indian State, constitutes the science of economics and statecraft. The study of economics, the art of government and foreign policy was a preoccupation of ancient scholars in India and is reported to have started around 650 BC. The earliest text on Arthashastra that has survived is that of Kautilya (4th–3rd century BC); modern research has revealed that there were at least four distinct schools and thirteen individuals teachers of Arthashastra before Kautilya.

Kautilya’s treatise deals elaborately with the functions of the State in all sectors of government – administration; law, order and justice; taxation, revenue and expenditure; foreign policy; defence and war. The treatise is in the nature of instructions to a ruler on the ways and means of achieving the welfare of his subjects through the acquisition of wealth. His work, while drawing a wealth of detail from the then prevailing society, is a description of an ideal state, and is not a true and complete reflection of his or an earlier period of Indian history.

The centralized, bureaucratized state machinery that Kautilya describes continues to subscribe to the fundamental dharmic principles that had been ascribed to Kingship. The

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16 Lingat, ibid. at 200.
17 Ibid. at 199.
18 Ibid. 226-27.
19 Basham, supra note 8. Basham notes that heterodox kings, however, did from time to time issue orders, which were in the nature of new laws, the most notable case being Asoka.
21 Ibid, p.32.
essential duty of government was the maintenance of law and order. This was broadly defined to include the maintenance of social order as well as preventing and punishing criminal activity. An integral part of the Arthashastra was the dandaniti, the enforcement of laws through sanctions or punishments, which was a primary responsibility of the state. 22 While this may seem to reflect the principles of the modern ‘positivist’ state, other references of Kautilya to the legal ‘process’ confirm his links to the traditional legal system.

Any matter in dispute was to be judged according to the four bases of justice. These, in order of increasing importance, were23:

- Dharma, which was based on truth.
- Evidence, which was based on witnesses.
- Custom, the tradition accepted by the people.
- Royal edicts, meaning law as promulgated.

Whenever there was a disagreement between custom and the dharmashastras, or between the evidence and the shastras, the matter, according to Kautilya, was to be decided in accordance with dharma. Whenever there was a conflict between the shastras and the written law based on dharma, then the written law was to prevail (i.e. dharma as then understood was to prevail); the reason underlying this was that the reasoning explaining the derivation of a particular shastra from dharma was no longer available. 24

Judges were called ‘dharmastha’ – upholder of dharma, indicating that the ultimate source of all law is dharma. Kautilya also recognized that the customary law of a people or a region was also relevant, in addition to which was law as promulgated by the king. ‘When all traditional codes of conduct cease to operate due to disuse or disobedience, the king can promulgate written laws through his edicts, because he alone is the guardian of the right conduct of this world’. (Verse 3.1.38)25

Custom has thus held an important place in the Indian legal system prior to the introduction of English law. It was sustained by the Ruler, as well as by Dharma, the moral authority which activated both.

Custom was “at once, a source, an instrument and a product of Dharma”.26 The distance between law and custom was itself a tradition in India.27

Kolff describes the essence of the ‘Indian Law Machine’ as “the dynamic interaction of

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23 Verse 3.1.39,40 of Kautilya’s Arthashastra, cited in Rangarajan, ibid. at p.380.
24 Verse 3.1.43-45, ibid.
27 Lingat, at p.177.
‘wisdom-law’, positive royal decrees, and customary local law-ways”. The authority of dharma, which was moral and not legal, was kept alive by Indian scholars and jurists—the Brahmins. The King through royal decree could translate dharma into law. This, in turn could contribute to local or caste custom. Custom, which was itself a source of law could be recognized by the brahmin pandits and received into the scriptures. Thus “the ideal and the actual were not uncompromisingly opposed to each other, but informed each other.”

The administration of law was conducted at multiple levels, with many groups enjoying varying degrees of autonomy. The dharmashastra did not unify the system. There was neither a political agenda nor institutional mechanisms to supersede local laws; rather, the systems co-existed, continually impacting each other, and enabling change according to changing circumstances.

Under Muslim rule, the judicial system remained a plural one. Muslim populations were governed by Muslim law in criminal, civil and family matters and disputes settled before royal courts established in cities and administrative centres. Hindus were generally allowed their own tribunals in civil matters. When such matters came before royal courts, Hindu law was applied and sustained by the sanctions of the State. While there was a hierarchy of courts and rights of appeal, there was no supervision of lower courts. No attempt was made to control the administration of law in the villages.

This was to change fundamentally under colonial rule.

2.4 The Administration of Colonial Law

It was the task of the British to establish the rule of a unified positive system. Colonial administrators could not conceptually or administratively hold together the three interconnected planes of moral order, royal decree and local law-ways. English law rests on a fundamentally different foundation - on the primacy of written law, on statute or positive law. All other sources of law - case-law, legal doctrine, jurisprudence, custom - are only subsidiary to it, even if they play a role in the ‘discovery’ of law by contributing to the interpretation of statutory provisions. Primacy belongs always to positive law, particularly statute. While the existence and importance of custom was recognized, its validity and authority was subjected to English notions of jurisprudence

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29 Ibid. at 206.
30 Galanter, Marc. "The Displacement of Traditional Law in Modern India", in *Law and Society in Modern India*, OUP 1989, p.16.
31 Ibid. Also, Kolff, op.cit. P.211.
32 Kolff, at 207.
33 Lingat, at 257.
and political economy. Early Anglo-Indian case law did confirm the primacy of custom over the written law.\textsuperscript{34}

\textbf{However, English law, by reason of its fundamental difference in doctrinal foundation, perceived custom through the eyes of law, through the notion of “legality”, rather than the notion of “authority” which underlies Indian legal tradition.}

Thus, custom, even if it had been a source of law, had to be sanctified by statute declared by the State. The judiciary was bound to assess the ‘legality’ of a custom, besides its justness. In other words, \textit{custom has no existence outside statute law}. It had to be discovered and asserted, case by individual case before courts.

Custom was displaced from the position of eminence that it had in the earlier legal tradition through a gradual development of positive colonial law.

The institutionalisation of colonial administration of law and justice involved a process of a gradual realization of the nature of Indian tradition, and substantive modification of it in stages.

\textit{2.5 Process of Change from the Traditional to the Modern.}

Galanter marks three distinct stages in which traditional law was displaced by the modern legal system.\textsuperscript{35}

The first stage, which constituted a period of ‘initial exploration’, dated from Warren Hastings’ organization of a system of courts for the hinterland of Bengal in 1772. There was a general expansion of government’s judicial functions. Simultaneously, there was a decline in the functioning of other tribunals. Authoritative texts of law to be used in government courts were isolated and legislation initiated. This stage continued until the take over of the Indian administration by the Crown.

Between the period 1860 and 1950, there was extensive codification and expansion of the system of courts. Sources of law became more fixed and legislation became the dominant mode of modifying the law.

After 1950, there was further consolidation of the law and the development of a unified judicial system over the whole of India.

Assuming the existence of a body of law comparable to their own, the British in their early years of rule attempted to apply indigenous law. However, there was no ‘single system of law, no fixed authoritative body of law, no set of binding precedents, no single legitimate way of applying or changing the law’. The main departments of law with which the British were immediately concerned were family law, whether Hindu or

\textsuperscript{34} Ibid.
\textsuperscript{35} Galanter, op.cit. P.17.
Muslim, land law (proprietary, tenancy, fiscal etc.) and adjective law (law of procedures and evidence).\textsuperscript{36}

Two methods were employed to deal with indigenous law. Firstly, collections and translations of ancient texts and commentaries was undertaken. Secondly, Hindu pandits and Muslim maulvis were appointed as ‘law officers’ in courts to assist judges to ‘root their decisions in traditional legal culture’, and to fill up the gaps in their understanding of traditional law. It was expected that in addition to the compilation of cases, the opinions of law officers would provide the ‘certainty’ that was sorely in need. Neither of these methods could be successful. The dharmashastras could not be reduced to an exclusive and ascertained source of law, as they constituted a “living and responsible science”, lending themselves to continuous interpretation and modification according to changing circumstances. By corollary, Hindu pundits could not be expected to speak “with one voice”, as it was their tradition to “rephrase and update the many-sided solid richness of old wisdom”\textsuperscript{37}, and to find justice on the basis of dharma and equity, in close touch with custom and changing political and social circumstances.

By the 1820’s, courts began to be almost fully governed by the principle of \textit{stare decisis} (decisions in earlier cases serving as precedents binding on later cases or lower courts), which worked as a counter-measure to the role of Indian Law Officers, who eventually became superfluous. Their posts were abolished in 1864, after which colonial courts assumed the full responsibility for the application of Hindu and Muslim law.

The next significant exercise was the compilation and recording of customs. It was done differently in the different provinces, and had to contend at all times with the steady advance of rule by statute.

In the Bombay Province, Mountstuart Elphinstone, Governor from 1818 to 1827 recognized the discrepancy between the ancient Hindu texts applied in the Bengal courts and the modern practice as it was found in the Maratha states. He also acknowledged that “in many cases, what did work in practice were known customs, founded indeed on the Dharma Shastra, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text.”\textsuperscript{38} Elphinstone proposed a system for the province, which would incorporate written and unwritten law. This was to be done by producing a digest through an exhaustive investigation. Hindu lawyers, \textit{shastries}, heads of castes and others were to be interviewed on law, custom and public opinion. Secondly, it was intended to study court records to elicit information on these subjects obtained in the course of judicial investigation.\textsuperscript{39} While a digest was produced in 1827 covering some Deccan districts, the ultimate aim of Elphinstone to put to use a Bombay Code did not materialize. The Code provided that in the absence of an Act of Parliament, or a regulation, the law to be observed would be the usage of the country in which the suit arose; if none such was discernable, the law of the defendant to be applied; in the absence

\textsuperscript{36} Kolff, op.cit. p. 204.
\textsuperscript{37} Ibid, p.213.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid, at 222.
of specific law, “justice, equity or good conscience”. This was intended as a mechanism to protect the dynamic interplay between Brahminical great tradition, as represented by the dharmashastras and custom, along with traditions of dispute management.\textsuperscript{40}

The loss of provincial legislative autonomy under the Charter Act of 1833, which created a Central legislature in Calcutta, put paid to these efforts.

Similar attempts were made in the Madras province as well as the Punjab, with more success in the latter, as it was a Non-Regulation territory, permitting discretionary rule by the executive for a longer period of time. However, the inexorable advance of positive law rendered these efforts to nought.

In Madras, J.H.Nelson, member of the Indian Civil Service and District Judge, objected to the imposition of “foreign law” on South India. The Hindu Great Tradition was foreign to the inhabitants of South India, who were not Aryans and who were generally ruled by their own customs. He suggested a short enabling act for the guidance of Madras judges. This act was to ‘recognize and proclaim the general right of the Indian to consult his own inclination in all matters of adoption, alienation, testation and the like’. Government was to refrain from all interference with substantive law.\textsuperscript{41} However, since 1802, provincial legislation followed the example of Bengal by not providing for custom, and “thus dozens of customs were from the legal standpoint, steamrollered out of existence.”\textsuperscript{42}

The Punjab, being a newly acquired territory, was deemed to require a strong executive with wide discretionary powers, as it was considered “primitive”. The operation of Bengal Acts and Regulations was withheld till the end of the century. The agricultural population followed their own customary law. In matters concerning personal relationships (except marriage and divorce) and land tenures, Punjab customs operated independently of shastric learning\textsuperscript{43}

In the Punjab, custom was the primary rule of decision in questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution. Muslim and Hindu law would come only secondarily.\textsuperscript{44}

Official sanctity was accorded to custom by the practice of recording of customs during land settlements by revenue officials since the 1850’s. Village customs were recorded in the “\textit{riwaj-i-am}” by collectively interrogating villagers of the same tribe or district and recording their joint answers. Based on these records, a series of volumes on customary law in the Punjab were published. A compilation of decisions of courts on points of customary law was also attempted and achieved in the 1870’s with the objective of

\textsuperscript{40} Ibid, at 224.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid at 228.
\textsuperscript{44} Ibid at 229.
producing a precise codification of custom as judicially recognized in the province.\textsuperscript{45} However, this very recording of custom fundamentally transformed its nature.

2.6 \textit{Advance of Positive Law.}

Customs occupied a very important place in modern India, and were are recognized by Parliament and the Indian legislatures as valuable in the administration of law and justice. Several Regulations and Acts between 1753 to 1935 reserved a legal space for custom.\textsuperscript{46}

1.0.1.1.1.1 The Charter of the Mayor’s Court in Bombay in 1753 reserved laws and customs to natives resident in the Company’s territories in India.

2. The preamble to 21 Geo.111( Chap.70) of 1781 reserved to inhabitants of Bengal, Bihar and Orissa all their laws, usages, rights and privileges. The same Act provided that all suits and actions regarding inheritance, succession to lands, rents and goods and all matters of contract were to be decided between Mohammedans by Mohammedan law, between Hindus by Hindu laws and usages, and when only one of the party was a Mohammedan or a Hindu, by the law of the defendant.

3. By Sec. 10, 37 Geo 111 , Chap.142, of 1796 , Recorder’s Courts were established at Madras and Bombay, and a provision similar to (2) above was incorporated by section 13.

4. The Bombay Regulation IV of 1827 provided that in the trial of suits, in the absence of Acts of Parliament and Regulations of Government, the usages of the country in which the suit arose was to be applied; and if there were none such, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone was to be observed.

5. The High Courts Act of 1861 provided that in matters of inheritance and succession and in other matters specified, the High Courts to be established were also bound to decide according to usages, as much as the Supreme Courts were bound.

6. The Government of India Act of 1915, by section 112, provided that the High Courts at Calcutta, Madras and Bombay shall, in matters of inheritance and succession to lands, rents and goods and in matters of contract and dealing between party and party, decide according to the personal law or custom having the force of law to which the parties are subject.


\textsuperscript{45} \textit{Ibid} at 230.
\textsuperscript{46} Kane P.V, “Hindu Customs and Modern Law”, Sir Lallubhai A.Shah Lectures (1944), University of Bombay, 1950. P.41-43.
Besides these Acts, other miscellaneous legislation - such as Punjab Laws Act IV of 1872, the Madras Civil Courts Act III of 1873 Burma Courts Act XVII of 1875, Central Provinces Laws Act XX of 1875, the Oudh Laws Act XVIII of 1876, the Bengal, North-West Provinces and Assam Civil Courts Act (XII) of 1887 - also provided that custom shall form the rule of decision in certain matters affecting Hindus and Mohammedans. These matters included succession, inheritance, marriage, caste, religious usage etc.

All these Acts provided that custom will be the rule of decision "unless it is opposed to justice, equity and good conscience or unless it has been abolished or altered by a legislative enactment". Custom in variance of the general Hindu and Mohammedan law, which was administered by the courts, was a matter of evidence, the burden of proving which lay heavily on the person alleging the custom.

The statutory reservation of the validity of custom through these several enactments was not very helpful in the face of increasing and extensive codification of laws and the centralization of the functions of law-making, law-enforcement and dispute management.

2.7 Codification of Laws.

Work on codification of laws progressed along with the centralization of law-making. The process was as follows:

- In 1833, a single legislature for the whole of India was established at Calcutta with power of legislation over the whole of British India, with authority not only over Indians but also over Europeans. The aim was to evolve a code of law common to all Indian ethnic and religious identities.
- In 1837, a draft Penal code was prepared by Macaulay.
- Upto 1860, the law that was applied was varied. Parliamentary charters and Acts, Indian legislation, Company Regulations, English Common Law, ecclesiastical and admiralty law, Hindu law, Muslim Law and many bodies of customary law. After 1858, the next twenty five years constituted the major period of codification of law and consolidation of courts.
- The Charter Act of 1853 authorized the Queen to appoint a Law Commission in England, which would propose appropriate enactments for India, thus taking away legislative initiative from Calcutta. Before the Law Commission resigned in 1870 and returned legislative function to the Indian Government, much work was done on a body of substantive civil law based on English law to be enacted in a simplified manner to suit Indian conditions. A series of codes were prepared and passed into law.
- A revised version of Macaulay’s draft Penal Code was enacted in 1860.

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47 This inconsistency or repugnancy principle was used in, for instance Africa, to outlaw unacceptable customs. See Merry, supra note 7, p.870.
48 Kane P.V, ibid. p.44.
49 Kolff, D.H.A –op.cit. p.219-220
• In 1859 and 1861 respectively, a Code of Civil Procedure and a Code of Criminal Procedure were enacted.
• This was followed by the Succession Act of 1865.
• In 1872, The Contract Act was passed.

It was estimated that during a period of seven years between 1862 and 1869, as many as 211 enactments issued from the legislature. By 1882, there was an almost complete codification of commercial, criminal and procedural laws. The personal laws of Muslims and Hindus were exempted, but their scope was limited to only personal matters such as family law, inheritance, succession, caste and religious endowments.

*The codes did not represent any fusion with indigenous law, nor was there any borrowing from Hindu, Muslim or customary law except for occasional adjustment with local rules.*

2.8 Impact of the Western Colonial Legal System on Indigenous Law.

At a general level, the impact can be summarized as follows.

• A centralized government assumed the monopoly power of ‘finding’, ‘declaring’ and ‘applying’ the law. Earlier, these functions were implemented at multiple levels. It was the scholars’ work to interpret ‘dharma’ and promote the diffusion of ideas to other levels. Further, Indian ‘legal literati’ were ‘sensitive and sophisticated interpreters’ of changing legal opinion. The declaration and application of law was done both by the ruler as well as local authorities and communities. It was part of the duty of the king to acknowledge the law as applied at local levels.
• The monopoly of government extended to disputes within its cognizance.
• Traditional tribunals declined. They could not invoke government enforcement of their decrees. While they continued to function, many subjects were removed from their purview. The village lost its position as guardian of customary behaviour. Colonial courts could declare as unlawful decisions of traditional courts, whereas there was no appeal from these courts.
• Criminal, commercial and procedural laws were separated from Hindu and Muslim law which were confined to family matters. The new codes which were prepared had no fusion with indigenous law.
• Where indigenous law was applied, it was transformed.

Firstly, Dharmashastra were almost completely obliterated and were no more the final reference or source of ‘precedent, analogy and inspiration’. On matters of personal law, shastric rules became ‘intermixed with other rules and administered in the common—law style, isolated from shastric techniques of interpretation and procedure’.

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51 Cited in Kolff - op.cit.
52 Cited in Galanter - op.cit.
Secondly, the attempt to ascertain and publish translated versions of Hindu law in digested form resulted in a rigidity that was alien to the legal treatises and commentaries. The characteristic nature of these texts was that they represented the ‘law-finding’ exercise of Indian scholars who constantly re-articulated ancient dharmic values to suit new conditions.

Thirdly, custom also became atrophied as a result of the rupture of its relationship with the other two parts of the “Indian Law Machine”. The recording of custom changed its characteristics. Custom was ‘a body of orally transmitted precepts and precedents’; it contained the possibility of variable interpretation and ‘quasi-legislative innovation’; in dispute management, solutions were sought which took the total situation of the parties into consideration. Under the influence of colonial legal administration, custom became a fixed body of law, indistinguishable from statute and case-law; opinions and evidence given by villagers on custom in courts or in the process of land settlement were isolated from their contexts and utilized to describe single transactions or offences. This gave rise to “a sense of individual right not dependant on community opinion or usage, actively enforced by court even in opposition to community opinion”. Specifically, dispute management was abstracted from the totality of customary law.

- Textual law was given precedence over bodies of customary law and extended at the expense of the latter.
- Rules of evidence imported from the colonial legal system and imposed by statute and convention in court procedures were a main cause for the disappearance of customs. Strict criteria were imposed to prove the legal validity of custom. To be valid, custom must be proved to be immemorial or ancient, uniform, invariable, continuous, certain, notorious, reasonable (or not unreasonable), peaceable, obligatory, and must not be immoral nor opposed to an express enactment or to public policy.55
- The rule of stare decisis put paid to the flexibility of Indian law by obviating innovation in shastric and customary law to meet changes in community opinion and sentiment. The modern legal machinery ‘forces local law to fall in line with national standards’.
- Where earlier traditional society drew inspiration from written shastras, under modern law, custom was “preserved, upgraded and frozen out of relevance to the flux of village life.”

This was the legal tradition that was inherited and consciously retained by the Indian State after independence from colonial rule.

It is in this general context of the changed inter-relationship between law and custom, in terms of their respective validity and exclusivity, and the impact of the one on the other, that the issue of natural resource use and management in India is located.

3.0 COLONIAL NATURAL RESOURCES LAW AND CUSTOM

55 Kane, op.cit. pp.44-86.
The evolution of modern statutory law on natural resources had its beginning, under Company rule, in the conceptual and legal separation or abstraction of the use of natural resources from a whole complex of social behaviour and inter-relationships that constituted the political, economic and juridical spheres of rural life.

Of the fact that there was such an integration in pre-colonial India, there was no doubt. The predominantly agricultural, pre-industrial society in medieval India was a mosaic of different modes of resource use - hunting, gathering (including shifting cultivation), nomadic pastoralism, and settled cultivation. In all the three modes, the ties of caste, lineage or clan networks formed the basis of resource allocation and management. Customs and usages regulated inter-caste relations and division of labour among social groups. Interdependence and reciprocity in economic exchange served to maintain the cohesiveness of the village community, as well as the system of hierarchy that characterized it. In places where hunter-gatherers and shifting cultivator groups predominated, the communal mode of control and use of natural resources predominated. The practices of resource use were buttressed by religious beliefs and value systems. In the more extensive ‘settled-agricultural’ areas, too, localized governing systems, influenced by caste stratification, division of labour and kinship ties, determined the modes of access and use of natural resources, both at the individual as well as the community level. Cultural adjustments were created and nurtured among different caste groups, with reference to types of resources sought and utilized and methods of exploitation of the resource, in order to enable a wider access to such resources by all the concerned groups.

The expansion of settled agriculture developed in its wake the institution of private property, and also contributed to the emergence of larger states throughout the last millenium. However, right up to the 19th century, customs and tradition played a significant role in constraining individual control of village land and maintaining local arrangements to accommodate conflicting individual and collective rights. Individual rights coexisted with rights in common property resources such as dry lands, grazing and wooded land and in irrigation works constructed out of community capital. The claims of the state to the surplus of production and the means to mobilize it are crucial determinants of local autonomy in the use and management of natural resources. The mode of tax collection from rural society in the Chola state, or Vijayanagar and Mughal empires treated the village, and not individual households, as the basic unit of social organization from which the State’s share of surplus grain was collected. This left the local community, governed by a council of leaders from different caste groups, a sufficient flexibility in determining rights and liabilities of villagers in resource use and

56 Gadgil, Madhav and Guha, Ramachandra, ”This Fissured Land – An Ecological History of India”, Oxford University Press, New Delhi, 1993, p.63.
58 Gadgil and Guha, supra note 55, at pp.96-100.
60 Ibid.
management. Comprehensive arrangements were employed, for example, for the management of tank irrigation systems in Southern India, well documented by stone inscriptions from the Pandya, Chola and Vijayanagar periods (800 A.D. to 1300 A.D)\textsuperscript{61}. On a wider scale, in different localities, equally elaborate and meticulously monitored arrangements existed between different occupational groups – cultivators, nomads, hunter-gatherers, fisher-folk, horticulturists, artisans and a host of subsidiary occupational groups – based on caste distinctions. Such arrangements provided “mutual exclusivities” within and between groups with regard to access to natural resources.\textsuperscript{62} The role of the state was mostly non-interventional - the collection of taxes on grain production; the imposition of a limited number of taxes; the exercise of authority to bestow land grants on individuals as circumstances required; infrequently settling disputes; establishing claims to hunting preserves; recruiting soldiers into armies etc. were actions which were not designed to interfere with or disrupt local governance of natural resources. Rural society was left to be ruled by custom and tradition rather than by royal edict. In the Muslim period, for example, which substantially followed the mode of governance of earlier Hindu kings, there were no taxes on horticulture, sheep raising, fisheries or on forest holdings. When once a tax was imposed by a governor in Srinagar on sheep and fishing, strong local protests resulted in a royal edict withdrawing the tax as it was opposed to custom.\textsuperscript{63}

The overarching “authority” of custom was a necessity to enable the fostering of cooperation among local groups in the “prudent “ use of varied natural resources in a sustained manner. The diversified micro-environments gave rise to a wide range of land types and water bodies, and species of flora and fauna. The integrated use of these required a high degree of coordination and mutual restraint, not only between different castes in a village, or between different types of resource users such as hunter-gatherers, nomadic pastoralists and peasant cultivators, but between the village and the state in Indian legal tradition.\textsuperscript{64} Natural resources-related economic activities of peasant societies were thus regulated as much by “personal” law involving caste, kinship and religious factors as well as territorial boundaries. “Custom” as a body of law was a constituent sum of those sectors of law that are recognized in the modern legal system as ‘property law’, ‘contract law’, ‘personal laws’ (of inheritance, marriage, adoption etc.), ‘criminal law’, and a wide range of ‘civil laws’. The absence of centralized judicial institutions for dispute resolution obviated the necessity of procedural codes or codified laws of evidence. In the strict sense, local dispute-resolving fora were not courts of law but of arbitration. They had no precise code of law, their actions being governed by custom. They functioned only with the consent of those involved in a dispute, and had no powers of enforcement, though they did have certain techniques of coercion.\textsuperscript{65}

3.1 Colonial Land, Forest and Water Laws.

\textsuperscript{62} Gadgil and Guha, supra note 55, pp 91-100.
\textsuperscript{63} Ibid, p.107.
\textsuperscript{64} Ibid p. 38.
**Law relating to Land**

The main revenue of the colonial state derived from land resources, and the first concerns of the British when they established their rule was to organize revenue and civil administration of the provinces under their control.

The fundamental changes introduced by colonial law relating to land which resulted in the “slow crumbling of property custom” were the result of the combined impact of three specific, interconnected processes.

1. The institution of private, saleable property rights in land.
2. The introduction of a broad division of society into the legal categories of “landlord” and “tenant”, with provisions for sub-divisional classification. The state was to be recognized as the universal landlord.
3. The mode of revenue collection from landholders and cultivators.

The process of establishing uniformity in administration based on these principles over the whole of British India extended to almost a century, the final pattern crystallizing and emerging in the last quarter of the 19th century. The several provinces and regions offered a laboratory of experiments to transform rural societies to their very roots.

From the late seventeenth century to the early part of the 19th century, British administrators such as Warren Hastings, while attempting to implement revenue policy and civil administration, were cautious in their approach, inclined to take into account and depend on the ‘customs and usages’ of the people. But the seeds sown during the Company era were to be reaped by the post-1857 British government to establish an irreversible pattern of exploitative land use, the fundamental features of which have been retained substantially till date.

In determining the mode of revenue administration, the main question to be addressed was, on what principles the assessment and collection of the land revenue were to be regulated. The real problem facing the British was to decide who actually exercised proprietary rights. Company administrators found the existing situation to be ‘completely lacking in certainty and regularity’. Rights over land had their origin in the unwritten customary law of the agricultural communities. The British could not tolerate the existence of a society based on custom and tradition, both of which “lacked precision”. What was required was a system whereby public rights could be clearly distinguished from private rights. For this, it was necessary to introduce a system of legality by which rights would be defined by a body of law equally binding upon the State and the subjects. The function of such a system would be to fix the revenue demand, and recognize the remaining produce of the soil as private property in the full legal sense.66

The essence of private property right in land - the right of transfer by sale or mortgage –

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had to ensured by law. This would enable the Government to enforce the payment of revenue through attachment and public sale of lands of cultivators or owners. The strategy was to introduce the tenures of landlord and tenants. The fundamental principle was that the landlord held title to an estate. This title gave him command over its gross rental. Government, as supreme landlord was to share at the rate of a fixed proportion in that gross rental. The proportion of government’s share ranged from 66 2/3 percent to 50 percent at different periods of time. In course of time, scientific principles were introduced to define assessment based on qualitative estimates of fertility according to soil classification.

The determination of tenurial rights, and mode of tax collection differed from province to province. This determination was significant with respect to legal title not only to cultivated lands, but also to cultivable and uncultivable “wastes”. The so-called ‘wastes’, which formed a critical common property resource in villages, also became subject to tenurial claims.

In Bengal, Cornwallis’s Permanent Settlement in 1793 recognized the great zamindars who were earlier revenue collectors, as proprietors and allowed them to obtain private rent from opening up the vast tracts of cultivable waste within their domains. In the Madras Presidency, Munro initiated a different system whereby the right of property vested in individuals – the ryots – whose title thereafter derived directly and only from state authorization. The ryotwari system was based on a permanent assessment of the rent payable on all arable land. The demand from each cultivated field and other smaller units was to be determined separately, and revenue collected directly from each cultivator by government as landlord of the soil. The result was a “much more inquisitorial investigation into the private concerns of the people and left the definition of public and private rights in the hands of an army of executive officials”.

The unassessed waste was declared to belong to government, even though it remained in the possession of ‘mirasidars’ through most of the Company period. Taking the cue from Munro that government “possesses – the absolute right of disposing the waste as it pleases”, the Court of Directors in London ordered in 1856 that all waste land was at the disposal of the Revenue authorities and should be offered for sale, first to local landowners and then to the public at large. Rules for selling waste lands were published in 1864 and the policy put into effect through survey and settlement operations.

In a third type of settlement in the Ceded and Conquered Provinces ( later to be known as the North Western Provinces ), a different class of intermediaries were given the right to engage for the revenue and enjoy proprietary right – the taluqdars and village ‘brotherhoods’.

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68 Stokes, op.cit. p.82.
69 Ludden, supra note 58, p.170
70 Stokes, ibid.
71 Ludden, op. cit. pp.175/176.
Each of these strategies was founded on specific theories of political economy – the Cornwallis system based on English constitutional principles as established in Bengal; the Munro system, which while exercising political power as a matter of right, attempted to preserve traditional institutions; the evangelists who sought a complete Anglicization of Indian society; and the Utilitarian philosophy which propagated a movement of individualism, seeking to liberate the individual from the ‘slavery of custom and the tyranny of noble and priest’.

The professed aim of the Utilitarians, whose philosophy reflected the “alliance of merchant, manufacturer and missionary”\textsuperscript{72}, was to make every individual in society “a free, autonomous agent, leading a life of conscious deliberation and choice”. The mode to bring about this change was by the power of law and government. The essential prerequisites for the operation of Utilitarian ideas were: \textsuperscript{73}

- There should be no middlemen between the state and the actual cultivator.
- There should be a code of law which would be universal in its application and mode of procedure.
- Most importantly, there should be a strong central authority possessing exclusive legislative authority for the whole of India.
- A total reorganization and expansion of the judicial system was to be undertaken along with a complete overhaul and reshaping of the administrative system.
- A survey and registration of all landholdings to be undertaken.
- Land revenue to be scientifically assessed based on detailed statistics of agricultural production.

The Utilitarian plan was gradually, substantially carried through; its influence was to be found in the zamindari system of Bengal, Bihar and Orissa and the ryotwari system in the Deccan. Under its influence, a uniform administration was evolved and established by the sixties and seventies of the nineteenth century.

Each of the three systems – Cornwallis’s, Munro’s or the Utilitarian – professed the same principles: the concept of private property and its alienation for debt, enabled by a permanent limitation of the State demand and permitting a private rent to the proprietor.\textsuperscript{74}

It was this intervention that resulted in the dissolution of the traditional social order. The vesting of ‘realizable’ value in land, either in sale value or as security for loans destroyed the tradition of communal interdependence as exemplified by joint proprietors of co-sharing village land.\textsuperscript{75} The registration of title and issue of ‘pattahs’ tended to break down community sharehold customs.\textsuperscript{76} Ludden reports that though individual rights in land and market transactions existed before the Company era, such transactions were conducted

\textsuperscript{72} Stokes, E., supra note 65, p.47-48.
\textsuperscript{73} Edwardes, supra note 64, pp. 59-60.
\textsuperscript{74} Stokes, op.cit. p.85.
\textsuperscript{75} Edwardes, ibid.
\textsuperscript{76} Ludden, supra note 58. p.183.
within the jurisdiction of local arrangements, which attempted to accommodate conflicting individual and collective rights. Most importantly, “the true private property right, that of regulating the occupation and cultivation of the soil, belonged to the primary tenure of Indian agrarian society – the co-sharing village community.” The custom was still strong over the greater part of British India, particularly the North Western Provinces, Punjab etc.

**Codification of Law**

Developments in codification of law and judicial administration kept pace with land administration. Early regulations during the Company era were for the settlement of revenue as well as the administration of justice, which was also an early concern. The first half of the eighteenth century was a period of improvisation through regulations, corresponding to the various experiments, reflecting the outlook and perceptions of different individuals, that were conducted on issues connected with land – the core of Indian society, and on modes of judicial administration.

The movement for codification came into play after the Crown took over the government. The first statutes that came into being were directly in response to the complexities thrown up by the administration of land resources - property, commercial and procedural codes to deal with the commercialization of land that had been engendered by the various revenue settlements.

The great Code of Civil Procedure of 1859 codified and amended the creditor’s rights of attachment and sale of his debtor’s property, together with the first provisions regarding insolvency outside the presidency towns, The former was an extension of the government’s right of compulsory sale for revenue arrears, and the latter a development in step with contemporary English practice. This was followed by the Limitation Act 1859 regulating, inter alia, the institution of suits. In 1870, the Court Fees Act established a uniform system of charges for presentation of suits. Rules for the submission of evidence were codified in the Evidence Act of 1872. Parallelly, reforms took place in the number and jurisdiction of courts.

The Penal Code was enacted in 1860, and a year later, the Criminal Procedure Code. In 1864, the first comprehensive measure codifying and amending the existing law relating to the registration of deeds was enacted. In 1872, inspired by the needs of commerce, the first Contract Act - a distillation of English legal principles - became law. The last pioneering statutes followed in 1882: Negotiable Instruments, Trusts, and most important of all, the codifying Transfer of Property Act. The law of mortgage developed largely through judicial decisions, establishing the legal concepts of foreclosure and equity of redemption, both of which were imported into the Indian legal scene. The development of property law was completed with the modernizing of revenue regulations relating to landlord and tenant in a series of enactments beginning with the Bengal

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77 Stokes, supra note 65, p.111.
Recovery of Rents Act of 1859.\(^79\)

Aspects of personal law relating to property, such as inheritance and succession, escaped codification. But the idea of codification slowly developed through enactment of marriage and succession laws relating to Non-Hindu and Non-Muslim communities.\(^80\)

After Independence, Hindu law was codified in 1955/56 as a territorial law.

*Forest Law*

The characteristics of colonial forest policy that emerged in the first half of the century were: the destruction of forests as a mark of political supremacy in the wars with native kingdoms, the revenue orientation of land policy and the beginning of timber supply for Britain’s imperial interests abroad. Gadgil and Guha report that in the early nineteenth century, the East India Company wantonly destroyed or razed to the ground valuable teak plantations in Ratnagiri after its defeat of the Marathas. These plantations had been nurtured and grown by the legendary Maratha admiral Kanhoji Angre.\(^81\) In other places, Indian teak replaced the vanished oak forests of England to supply English wars against Napoleon and Britain’s maritime expansions and put to use for shipbuilding, iron-smelting and tanning.\(^82\)

It was the pursuit of land revenue, however, through the impetus given to agriculture, that was the cause of destruction of much of forest wealth in the different regions. Expansion of agriculture was vigorously promoted at the expense of forests, to add to land that could be assessed to revenue. Along with forest, a great part of the culturable waste lands was also been broken up, further draining the supply of firewood and grass.

The legal mechanism which enabled the exploitation of land resources to the fullest – i.e. the separation of ‘public’ from ‘private’ land, the declaration of the former as state property, and the inclusion of ‘waste’ lands in the public domain – was replicated in the administration of forests as their exploitation increased in pace with the development of British colonial and imperial interests, particularly in the second half of the nineteenth century. In the matter of law and custom, the evolution of colonial policy on the governance and use of forests followed more or less the same path charted by land policy.

There was sufficient evidence that rural communities in the pre-British era enjoyed untrammeled use of the forests and wastes in their vicinity.\(^83\) British administrators noted the non-intervention of earlier rulers in the use of forests by local communities. Pauw, in his report of the settlement of Garhwal, noted that waste and forests lands never attracted

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\(^{79}\) Ibid.

\(^{80}\) Succession Act of 1865, applicable to foreign communities resident in India; Native Converts Marriage Dissolution Act, 1866; Indian Divorce Act 1869.

\(^{81}\) Gadgil and Guha, supra note 55, p.118.

\(^{82}\) Ibid.

the attention of former governments. Atkinson, in his gazetteer of the North Western Provinces, remarked that while native kings did subject the produce of the forests (such as medicinal plants) to a small cess, as and when there were exported, the products of the forests consumed by the people themselves were not taken into account. It was not only the existence and continued exercise of community rights in relation to produce from forest and waste land, that characterized pre-British societies. Village ownership of the forest within their boundaries was also very much in evidence in the south in the Madras Province as much as in the Himalayan tracts in the north. Needless to say, local rights of ownership and use were exercised not randomly, but through social and cultural institutions and norms evolved and adopted by local communities themselves.

The politico-legal principle introduced through early colonial land administration that “all land not actually under cultivation belonged to the State” served the purpose of enabling the cutting down of vast and valuable forests in the initial decades of British rule, mostly for export to England. A tremendous impetus was provided by the introduction of railways in the early 1850’s. Thereafter, great tracts of forests all over the country disappeared in service of the great Indian railway network. In the sub-Himalayan tracts of Kumaon and Garhwal, “forests were felled in even to desolation” As early as in 1857, scarcity of wood fuel was reported in the Gangetic valley, due to the widespread use of local timber as fuel for the railways. By 1865, considerable deforestation had occurred in the Doab. The Melghat and North Arcot hills in the Madras province were laid bare. The bamboo, sal and teak forests of peninsular India became exhausted. The deodar forests of the Sutlej and the Jumna valleys vanished. Within fifty years, the magnificent forests of India and Burma were almost completely decimated.

However, until 1864, when a Forest Department was first constituted, followed by the first Forest Act of 1865, the unrestricted use of forest resources by the colonial administration did not interrupt the access of local communities to the same resources, which they had exercised ‘down the centuries’. The same approach characterized land resources as well. In spite of government’s assumed control over all land, communities continued to exercise their “access rights” over “wastes” until legislation was enacted to bring wastelands under government control.

The uncontrolled rampage on forest resources soon led to the necessity of adopting more restrained exploitation in a “scientific manner” for which a Forest Department was set up in 1864. The need also began to be felt for legislative control over ‘forest areas’, to assert

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87 Pearson,G.F.,1870, “Deodar Forests of Jaunsar Bawar” cited in Gadgil and Guha, p.120
88 Whitcombe, supra note 77, p.94.
89 Gadgil and Guha, p.121
90 Guha, supra note 82.
91 Ibid, p. 58.
the state’s right over forests, as well as to ‘acquire’ forest areas that could supply timber for the railways. The Forest Act of 1865 came into being. It sought to establish the claims of the state to the forest that it required. At the same time, the Act provided for existing rights to be protected.  

While a significant extent of forest decimation had been achieved by the administration before the enactment of any legislation specifically on forests, the Forest Act for the first time set the foundation for the definition of the state’s rights versus the community’s customs, and with it, the inevitable advance of the former over the latter. Within a decade and a half of the enactment of the Act of 1865, the unrestricted rights of user hitherto allowed to villagers as much as the incomplete control over the forest by government was beginning to be regretted, and remedial efforts were begun.

The enactment of the Forest Act of 1878 was preceded by an official debate that echoed the issues that formed the core of the revenue debate almost a half century earlier. The main concern then was the determination of the extent of government intervention and the nature of agrarian institutions. As a corollary, it was also a debate about the nature of the legal system – the extent of codification, the policy on ‘customs’ and the nature and function of judicial institutions. A careful balance was to be attained in order to provide sufficient freedom for entrepreneurship and incentive for productivity and thereby increase land revenue.

In the matter of forests, however, there was no such concern. Both the state and villagers were seen as ‘users’, competing for the same resource; the complementarity of forest use and agriculture was not sufficiently appreciated by the administration.

The main concern of forest administrators after the Forest Act of 1865 was similarly to achieve the ‘absolute proprietary right of the state’, which had been diluted by early government authorities. It was strongly felt that the most important shortcoming in the Act of 1865 was the “absence of all provisions regarding the definition, regulation, commutation, and extinction of customary rights”.

The Forest Act of 1878 was enacted which established the government’s complete control over all forests lands, and not only over those forests selected for protection and declared a government forest. The definition of ‘forest’ was expanded to include all lands instead of only land covered with trees, brushwood and jungle. The free access enjoyed by local communities were suspended. Thereafter, use of forest was to be based on privilege and not a right. The government reserved the powers to grant, regulate, limit, suspend, transfer or extinguish such privileges or concessions. Different classes of forests were defined – reserved, protected, and village forests. The third type were not

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92 Early revenue regulations similarly provided for the documentation of village rights in land in a “wajib-ul-urz” (record of rights). This included village rights to groves and pastures. It was hoped that by recording customs in the greatest detail, peace could be ensured by their protection.

93 Gadgil and Guha, supra note 55, p.124.

constituted over most of the subcontinent. Concessions were individualized, and community interests ignored. The Act paved the way for purely commercial forestry to be practiced over the greater part of the country. Monoculture species were introduced. The Act also enabled the government to indulge in large-scale hunting, and sale of woodlands to Europeans for tea, coffee and rubber plantation. The customary use and management systems of peasant and tribal communities could not survive the onslaught of colonial forest policy that isolated the individual from the community. The redefinition of property rights severely limited the earlier free access enjoyed by local communities.

After Independence, colonial forest policy was consciously retained, on the contention that the fundamental concepts of 19th century forest policy still held good in 20th century independent India. All the constituent features of that earlier policy - state monopoly right, exclusion of forest dependent communities, commercial, monoculture-based forestry, industrial and commercial interests over-riding environmental concerns, restriction of rights, ignoring community interests and community management – were continued in democratic India. The Forest Conservation Act of 1980 extended this policy to its ultimate limit. By the enactment of this Act, State control was extended even over trees growing on private holdings.

Colonial Water Law

Sufficient evidence exists of the principles governing water resources administration in pre-colonial India to prove that colonial rule effected a fundamental change in this sector as it did with other natural resources.

The artificial application of water for various human uses in India has a history extending over millennia. Archeological evidence in the form of excavated physical structures as well as currently functional water systems that are tens of hundreds of years old, testify to a variety of technologies that were developed and successfully utilized all over the country. Types and sizes of technologies varied immensely from region to region, mirroring the varied environmental, hydrological, social, economic and political regimes that flourished in different periods of history. The initiators and promoters of water technologies ranged from Rulers to citizens, evidencing commonly exercised access rights. The numerical predominance of small-scale water technology in pre-colonial India points to the practice of decentralized water management that implied the exercise of a wide range of local rights and powers of control over water resources. While large-scale artificial lake systems, tank systems, canal systems, river diversionary systems, etc. were constructed by medieval rulers and managed by state agencies, they were far less in number than water systems created by individuals, local communities, or local bodies.

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97 For information on legal powers of local bodies over water systems in medieval peninsular India, see M.S.Vani, “Role of Panchayat Institutions Irrigation Management: Law and Policy, Tamilnadu and Karnataka”, Indian Law Institute, New Delhi 1992.
References in ancient religious texts and commentaries and stone inscriptions provide information on legal and ethical principles and administrative arrangements regarding water that obtained in pre-colonial Hindu and Muslim societies in India. The disparateness of this evidence in space and time precludes the possibility of constructing a single, composite body of law that can be termed as ‘water law’. They do, however, indicate the depth and detail of governing principles – ethical, moral, spiritual, social, ecological - that were applied to water management and use.

Individual and community ownership of water resources was prevalent; the ruler’s sovereign right to make land grants, which often included water bodies, did not imply a monopolistic state ownership of all water resources. As a corollary, the control and management of water systems was significantly decentralized. This fostered the evolution and sustenance of myriad modes of management strategies closely allied to local life styles and patterns, under Hindu as well as Muslim rule. That such strategies were successful have been proved by the survival of a wonderful variety of traditional water harvesting systems in every part of the country. What came under attack from the colonial mode of resource control and management was this diversity of technologies and management patterns arising from varied socio-economic and cultural milieu.

Colonial Water Law in Northern India.

The control and management of water resources by the British in India was exercised ubiquitously - within territories which had been brought under direct British administration, within ‘zamindari’ areas, as well as within ‘native states’. Control was sought to be effected over water sources – that is, rivers, streams, lakes and other collections of water – and water systems. Water systems included government-constructed canals and other works, as well as ‘privately’ constructed water systems such as canals, tanks, wells and the various water technologies that predated colonial rule, or were constructed later as well.

Thus, in totality, all water systems and technologies in all territories in the country came under British control in varying degrees.

Government intervention in water resources in India commenced early in the nineteenth century, as an integral part of land revenue administration. As Whitcombe states, the history of water resources in British India was an irrigation history, and that history established a state monopoly over water resources. The ryotwari tenure established by

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98 These include the Rigveda (circa 2500 BC), Kashyapa’s treatise on agriculture from the Mauryan period (321 BC to 185 BC), the dharmasutra of Apastamba, the Manusmriti, the Vishnusutras, the works of Manu and Kautilya, the dharmashastra of Vashista, Muslim law, stone and copperplate inscriptions from different periods of India’s pre-British history. For details, Vani M.S. and Rohit Asthana, “Law and Custom in Water Resources Administration: A Case Study of Uttarakhand, India” Development Centre for Alternative Policies, New Delhi, forthcoming.

99 Vani M.S. and Rohit Asthana, ibid.

100 Whitcombe, Elizabeth, “The Cambridge Economic History of India”, ed. by Dharma Kumar,
the British over peninsular India had brought all water resources under its control. Under Zamindari tenure, zamindars were held responsible for irrigation works, and even here, government reserved a right to repair or maintain sources and modify revenue arrangements with tenure holders on that basis.\textsuperscript{101}

The first half of the nineteenth century also saw the beginning of investment by the government in the repair and reconstruction of irrigation works in both the southern and northern provinces. Characteristically, the intervention was only in large-scale irrigation works. In the Madras Presidency, Sir Arthur Cotton devised and executed, in 1836, a reconstruction of the Grand Anicut on the Cauvery, originally built by Karikala Chola in the 2\textsuperscript{nd} century A.D.\textsuperscript{102} In the north, the East Jumna Canal, constructed during Mughal rule, was radically redeveloped in 1830.\textsuperscript{103} With these works, commenced the predilection of the colonial government for large-scale irrigation works over all other types. The same prejudice was carried forward into Independent India and is practiced to date.

\textit{Government’s Control over Water in its Own Territories - Evolution of Irrigation Legislation}

With regard to the regulation of water resources within \textit{British} territories in the 19\textsuperscript{th} century in the Northern provinces, there was a “gradual progress from …discretionary government to government by law”\textsuperscript{104}. The development was wholly in consonance with that of irrigation – the construction and management new large-scale irrigation canal networks and the take over of the administration of existing water bodies such as tanks, channels and other water bodies which were privately owned.

\textit{As in the forestry sector, the establishment and operation of an irrigation bureaucracy preceded the enactment of statutes for the regulation of water resources.}

Three important statutes were enacted in Northern India, which cumulatively established comprehensive State control over water resources, thus paving the way for the erosion of water resources custom. These were:

1. The Northern India Canals and Drainage Act 1873.

\textit{Rights of the State over Water Resources}\textsuperscript{105}

\begin{thebibliography}{10}
\bibitem{101} Vani,M.S., supra note 96, at p.41.
\bibitem{102} Ibid .
\bibitem{103} Whitcombe, Elizabeth, supra note 77, at p.64.
\bibitem{104} National Archives of India, Legislative Department 1871 Proceedings A December Nos. 13-76.
\bibitem{105} NAI, Legislative Department 1869 A Proceedings, October 1869, Nos 127-128; P.W.D. Irrigation December 1901 No 31(a); Legislative Dept. 1871 Proceedings A December Nos13-76; Legislative Dept. Proceedings February 1873 Nos 136-187.
\end{thebibliography}
These statutes declared sovereign rights of the State over water resources, provided for the compulsory acquisition of private rights, provided for centralized administration of water through an irrigation bureaucracy, and for the regulation of private irrigation works.

The foremost concern in the passage of the Northern India Canals and Drainage Act, 1873 related to the questions of the extent of required governmental control over private irrigation works and the extension of governmental canals through private water courses, besides the administration of government canals. The Act accordingly provided for dealing with private rights in water in a manner analogous to that in which private rights in land was dealt with under the existing law, when it was necessary to interfere with them for public purposes.

The declaration of the State’ sovereign powers over water was based on the proposition that the property in the lakes, rivers and streams of British India was vested in the State, subject in certain cases to rights acquired by usage or grant. This proposition was declared to reflect “not only of the existing custom of India, but of a fundamental rule universally recognized in Western Europe and distinctly asserted in those European countries, such as Northern Italy, which resembled India in their dependence on artificial irrigation”.

Provision was made in the Act, that whenever it became necessary for the government, on behalf of the public, to invade private rights which were admitted, proper compensation would be paid to persons in whom such rights may be vested. The Government of India was of the view that there could be no refutation of its power to resume any water supply in the possession of any individual “in the same general manner that it had the power to take land for a public purpose, and to redistribute the water in the way most conducive to the good of the community at large”.106

Private rights were restricted in the waters of government canals as well. With regard to these canals, the government was of the opinion that it was “most necessary to guard against any possible future complications arising from the recognition of private rights adverse to those of the state acting in behalf of the whole irrigating community.”107 Till then, government had taken care to see that the use of the water of government canals had not been permitted to constitute private rights of a permanent nature. The contract with the irrigator was virtually for the crop under irrigation, or for a fixed term of years. The arrangements were made with the occupier and not with the proprietor of the land. No obligation was placed on the cultivator to take water, or pay for it unless he used it. At the same time, there was no obligation on the government to maintain any canals or any particular portion of them.

In summary, the Act so far as it related to irrigation works, proceeded on the presumption that the water appropriated was the exclusive property of the State, and that it was to be understood that when any previous rights had existed in the water supply, they had been

106 NAI, Legislative Department A Proceedings October 1869, Nos.127-128.
107 Ibid.
extinguished, proper compensation having been given at the same time. The canals
referred to were consequently only those constructed by the government at public
expense, and the water courses were only those fed by such canals that provided water
which was exclusively the property of the State.

This general view of the rights of the State was carried through in spite of conflicting
view not only from members of the Council and Provincial Governments, but also from
the public. Representations were made that the proposition on State rights was a
“somewhat doubtful statement of facts”. Although a certain sovereign right in all natural
streams and watercourses vested in government pretty much the same way as it did in
regard to land, unless it had been specifically relinquished; but there was also a “co-
existent right of usage of the water of natural streams vested in the community”. The
Government of North Western Provinces and Oudh, in a letter to the Government of
India, Department of Revenue and Agriculture, objected to the preamble of the Act, on
the ground that the statement that was set forth that all lakes, rivers, channels and other
collections of water are the property of government, was not correct as regards the North
Western Provinces. The running water in rivers and streams was, no doubt, the property
of Government, and as long as due provision was made in the Act for compensation to
individuals in respect of stoppage and diminution of existing supplies taken for private
use, there was no objection to the declaration. However, natural drainage channels and
lakes were not always the property of Government. They were sometimes altogether
private property, as the bed of the Kalee Nadi in the Doab, and most other drainage beds
and all the jheels in that province. Sometimes they were partly private and partly public,
as some of the lakes in Bundhelkhand. Here the area or “fields” of water, belonging to
individual owners or villages on the edge, which claimed the ‘singhara’ and other
“julkhur” products, were carefully marked off by poles stuck into the bed of the lake. At
the same time, the right of the government to take and distribute the water was not
disputed.

The Government of North Western Provinces and Oudh was of the opinion that the
preamble should be reworded so as to limit the right of property of government to
running water in rivers and streams, and to declare the right to control the waters of lakes
and natural drainage lines to employ the water in them to the best public advantage.

Representations from members of the public also objected to the broad declaration of the
rights of the Government over water, which “was likely to lead to widespread
misapprehension and cause unnecessary alarm and mistrust”. It was pointed out that
lakes, jheels and all similar natural collections of water had always been the property of
the zamindars in whose demesne they were situated. Even when land or revenue grants
were conferred by government on individuals, such individuals enjoyed the usual profits
of water bodies just as they enjoyed the usual profits of the area, not covered with water,
and exercised equal rights to both, of transfer or sale. Earlier law had recognized such

108 Emphasis added. Legislative Dept. 1871 Proceedings A December Nos13- 76;
109 No.1578-A dated 20th September 1872, in supra note 156.
110 Memorial dated 22nd January 1873; in Legislative Department Proceedings Feb.1873 136-187,
rights. The memorialists requested the government to alter the wording of the preamble so as “not to give rise to the suspicion that it was intended, by the laying down of a principle in such broad terms, to declare that government has, or shall in future assert any greater right to area of land covered with water than it does.”

In spite of these objections, however, the Northern India Canal and Drainage Act was eventually passed in 1873, including Oudh as well under its purview. The Preamble declared generally the Government’s title to the water flowing in rivers and streams, and its entitlement to use and control such waters for public purposes. The Act conferred wide powers on canal officers for the management of canals covered by the Act. By means of interpretation, these also came to include, in course of time, minor canals not constructed by government, but whose administration was taken over. The Act empowered the Government to notify any river, stream any lake or other natural collection of water that was to be applied or used by government for the purpose of any existing or projected canal or drainage works. The award of compensation was provided for loss of existing rights to water supply, thus recognizing earlier rights. The nature of these rights was, however, transformed by making them subject to the sovereign powers of the State.

The Northern India Canal and Drainage Act of 1873 set down in broad and specific terms the role of the State in the control of water resources. All subsequent statutes – such as the Punjab Minor Irrigation Act, 1905 and the United Provinces Private Irrigation Works Act 1920, were based on the principles laid down in this Act.

In summary, colonial water law brought about a fundamental and radical change in the legal framework on water resources.

Water law of the British era was an integral part of the imperialist- colonial politico-economic exploitation of natural resources—land, forest and water—in India. The exploitation of water resources served the primary interest of revenue generation, mostly associated with agriculture, but also in other forms, such as navigation. The primary and only principle on which the administration of water resources was based was the principle of commercialization.

For this purpose, firstly, a State monopoly right over all water resources had to be asserted. Such an assertion not only permitted unlimited Government intervention in the business of irrigation development, but also provided the foundation to subject all existing rights and management institutions to government control and supervision. Statutes constituted the tool to establish State monopoly and to exercise it in different contexts. Thereby, the customary legal framework that informed the use and management of water resources earlier, became irrevocably subjected to modern law.

The recognition of pre-existing water rights that did not owe their existence to the colonial government, constituted sound political and economic strategy. Recognition of

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\(^{111}\) In section 3 of the Oudh Rent Act of 1868, the legislature itself had recognized the fact by including lakes, jheels etc. and the profits thereof in the definition of the term “land”. Ibid.
such rights helped to provide the impetus to increased agriculture, thereby increasing revenues. It also helped to prevent the social unrest that might have resulted in any denial of rights, which in its turn would have a deleterious effect on the economy. Lastly, and importantly, the recognition of rights helped to secure the cooperation of cultivators in the repair and maintenance of vast numbers of irrigation systems, which Government would be hard put to manage unilaterally.

The impact of legislation on such pre-existing customary rights was to separate them from their social management contexts, which were completely ignored in law. The provisions in the Punjab Minor Canals Act to require owners to “nominate” a “manager” on behalf of all shareholders was more in the interest of securing accountability to Government than promoting local management institutions.

While rights were thus legally recognized, they were substantially transformed. Firstly, what had been “co-existent” (with the State) rights of property in water, during the first three-quarters of a century of British rule, were now made subject to the newly declared “sovereign” rights of Government.

Secondly, water rights were ‘individualized’ in tandem with the individualization of land rights that took place with colonial land administration strategies. Water rights were made analogous to rights in land. This served two purposes. On the one hand, it enabled the “take-over” of private rights whenever the Government thought it expedient. On the other hand, it served to provide ‘security’ for recovery of costs and taxes that Government now intended to impose on both government and private irrigation works.

As for the newly created water rights in Government canals, permanent rights were not allowed to develop. This was done by supplying water to the irrigator under “contract” for a limited period of the crop under irrigation, or for a fixed term of years. The legal fiction was employed that the cultivator had no legal obligation to take water, or pay for it unless he used it. The fiction extended to the negation of ‘obligation’ on the part of government to maintain any canals or any particular portion of them.

Recording of rights was provided for; simultaneously, government’s powers to alter rights by suspending, restricting or extinguishing them altogether, were reserved. The Punjab Minor Canals Act included a proviso to the section on recording of rights to the effect that Government’s powers would not be limited by such recording of rights. This was made applicable to both government as well as private canals.

The range of Government’s powers that was sought to be legally established was awesome in extent. It included the following:

1. Sovereign powers of the State over all water sources.
2. Power to levy rent, tolls and dues for irrigation and drainage.
3. Power to redistribute the water supply of districts.

112 Vani M.S. and Rohit Asthana, supra note 98.
4. Powers to notify water sources and prohibit construction of works on them by any person without official permission.
5. Powers of planning and implementation of irrigation works.
6. Powers of entry upon land for planning, construction, maintenance, repair, inspection and supervision of canals and other systems, whether government or private.
7. Powers to remove obstructions to construction, etc.
8. Regulation of the distribution of water in government as well as private canals.
9. Prohibiting activities which disrupt construction, etc. of canals and other systems.
10. Prohibition of construction of canals and other systems by private persons without permission.
11. Powers to enhance rent of land; determine compensation
12. Powers to order the transfer of land and watercourses by owners upon payment of compensation.
13. Powers to recover costs and rates from beneficiaries.
14. Powers to enforce the payment of rent.
15. Powers for requisitioning of ‘customary’ labour in special circumstances, or commuting labour into tax.
16. Powers to define offences and sanctions.
17. Powers to effect closure of canals, and impose other sanctions for offences committed or for disobedience to orders.
18. Powers to settle disputes.
19. Recording of rights.
20. Power to take over management of private canals.
23. Powers to determine the amount and character of water rates.
24. Powers to regulate the construction and use of water mills.
25. Powers to override recorded rights in scheduled canals – restrict, suspend or extinguish rights.

The totality of powers assumed by the Colonial State over water resources through legislation completely transformed the earlier ownership, use and management patterns, the survival of which depended on how ‘legal’ they now were.

These laws remain on the statute book today in a substantially identical form. Hardly any changes were brought about in the structure and form of water resources administration to suit a politically independent society. What changes there were, were of the nature of strengthening the role of the State and further weakening societal institutions.

3.1 Impact of Colonial Law on Natural Resources Custom in India.

The impact was three-fold.\textsuperscript{113}

\textit{The first notable impact of colonial natural resources law was the separation, by statute, of resource use practices from the wider spectrum of social behaviour and norms. A}

\textsuperscript{113} Vani M.S. and Rohit Asthana, ibid.
distinction was introduced by the British legal system between territorial laws (criminal, civil and commercial laws which were made applicable to all) and personal laws (marriage, adoption, joint family, guardianship, minority, legitimacy, inheritance and succession, and religious endowments). The latter were left subject to the laws of the various religious communities. This resulted in a dis-aggregation between natural resources use and management on the one hand, and customary social, juridical, and religious networks on the other. The economic value of natural resources, abstracted from the totality of value systems, formed the basis of state law and policy.

This in turn gave birth to centralized institutions for the management of resources, and in the process, eroded varied, localized institutions at multiple levels. The composite of social norms, behaviour, and institutions that made for a pluralistic regime of governance was replaced by monopolistic, centralized rule through a legal regime that was antagonistic to equitable and sustainable management of resources.

At a second level, the legal regime on each of the natural resources of land, forest and water, though linked by the same objectives of political economy of colonialism, developed independently of each other in space and time, resulting in their fragmented administration through separate laws.

A third dimension of change in natural resource custom was the separation of “rights” from “duties”, opposed to the characteristic feature of their symbiosis in customary patterns of resource use. The observance of ‘duties’ with respect to products of nature, enjoined by social and environmental conditions, was co-terminus with the exercise of ‘rights’. Rural peasant society in pre-colonial India was constituted by innumerable endogamous groups of different castes, each following well-defined, specialized occupations. They were linked together in a ‘web of local property custom’, the use of common property resources providing a particular context for mutually supportive relationships. The characteristic small-scale cultivation of the period was inextricably entwined with a minute and highly flexible pattern of local rights which often accommodated the demands of hunter-gatherer, nomadic and semi-nomadic social groups within their territorial jurisdiction. In such an environment, the ‘duty’ to accommodate, to practice self-restraint, to respect mutual access rights would have been an economic necessity to ensure the survival of all. ‘Duties’ were prescribed not only in human relationships, but also with respect to other species – flora and fauna – as well as with respect to the natural resources of land, forest and water.

Gadgil and Guha describe some manifestations of the concept of ‘duty’ with regard to natural resource use, which translates into the practice of “restraint” of resource use in peasant societies:

- A quantitative restriction on the amount of harvest from a given locality, e.g. on the amount of wood or grass harvested by a family or their livestock from community

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115 Gadgil and Guha, supra note 56, p.37.
• Restrictions on the harvest in certain seasons. Thus, lopping the green leaves may be permitted only after the rainy season, i.e. after the trees have ceased to put on growth.
• Certain species, e.g. trees belonging to the genus *Ficus*, may be wholly protected.
• Certain habitat patches may never be harvested. In the state of Mizoram, in northeastern India, the community wood-lots from which regulated harvests are permitted, called supply forests, are complemented by sacred groves, aptly called ‘safety forests’, from which no harvests are permitted.
• Certain methods of harvest may be completely prohibited. In the Aravalli Hills of Rajasthan, there are patches of forests called *oraons* where harvesting by using metal tools is prohibited, though wood may be removed by breaking twigs by the hand.
• Specific age-sex classes or social groups may be banned from employing certain harvesting methods, or from utilizing certain species or habitat patches.

Colonial natural resources law – statutes on land, forest and water – disrupted the ‘rights-duties’ dynamics of customary group behaviour through the introduction of private and State property rights, while ignoring common property rights and related practices.

4.0 POST CONSTITUTIONAL LEGAL FRAMEWORKS – SCOPE FOR LEGAL PLURALISM.

In the above context, the question next arises as to the nature of the current legal framework in India, and its potential to enable pluralistic approaches to resource management. A brief review is provided.

*The Constitution of India*

The fountainhead of natural resource statutes- land, forest, and water laws - in India is the Constitution. ‘Equitable and sustainable natural resources management’ or ‘environment-based development’ as a fundamental aspect of and special approach to political governance was not envisaged in India at the time of creation of the Constitution. As a corollary, natural resources statutes – land, water and forest legislations – of colonial origin, founded on the colonial policy of resource exploitation, were legitimized by the Constitution and continued into the post-Constitutional era in a substantially identical form. It was not until 1976 that concept of environmental protection and development was first given Constitutional recognition.
In the absence of clear directives in the Constitution on principles of governance of environmental resources, an attempt has to be made to review its current provisions and their appropriateness for decentralized governance of natural resources and elimination of poverty. Particularly, it has to be seen what rights, powers, and duties in relation to natural resources management that the Constitution legitimizes. These are briefly reviewed below.

I Fundamental Rights.

The right of every citizen to the benefits and support of environmental resources is obliquely recognized as a fundamental right by imputing it as an integral part of the “right to life and personal liberty” under Article 21 of the Constitution. The expression “life” assured in Art.21 of the Constitution, it has been clarified, does not connote mere animal existence or continued drudgery through life. It has a much wider meaning, which includes right to livelihood, better standard of life, hygienic conditions in work place and leisure\(^{116}\). In Bandhua Mukti Morcha v. Union of India\(^{117}\), the Supreme Court held that the right to live with human dignity, enshrined in Art.21, derives its life-breath from the Directive Principles of State Policy. \(^{118}\) Since access to natural resources is fundamental to achieving and sustaining means of livelihood for the rural and urban poor in India, the Fundamental Right to Life as guaranteed by Art 21 implies the right to adequate natural resources as well.

The question that arises is, how strong or effective is the guarantee that is provided of the right to life and livelihood under this chapter?

The answer lies in Article 31A, B & C in the same chapter. While guaranteeing certain Fundamental Rights under Part III, including the right to life/livelihood, the Constitution also “saves” certain laws enacted by the Parliament and Legislatures.

Art.31A, inserted by the Constitution (First Amendment) Act of 1951, states that, notwithstanding anything contained in Art.13, no law providing for –

a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modifications of any such rights, or

\(^{118}\) Consumer Education and Research Centre V. Union of India, A.I.R. 1995 S.C. 922 at p. 939.
b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property or

e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14 or Art. 19.119

The types of ‘land’ covered by this Article included not only that held under any type of tenure or grant, but also land used for agriculture and ancillary purposes, including waste land, forest land, pastures, building sites etc. This provision means, in effect, that laws relating to land resources cannot be challenged, even if they fail to assure environmental rights, or if they take away or abridge the fundamental right to ‘life’.

In addition to the above “general” saving of laws made by Governments, provision has also been made in the Constitution, through Art. 31B, to protect specific enactments from being challenged as violative of fundamental rights. These enactments are listed in the Ninth Schedule of the Constitution. Statutes listed in this schedule that having a bearing on natural resources are those that deal with the following.

- Tenancy.
- Land Reforms.
- Land Acquisition.
- Land Ceiling.
- Land Development and Planning.
- Land Revenue.
- Private Forests Acquisition.
- Regulation of Village Common Lands.
- Regulation of lands of Scheduled Tribes.
- Industrial Development and Planning.
- Development and Regulation of Mines and Minerals, etc.

None of these statutes were originally enacted from the perspective of environmental sustainability – conservation, equitable use and management. The rights that they define, the institutions created, the powers vested in these institutions were not crafted from an environmental sustainability or equity perspective. However, in their current form, they are protected by the Constitution from being challenged as violative of the fundamental right to life.

119 A proviso to the Article states that, land held by any person within the ceiling limit applicable under any law in force, could not be acquired by the State without payment of compensation
Through an amendment of the Constitution in 1971, Article 31C was inserted, which sought to give protection to any laws giving effect to the policy of the State intended to secure all or any of the principles laid down in Part IV of the Constitution – i.e. the Directive Principles of State Policy. This amendment sought to give precedence to Part IV over Part III in the event that Government made any laws in furtherance of the former.

This Article carries the potential to enable environmental-friendly legislation. However, even if such laws had been enacted, they would have been nullified in effect by the continuance of existing natural resource laws protected by Art.31A and 31 B.

This, however is not the only source of weakness of Art.31C. Strangely, the Article sought to nullify its own effect by including the proviso that “no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.”

The interpretation of the right to life under the Constitution as including rights to natural resources is hardly sufficient to empower citizens over resources. In effect, the right can be accessed or defended only when an individual litigant approaches the court – an untenable practice in a country with a population of one billion.

II  Directive Principles of State Policy

The significant (negative) feature of the Directive Principles enshrined in Part IV of the Constitution is that they are not enforceable in any court. Art 37 merely prescribes, without providing any means of enforcement, that the principles shall be fundamental in the governance of the country and that it shall be the duty of the State to apply these principles in making laws.

Only one of the a total of 17 Directive Principles - Art. 48A - relates directly to environmental issues, while several others [Articles 38, 39 and 40] encourage the adoption of principles of equity in the use of resources and public participation in governance.

Art. 48A, inserted by the Constitution (Forty Second Amendment )Act, 1976, imposes a [unenforceable] duty on the State to endeavour to protect and improve the environment and safeguard the forests and wild life of the country. In effect, therefore the Directive Principles amount to no more than exhortations.

Fundamental Duties.

The concept of fundamental duties was first introduced by the Constitution (Forty Second Amendment )Act, 1976. A set of ten duties are enjoined by the Constitution through Art.51A on every citizen, but not on the State. Of these, 51A(g) states that it shall be the

120 The Supreme Court held this proviso to be invalid in Kesavananda Bharathi v. State of Kerala Supp. S.C.R. 1.
duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

In M. C. Mehta v Union of India\(^{121}\), the Supreme Court has invested the Central Government with the duty to ensure environmental education in educational institutions. Thus the only mechanism to enforce the State’s duty to protect the environment is through legal action *case by individual case*.

*Decentralized Governance*

The Constitution 73\(^{rd}\) and 74\(^{th}\) Amendment Acts of 1992 introduced provisions relating to local self-governing bodies- Panchayat Raj Institutions and Municipalities - in the Constitution. The operative features of the Amendments are as follows.

**Panchayats.**

1. The Constitution mandates the formation of a three-tier Panchayat system in every State, whose members are to be directly elected.
2. Mandatory provisions have been made for the tenure of Panchayats, their composition, reservation of seats for specific groups, disqualification of membership, constitution of Finance Commissions in every State for recommending financial structures for local bodies, etc.
3. There are no mandatory provisions for powers to be devolved on Panchayats. The provisions in regard to this aspect are:
   - The Legislatures of States *may* endow Panchayats with powers.
   - Such endowing is *subject* to the provisions of the Constitution (i.e. existing distribution of legislative powers).
   - The Panchayats *may* be endowed with such powers as may enable them to function as institutions of self-government.
   - Such law *may* contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, *subject to such conditions as may be specified therein*.
   - The devolution of powers *may* be with respect to:
     a) the preparation of plans for economic development and social justice.
     b) The implementation of schemes for economic development and social justice as *may* be entrusted to them, including those in relation to the matters listed in the *Eleventh Schedule*.
     c) Levy, collect and appropriate taxes, duties, tolls and fees as the State *may* determine subject to such conditions as it *may* consider appropriate.

Of the 29 matters listed in the Eleventh Schedule, as many as 14 are relevant to natural resources management.

In summary, except for the mandatory constitution and periodic election of panchayat, the 73\(^{rd}\) Amendment Act does not devolve any special or new powers on these bodies outside the overall authority of the State and Central Governments. The matters listed in

the Eleventh Schedule for the functioning of the Panchayats do not imply that any new powers have been Constitutionally devolved on them. The list is merely advisory in nature. Whether or not States devolve powers, and to what extent is entirely a matter of the State’s choice, enabled by the legislative powers conferred on the States by the Constitution. Whatever powers or functions are devolved, will be subject to provisions in existing enactments. This implies that powers of local bodies to manage natural resources will be subsidiary to those of the States, and by corollary, the Central Government.

**Municipalities.**
The position of Municipalities after the 74th Constitutional Amendment is exactly identical to that of Panchayats in the Constitution. A half of the total 18 matters listed in the Twelfth Schedule relate to natural resources use and management are the following.

The Constitutional Amendments on Local Governing Bodies therefore do not create any new dispensation that would enable a pluralistic, decentralized governance of resources. This is evident from the fact that the legislative powers of the Centre and the States remained unchanged.

Articles 246, 248-254 spell out the respective legislative fields of Parliament and State Legislatures contained in List I, II & III in the Seventh Schedule. Parliament has exclusive power to legislate on matters listed in List I, the States have similar powers over matters in List II, while List III is the Concurrent List relating to matters over which both States and Parliament may legislate. Parliament has been vested with residuary powers to legislate on any matter not included in the State or Concurrent List. Laws made by Parliament under List I and List III are also declared to prevail over Laws made by the States on similar subjects.

Both the Union Government and the State Governments together or separately exercise monopoly legislative powers over the following subjects.

Table –1 Scope of Powers of Union/States

<table>
<thead>
<tr>
<th>Control over Basic Resources</th>
<th>Control over Products of Resources</th>
<th>Administrative/Judicial Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mines and Minerals.</td>
<td>Fishing and Fisheries beyond Territorial Waters</td>
<td>Treaties, Agreements and Conventions.</td>
</tr>
<tr>
<td>Forests.</td>
<td>Fisheries (Inland, and within territorial waters.)</td>
<td>Land Revenue, Taxes of Agricultural Income, taxes on minerals</td>
</tr>
<tr>
<td>Water Resources</td>
<td>Electricity</td>
<td>Trade; Commerce; Production, Supply &amp; Distribution of goods.</td>
</tr>
<tr>
<td>Land Resources.</td>
<td>River Valley Development</td>
<td>Local Government.</td>
</tr>
<tr>
<td>Protection of Wild Animals and Birds.</td>
<td>Shipping and Navigation in inland waterways.</td>
<td>Regulatory powers on these subjects.</td>
</tr>
<tr>
<td></td>
<td>Pilgrimages</td>
<td>Judicial powers.</td>
</tr>
</tbody>
</table>
From the above table, it is evident that legislative powers with regard to the use and management of natural resources are distributed between the Union and the States. The States have more legislative powers over land and water resources (inland). Forest resources are in the Concurrent List, with however, Parliament holding superior powers of legislation. Financial, judicial and other administrative powers are also distributed accordingly.

In effect, this means that institutions below State level – district, intermediate or Panchayat level – do not hold independent powers of control over natural resources. They may exercise only such powers as may be delegated to them. No State in India has adopted the “watershed approach” as the exclusive development model, particularly in rural areas. Nowhere in India has “empowerment” in totality over natural resources descended below the State level. These two factors continuously militate against the possibilities of decentralized and sustainable management of natural resources.

In summary, The Constitution is limited in these aspects.
- Rights to natural resources or environmental resources are not guaranteed directly by the Constitution.
- The Constitution does not provide for mechanisms for the enforcement of environmental duties either of the State or citizen.
- The Constitution does not prescribe a developmental model based on sustainable and equitable management of natural resources.
- The Constitutional Amendment on Panchayat Raj Institutions do not mandate the devolution of powers on these bodies.

On the other hand, the Constitution specifies the legislative fields of the Centre and the States, indicating that it is these institutions which have the power to confer and regulate rights on the basis of the powers vested on them in relation to the resources.

Other Disabling Laws

Natural resource management in India has not only been deprived of enabling legislation to strengthen, protect and promote pluralistic institutional mechanisms, but has been assailed by a host of disabling laws. These have prevented the development of technological, environmental, social, economic and political arrangements that could promote decentralized management of natural resources. More importantly, they have been the main tools in the fragmentation of customary legal frameworks and their untenable subjection to formal law.

Almost all States have on their statute books statutes such as Land Reform laws, Land Revenue Codes or Acts, Land Improvement Acts, Soil Conservation Acts, Tenancy laws, Land Development Acts, Forest Act, Irrigation Acts, etc.
Some common features of these statutes for instance, are:

- A critically debilitating feature of existing legislation on natural resources is that they establish independent, mutually exclusive administrative frameworks for each of the resources separately – in faithful allegiance to the colonial policy of “divide and rule”. Thus land laws, forest laws and water laws take no note of each other, empowering a fractured system of governance, which is completely contradictory and damaging to the interests of integrated management of resources.

- None of the natural resources statutes have the avowed objective of managing natural resources sustainably primarily for the purpose of development and elimination of poverty in the country. They are mostly designed for the optimum exploitation of resources. Regulatory provisions in these statutes are linked to same purpose of resource exploitation. This underlies the lack of necessity felt for participatory management frameworks.

- Powers of control of all land resources are vested in the State, with statutory authorities vested with all powers necessary for administration of land resources. Participatory institutional frameworks for the administration of land resources do not feature in any of the land laws. District –level panchayat institutions have, in some states been conferred with administrative powers over land resources. However this has been done within the rubric of existing land laws, which do not reflect an ‘integrated natural resource management’ perspective, and which retain the residual powers of the State Governments over the resource.

- Individual rights to land are recognized, subject to the payment of land revenue. This is based on the assumption by the State of the role of “supreme landlord”. This concept forms the foundation of centralized empowerment of the State over all land resources.

- Prior to land reform laws, or post-Independence land revenue acts, customary rights of village communities over village common lands were recognized and protected. After these Acts, village common lands were re-designated as “Government Lands”\(^\text{122}\). Rights to resources from common lands are recognized in some states such as Madhya Pradesh\(^\text{123}\), Punjab etc. However, such rights are perceived in isolation, with no concomitant local powers of management, or duties of conservation, which are inalienable components of powers of control over land resources.

- ‘Customary rights’ to natural resources in rural areas are often generated from “common property systems” – such as village common lands, villages forests, community irrigation systems, community water bodies, etc, Where collective rights are involved, these are legally defined as “concessions”, for two reasons. One, to exert the proprietary rights that the State exercises in the name of sovereignty, and secondly to avoid the legal recognition of collective property rights. Administration of rights legally is done on an individual basis. Land Revenue, water tax, Lease or

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\(^{122}\) For instance, U.P. Land Revenue Act, 1905; Kumaun and Uttarakhand Zamindari Abolition Act, 1965.

\(^{123}\) Nistar Rights, as per Madhya Pradesh Land Revenue Code, 1959.
licence fees, fines or penalties are collected individually. Rights are thus privatized, with almost no legal recognition to common property systems.\textsuperscript{124}

- The “powers” of allocating legal rights to natural resources is exercised monopolistically by State authorities, far removed from local contexts of management and conservation. Thus, while community irrigation systems\textsuperscript{125} in fact allocate customary rights among right-holders in consonance with duties to maintain and operate such systems, the same rights are “legally” recognized, or conferred by the State, on an individual basis, divorced from community management systems.

- Monopolistic powers held by the State over the resources result, in frequent cases of loss/destruction or dilution of rights. Degradation of lands, loss of forests, depletion of water resources etc. which result from State action or inaction cause loss of rights which in many cases are not compensated.

- In the context of the State’s monopoly powers over resources, rights to land, forest, water etc. are not absolute, but subject to control by the State. They are mostly “use rights”, and are contingent on the payment of prescribed taxes to the State, which are mostly nominal. Property laws enable inheritance or transfer of these rights. However, such rights have not been made subject to the sustainable use of the resource. Norms of sustainability of resource use may only be defined at a local level, on scientific assessments of resource availability and demand. The antiquated resource legislations that are in force do not provide for any such management models. Legal rights, therefore are totally abstracted from sustainable management practices.

- Existing laws on forests, land resources, irrigation, drinking water supply, soil and water conservation, fisheries etc, have constituted “line agencies” with monopolistic powers of control and management of natural resources. This has promoted bureaucratic methods of functioning, which are inappropriate, where more participatory frameworks are required. The monopoly powers of control over water, land and forest resources vested on government prevents public participation in planning. These statutes do not provide for a broad-based institutional framework that offers scope for a spectrum of stakeholders to participate in planning, construction, operation and management of systems based on these resources.\textsuperscript{126}

Programme strategies devised by external agencies/non-government organizations in partnership with government, which introduce participatory institutional mechanisms, almost always do so on the strength of executive orders rather than statutory reform. These serve the purposes of specific programmes, without offering any guarantee of sustainability beyond the project period. In a few cases, where statutory amendments are made, their operation is limited to the specific project-jurisdictional areas, with no guarantees of replicability. More importantly, the role of

\textsuperscript{124} An exception is common property rights that are still extant in tribal areas, particularly in the North East.

\textsuperscript{125} First inventoried by the Government of India through the quinquennial Minor Irrigation Census started in 1985.

\textsuperscript{126} Some recent attempts – such as participatory irrigation management, joint forest management, etc, which are backed by legislative measures or executive orders merely transfer maintenance responsibilities, without in any way devolving powers in a holistic manner for integrated management of resources.
the State is not modified in any significant way. This legal regime prevents the emergence and sustenance of local legal frameworks that can support more democratized governance of natural resources.

- In most States, natural resource laws, by conferring monopoly legal powers on government to collect and utilize revenue from land, water and forest resources have deprived local bodies of the important power of taxation.

- Decentralized and informal dispute resolving processes have been marginalized by the operation of formal State Judicial Institutions. This is enabled by the monopolistic powers of the Central and State Governments of the administration of justice.

- None of the existing basic natural resources statutes incorporate the Constitutionally prescribed “obligation” to protect and preserve the environment, the reason being that they were enacted several decades before the emergence of environmental consciousness in governance. Instead of reforming these statutes, to introduce the concept of sustainability and mechanisms for practicing it, new legislations – the Water(prevention and Control of Pollution) Act, 1974 and the Environment Protection Act, 1986 - were enacted for the purpose of protecting and improving the environment. These laws are regulatory in nature. They define offences and liabilities in relation to damages to the environment. However, the strategies for implementing the Act is no different from earlier legislation – i.e monopolistic, bureaucratic state authorities vested with powers to identify case by individual case, for taking appropriate action. The fundamental weakness of such laws are that, firstly, regulation is divorced from management of resources. As such, they do not represent an integrated environmental perspective. Secondly, they empower only State agencies. No role is envisaged for people’s institutions.

- A critical shortcoming – perhaps the most important – in existing natural resource statutes is their inability to ensure equity in access to natural resources. While land, water and forest laws define “rights”, and regulate “rights”, there are no provisions in these laws to ensure equitable access rights to all sections of the community. Rights are not located in a total management framework, but are individualized, isolated and confined to specific contexts. For example, irrigation systems are created by the State through administrative policies, which are not regulated by any legal principle or laws relating to establishing equity of access. Once systems are installed, irrigation acts come into play to “regulate” already created rights. This process leaves out large segments of the rural population from access to the benefits of irrigation. Land reform or equitable distribution of land, equity in access to forest or water resources, equitable right to clean air and water etc are not legally recognized as fundamental rights, nor are there any legal mechanisms to achieve or enforce these rights. Currently, the legal administration of natural resource rights is carried on without a foundation of environmental sustainability and social equity perspectives. This is one of the main reasons for the emergence and prevalence of poverty.

In conclusion, it may be stated that the legal framework on natural resources in India is antithetical to decentralized, participatory, equitable and sustainable management of natural resources. They are antithetical in substance to pluralistic approaches and have very little scope for adjustment or accord with alternative governance frameworks.
5.0 PROSPECTS FOR ACCORD AND STRATEGIES.

The evidence thus far has shown that sustainable and equitable governance of natural resources cannot be enabled or nurtured through a legal regime that engenders monopolistic, centralized and resource-exploitative governance mechanisms. On the other hand, a legal framework is required that mandates a decentralized approach. It is also evident that customary law by definition implies decentralized and pluralistic governance mechanisms and processes and can serve sustainable and equitable management of resources, provided it is located within a larger enabling framework that upholds and imposes such norms.

This evidently calls for a revival of the “authority” of customary law. However, to be generally acceptable in current socio-political contexts, a modern interpretation of this goal needs to be defined. What is required therefore, is the revival of this authority within an enabling modern democratic legal framework. What is required is the extension of the goal of “decentralization of powers” to include devolution of law-making or legislative powers.

It is only through such a strategy that an accord could be achieved between the “authority” of local law-making that underlies custom, and modern legal frameworks.

A call for the revival of customary law is therefore to be perceived as a call for the revival of decentralized governance frameworks that includes the functions of law making, law enforcement, dispute resolution, etc. based on localized control of resources. Such a governance framework has to be supported and strengthened by national or regional statutory arrangements for the declaration and protection and of the rights of socially, economically and politically disadvantaged groups in society, which have become eroded over the centuries.

Such an enabling framework can be achieved:
• Firstly, through a thorough reform of the legislative powers of the Central and States under the Indian Constitution under List I, II, and III [Union, State and Concurrent Lists] and the creation of a Fourth List – a Local List – whereby subjects are reserved for local bodies at the District, Sub-district and Village levels, and Municipal Bodies for the making of laws and their enforcement.
• Secondly, by enabling local governance bodies to evolve appropriate laws for development based on sustainable and equitable management of natural resources.

Seeking or supporting decentralized approaches to resource management without the inclusion of the objective of devolution of legislative powers to local levels will merely result in sustained failure in the attainment of the goals of equity and sustainability.

The undertaking and accomplishment of appropriate legal reform for natural resources management is complicated by several situations.
• Firstly, the inflexibility of the State in the retention and exercise of monopoly powers, and its unwillingness to yield to more democratic forms of governance.
• Secondly, the necessity for a wide-ranging reform of existing legislation starting from the Constitution and extending to innumerable Central and State laws on resource use and management.
• Thirdly, the necessity of complying with internationally imposed legal obligations on natural resources use, even while undertaking domestic legal reform.
• Fourthly, the lack of perspectives, accountability, and consent within the currently prevailing political establishment for such alternative governance frameworks and the difficulties involved in acquiring consensual support from this quarter. Environmental concerns have never been reflected in the agenda of any political party, of whatever hue.
• Fifthly, interventions by non-government institutions in the natural resources sector is extensive, disparate and poorly coordinated in nature. Most NGOs work within the confines of exiting policies and programmes. Few venture into policy reform and even fewer seek legal reform. There also exists a significant gap between NGO intervention in the Natural resources sector and in other related development sectors such as health, education, economic development through micro-enterprise, entrepreneurship etc.
• Sixthly, the disparate, un-coordinated interventions of bilateral and multilateral institutions and donor agencies in the development sector, most of which do not pay allegiance to norms of environmental sustainability or equity as a basis of intervention. The general tendency [with a few significant exceptions] with multilateral and bilateral development institutions, non-government institutions, etc. is to locate their work on current policies and programmes, and turn a discreet blind eye to legal frameworks underlying development policy.
• Seventhly, and most important, the disinterest and incapacity of local communities to assume the responsibilities of self-governance. The long history of State control has resulted in a fractured, corrupt and inequitable rural society, which favours and promotes individual exploitation of resources in contradiction to community interests, leading to a steady erosion of customary legal frameworks. Thus appropriate law-making at the local level is as onerous a task as reform at the State-level. The skills of consensual law-making at local levels need to be revived.

Strategy

However onerous or even impossible the tasks may be, they cannot minimize or deflect from the necessity of achieving the desired goal. Without legal reform, sustainable management of natural resources cannot be achieved. Such legal reform, on the other hand, will not be sustainable unless it is achieved through participatory strategies.

The numerous difficulties described reveals the necessity of evolving a strategy that can accommodate a multi-pronged, coordinated approach towards achieving decentralization of law-making powers. Such a strategy can be participatory legal reform that simultaneously addresses both ends of the spectrum – State and society.
This approach has several components:

- Legal research that is non-doctrinal and is development oriented.
- Strengthening legal perspectives in development planning.
- Inclusion of legal perspectives and strategies in ongoing developmental programmes.
- Promotion of legal literacy and public dialogue among citizens and other stakeholders.
- Evolving consensus on environmental concerns, goals and the required legal framework among a broad range of stakeholders.
- Developing and strengthening skills for local self-governance – law-making, enforcement and dispute resolution.

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