

Customary Law and Conservation in the Himalaya

The Case of Nepal

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Introduction

The Himalaya Region

The Himalaya region has unique functions and roles in terms of biodiversity, water resources and civilizations. This is due to its extreme altitudinal variations, concurrent changes in temperature and precipitation, and differences in soil conditions, which have combined to create a striking vertical zonation in natural vegetation. The region's great physical and biological diversity gave rise to a similarly high level of cultural diversity as diverse ethnic groups developed unique cultures based on locally available natural resources.

Nepal's Geo-political Map

Nepal is a country situated on the southern slopes of the central Himalaya. About 83% of its total land area is occupied by high mountains and hills and the remaining 17% consists of flat lands of the Terai. The altitude varies from 63 m above sea level in the Terai to 8,848 m on Mt. Everest, which is the highest point of the world.

Biological diversity

The diversity of Nepal's physiography has given rise to a wide array of climatic variations. Indeed, it is possible to find almost all types of climates, including tropical, subtropical, temperate, alpine and tundra, within this small country covering an area of merely 1,41,181 sq km. Therefore, a wide variety of plants and a large number of wild animals live here.

It is estimated that 54% of the country's area is currently covered with vegetation. A total of 118 ecosystems with 75 vegetation types and 35 forest types have been identified in Nepal. A large number of these have been used for industrial raw materials, energy, food, pesticides, and medicinal purposes. Nepal occupies 0.03% of the land area of the globe but holds at least 2.5% of the world's plant and animal species. Her share of biodiversity is thus about thirty times greater than her share of land surface.

Cultural Diversity

In 2001, the total population of Nepal was 22,736,934 and the total number of castes, indigenous nationalities and religious groups was 100, plus three unknown/unidentified groups. There are four racial groups in Nepal: Mongolian, Caucasian, Dravidian, and Proto-Austroloid. The Summer Institute of Linguistics (SIL) has revealed more than 125 languages and dialects in existence in Nepal (Grimes 1996). Linguists have categorized the languages and dialects of Nepal as belonging to four language groups, namely the Tibeto-Burman group under the Sino-Tibetan language family, the Indo-Aryan group under the Indo-

European language family, the Munda group under the Dravidian language family, and the Proto-Austroloid group under the Austro-Asiatic language family. The census enumerated 7 religions—Hinduism, Buddhism, Islam, Kiranti, Christianity, Jainism and Sikhism. In addition there are animism and Bon, which indeed are older than others.

The government of Nepal has recognized 59 ethnic groups as indigenous nationalities, which number from 164 to 35,000,000 in size.

Sources of Livelihood

Nepal is predominantly an agricultural country, with almost 90% of its population and 42% of its GDP tied to agriculture. The climatic variations of its agro-ecological zones favor crop and animal diversity. Over 400 species of agro-horticultural crops are estimated to be found in Nepal. There are over 100 varieties of 15 major fruit species, 200 varieties of 50 vegetable species and about 10 varieties of potato under commercial cultivation (HMGN 1997). Forests are sources for food, fodder, timber, and non-timber products.

Customary Law

Customary law consists of the indigenous customs of traditional communities. Every ethnic group in Nepal has evolved its own discrete customary legal system of rules which are binding on its members. Unlike ordinary social habits and observances, the rules carry along with them local sanctions for their breach. For the most part, the rules are unwritten, although efforts are now being made to compile them in written form. Customary laws are not uniform across ethnic groups. Differences in the customary laws of ethnic groups can be traced to various factors, such as language, proximity, origin, history, social structure and economy.

Customary law is not static. It is dynamic and its rules change from time to time to reflect changing social and economic conditions. One of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character. Like any system of unwritten law, customary law has a capacity to adapt itself to new and altered facts and circumstances as well as to changes in the economic, political and social environment. Thus, it has adjusted to such influences as the introduction of Indo-Hindu and other foreign legal systems in Nepal, urbanization and the growth of a money economy. This dynamism of customary law is illustrated in customary law rules concerning land ownership; it is now possible to own land individually, but in earlier times land belonged to the community as a group and an individual could neither own any piece of land absolutely nor sell it.

Customary law addresses matters ranging from dispute-settlement processes and systems of governance to hairstyling techniques, traditional methods of preparing food, spices and drinks, meat-cutting techniques, languages, care of historical sites, resources management and distribution, and the sharing of knowledge. Examples of traditional knowledge include medicinal uses of plants, environmental and biodiversity conservation-related knowledge, such as knowledge of grass species, grazing and animal tracking systems, weather patterns, and knowledge relating to the preservation and use of natural and genetic resources.

Principles of Liability under Customary Law

To understand why customary law rights are binding, it is necessary to examine more closely the nature and significance of the social and political structure in tribal societies. The social organization of traditional societies is based on a strong pattern of kinship groups with lineage as their basic constituent. Lineage forms the foundation of a wide social group called the clan. A system of interclan linkages in turn constitutes the tribe, which is made up of people belonging to different lineages but speaking the same language and following the same traditions. Within each group is a leader selected on the basis of seniority, knowledge and leadership quality. Thus, the leader of a nuclear family is accountable to the leader of the lineage, who in turn is accountable to the leader of the clan, and the clan leaders are accountable to the tribal assembly and the tribe. The members and chief (Choho or Bang) of the tribal assembly are elected annually. The Chief and tribal assembly control territories including meadows, farmland, forests, lakes, waters and other property of the group, allocates land for slash and burn (swidden) agriculture, arbitrates disputes and imposes punishment to control the behavior of group members.

Group relations are normative and give rise to a series of well-defined rights and obligations adhering to members of the group. Observance of all traditional norms is secured through a system of sanctions that may vary according to the degree of kinship. Forms of punishment can range from censure, to fines, to ostracism or even expulsion from the group. Decision making in tribal groups is through consensus.

Several bases for the application of customary law sanctions have been identified including religious and magical beliefs, notions of collective responsibility, and fears of ridicule and ostracism. The fear that the spirit of ancestors will unfailingly punish offenders ensures compliance with society's rules. Where an offense has already been committed, legal compensation is urged to avoid the spiritual retribution that could befall the offender. Under the concept of collective responsibility, all clansmen are responsible for the actions of other clansmen.

The concept of collective responsibility is particularly important to systems of customary law sanction. Under collective responsibility, all clansmen are responsible for one another's actions and each is bound to protect the others. Thus collective responsibility serves to deter unnecessary wrongdoing because of the inherent belief that any offense committed by a clansman may be avenged against any member of the clan. In addition, it increases the deterrent effect of expulsion as a form of punishment since an offender who has been expelled can no longer count on the support and protection of his ethnic group. Finally, collective sanctions put the offender out of status such that he is not in a position to participate in communal activities until his offense has been purged and his status restored. All of these sanctions are not limited to the individual but can apply also to his children, spouse, relatives and even clansmen under the notion of collective responsibility. By the middle of the 19th Century, customary laws and institutions began to lose their rightful place in Nepal when the Hindu Kingdom was established and a Hindu court system and laws were formally introduced. Customary institutions were formally replaced by feudal institutions and a new political system. This process has been strengthened during last fifty years, but customary laws and institutions are still powerful tools of social order in most indigenous communities and rural areas of Nepal, and indigenous communities are struggling to further revive them.

Customary Law and Ownership

By tradition, indigenous communities of Nepal were self-ruling and their institutions were based on a communal system of ownership known as *Kipat*. Indeed, *Kipat* was one pillar of a tribe's autonomy. Culture, customary laws and institutions were built on the basis of this communal system of ownership. Though members of the community had the right to use land, land ownership was centered not in the individual but rather in the group and in the community.

Concept of the Village (Namsa)

For indigenous communities, the relationship with the land is not merely one of possession and production, but it also has a material and spiritual element. The integration of society is made possible by a world view that reflects the assumed relationships between the spiritual world, natural world, and social world. Ritual is a key element in the human relationship with nature.

Rituals are performed in all social and productive activities. The intention of the ritual and the spiritual activity is to create room and initiate a certain movement in the material world in order to maintain or restore harmony and natural order among all the elements. Ritual therefore plays a very important role in a cosmology in which the physical, geographic world and the spiritual world co-exist (Mandala). "Territory" is a concept that applies not merely to the boundaries of a political area but also to a distinct cosmology with a certain faith, taste, notion of beauty and means of livelihood. It incorporates the notion of residence and consists of an agglomeration of houses with the fields of the inhabitants and the habitats of living and non-living beings around it. It includes the notion that people live together with spiritual beings, forests, mountains, rivers, sacred places, feared places, altars, evils, etc. Hence submission, devotion and reverence are accorded to these elements.

The Concept of Environment

The concept of Protected Areas is not new to indigenous and local communities in Nepal since forests, lakes, and mountains, given names such as religious forest, sacred site and sacred lake, were under community protection and managed by their customary laws and institutions. These areas were conserved due to communities' strong attachments to and ritual relations with their land and either legal ownership of the area or de facto control over the resources.

Indigenous perceptions of the environment are influenced by the creation myth. The creation myth is divided into four parts – origin, differentiation, migration and creative deeds of the ancestors – starting from the beginning of the world, continuing with the establishment of order, leading to the present situation. Indigenous ethnic groups have their own territories in Nepal and each clan of indigenous ethnic groups keeps an ancestral stone erected in their territories. The stone symbolises the ancestral lands and territories of particular clan or group or peoples and gives meaning to the concept of clan territory.

Indigenous Knowledge

1. Throughout history the interaction between mountain people and the natural system has helped to maintain the richness of species, communities, and genetic materials in both the productive systems and wild lands of the mountain environment.
2. Mountain forests are conserved as sacred forest sites, sacred mountains and lakes. There are different systems in different communities for forest conservation, sustainable use and the distribution of resources. In the Singo Naua system (Singo and Naua are Tamang and Sherpa words meaning "Forest's Guards,") part of a village organisation or council, called Nangkhor, is responsible for the protection of community forests. (Nangkhor is a Tamang word meaning indigenous organizations of councils represented by all the permanently settled households of a village.) The councils promulgate the rules for the management of natural resources, usually by consensus. Often the councils may elect or nominate one or several of the households of specific periods to act as the enforcer of rules meant for the management of natural resources. These officials derive their mandate from the village Councils and are responsible for the preservation of the forest close to the village...to permit limited fellings in the protected forest for special purposes, such as house-building and wood required for funeral pyres. This is just one of a number of local systems operating among different indigenous and local communities.
3. Livelihood centers on food security. Communities practice relatively stable agriculture on steep rainfed terraces, supplemented by slash and burn (swidden) cultivation in the eastern Himalaya.
4. Natural resource management systems are localized systems that guide rural people's decision-making. Farm and fallow (swidden) agriculture is one of the best examples of resource management and strategy.
5. Communities' natural resources use patterns exhibit a high level of suitability-proven knowledge regarding resources classification, forest and fodder, plants, their uses, combinations of forest and agricultural species, seasonality of migration (*Ubhauri and Udhauri*) within their territories, soil fertility management, erosion control (by maintaining a long fallow period with vegetative cover following harvest), and genetic resources management.
6. Biological diversity and cultural diversity co-exist.
7. 70-80% of the mountain population depends on traditional medicine and healing systems.
8. Indigenous knowledge is gained through trial and error in response to changing environmental and socio-economic circumstances and opportunities. It is generally transmitted orally and provides the basis for decisions related to land use, natural resources management, etc.
9. The knowledge of shamans, traditional healers, elders, and practitioners of witchcraft are guided by customary laws. Genealogy tellers (clan historians), shamans and priests are main ritual specialists and members of the tribal assembly.

10. Family types and cultural lifestyles are adapted to resources management strategies. (See films: Dragon Marriage, Border line and Caravan in the Himalaya.)

Nationalization of Forest and Establishment of Protected Areas

The autonomy of indigenous communities was gradually undermined as the central authority in Nepal was consolidated. Communal land, *Kipat*, was abolished. *Kipat* is a system of collective land tenure whereby the residual rights over the land, including other resources, were vested in the community itself. Under this system, only the members of the particular ethnic groups had the right to access, control and use land and resources. After this system was abolished, the concept of land belonging to state (Monarch) was strongly introduced. The forest was nationalized in 1957.

The Nepalese National Parks and Wildlife Conservation Act, enacted in 1973, recognized two main categories of PAs: National Parks and Reserves (including strict nature reserves, wildlife reserves, and hunting reserves). Currently, the country has the following categories of PAs: National Parks, Wildlife Reserves, Conservation Areas and Hunting Reserves. They now cover more than 2 million hectares or 16.5% of the total area of Nepal. Recently His Majesty's Government has also created buffer zones. If the area under buffer zone management is included, the proportion of area of Nepal now under protection increases to 25%. Most of the Protected Areas are established in indigenous peoples' territories

The parks were organized according to a traditional, exclusionary PA model and indigenous and local communities were not allowed their activities. It is noteworthy here that protected areas have been establishment on indigenous peoples' territories without their prior informed consent, and their rights and interests were not taken into account. Forced removal and relocation, cultural collapse, social and political marginalization, impoverishment and the destruction of age-old community-based natural resource management regimes have all ensued. Through the years, the establishment of national parks has had severe, adverse impacts on local traditions and beliefs, in some instances resulting in disastrous side effects. Since insufficient attention was paid to indigenous peoples and their customary rights, many cultures, which otherwise could have been valuable in reinforcing conservation, have gradually vanished. Social disintegration, economic dependency, unsustainable harvesting and severe conflicts over resource use are some of the major negative impacts of the establishment of national parks.

In 1978, community participation was sought to overcome the problems created by the Forest Nationalization Act of 1957. The Forest Act (1993) and Forest Rules (1995), Buffer Zone Management Rules (1996), and Environment Protection Act and Rules (1996) were enacted and amended to empower local communities for resource management. Under the Conservation Areas Management Regulation of 1996, Annapurna Conservation Area was entrusted to an NGO, the King Mahendra Trust for Nature Conservation. The Buffer Zone Management Rules are designed to develop a co-management system.

Nonetheless, the customary laws and rights of indigenous and local communities have not yet been recognized. Given that indigenous peoples have used the areas under protection since long before the creation of the present state that claims to have declared its sovereignty, indigenous peoples hold a priori or customary rights over these lands.

Concluding Remarks

1. The ancestral and customary rights of indigenous peoples to their lands, territories, and natural resources must be recognized, respected and protected. In cases where indigenous lands have been expropriated to create protected areas, these must be restituted and rapid, just and significant compensation be agreed upon in a fully transparent, participatory and culturally appropriate manner.
2. The governance of PAs and conservation policy overall must recognize indigenous peoples' knowledge, practices, customary laws and institutions, areas of conservation, and systems of resources management with cultural integrity as a basis for the management of PAs. Legal framework must also be established to ensure full and effective participation of concerned indigenous peoples in all aspects of the administration and management processes of PAs.
3. IUCN should consider creating a mechanism such as a commission on indigenous peoples and PAs. Such a body could formulate conservation policy, work to mainstream indigenous peoples' viewpoints and issues concerning the management of PAs, and promote the participation of indigenous peoples, mobile people and local communities within the IUCN.

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