

**THE ROLE OF INDIGENOUS PEOPLE IN ENVIRONMENTAL
GOVERNANCE WITH SPECIAL REFERENCE TO UNITED
NATION'S REDD+ INITIATIVE IN NORTHEAST INDIA**



Dissertation submitted to National Law University, Assam in partial fulfilment for the award
of the degree of MASTER OF LAWS

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SUPERVISOR CERTIFICATE

It is to certify that Mr. ABHISHEK CHAKRAVARTY is pursuing Master of Laws (LL.M.) from National Law University, Assam and has completed his/her dissertation titled “ROLE OF INDIGENOUS PEOPLE IN ENVIRONMENTAL GOVERNANCE WITH SPECIAL REFERENCE TO UNITED NATION’S REDD+ INITIATIVE IN NORTHEAST INDIA” under my supervision. The research work is found to be original and suitable for submission.

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DECLARATION

I, ABHISHEK CHAKRAVARTY, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled “THE ROLE OF INDIGENOUS PEOPLE IN ENVIRONMENTAL GOVERNANCE WITH SPECIAL REFERENCE TO UNITED NATION’S REDD+ INITIATIVE IN NORTHEAST INDIA” is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

Date:

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Abhishek Chakravarty

PREFACE

The basis for this research originally stemmed from a Symposium which I took part in during my graduating days. There I brought up the matter of REDD Plus while discussing about climate change with other participants. From the symposium my ideas went further and my passion on the topic grew due to my extensive reading on the topic. I started contacting different people associated with the project and also visited a number of sites where REDD Plus was being implemented or was planned to be implemented.

At one point of time I also got in association with Government in regard to implementation of the mechanism in the state of Assam. I also held discussions with Government officials and the Minister concerned. This further, enhanced my knowledge on the topic. Then, when I got the chance to do an LLM in Environmental Law, I decided to take up this topic for my dissertation. I was guided very well by my supervisor. Apart from that, all my teachers and various people associated with REDD Plus in Northeast India contributed to my knowledge base on this matter. Thus, I could come up with this research. I hope to go even further with this research and if given a chance, pursue my PhD on the same topic.

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LIST OF ABBREVIATIONS

1.	AIR	All India Reporter
2.	UNFCCC	United Nation's Framework Convention on Climate Change
3.	MOEF	Ministry of Environment and Forest
4.	ILO	International Labour Organisation
5.	REDD	Reducing Emissions from Deforestation and Forest Degradation
6.	UN	United Nations
7.	UNEP	United Nations Environment Programme
8.	NGO	Non-Governmental Organisation
9.	IUCN	International Union for the Conservation of Nature
10.	CBD	Convention on Biological Diversity
11.	ST	Scheduled Tribe
12.	TAC	Tribes Advisory Council
13.	JFM	Joint Forest Management
14.	CFM	Community Forest Management
15.	LULUCF	Land Use, Land Use Change and Forestry
16.	SCR	Supreme Court Reporter
17.	AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action
18.	SBSTA	Subsidiary Body for Scientific and Technological Advice
19.	COP	Conference of Parties
20.	MRV	Measurement, Reporting and Verification
21.	NFP	National Forest Policy
22.	NTFP	Non-Timber Forest Products

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I. INTRODUCTION

“The way we see the world shapes the way we treat it. If a mountain is a deity, not a pile of ore; if a river is one of the veins of the land, not potential irrigation water; if a forest is a sacred grove, not timber; if other species are biological kin, not resources; or if the planet is our mother, not an opportunity—then we will treat each other with greater respect. Thus, is the challenge, to look at the world from a different perspective.”

- David Suzuki, Environmental Activist

1.1 RESEARCH BACKGROUND

In most of the indigenous societies, the people believe that human and nature are deeply connected and inter-dependent, almost like kin to one another. Across the world, indigenous people have often been regarded as exemplars of environmentally sustainable living. The impact of their subsistence livelihoods was apparently kept in check by customary laws to ensure they lived by the laws of nature.¹ A lot of the answers to today’s environmental problems lie in these traditions. Due to their unique traditions and laws, these marginalized groups are gaining recognition as vital stewards of our environment and depleting resources; and also gaining a role in environmental governance. The United Nations’ pioneering report, *Our Common Future*, proclaimed that: “these communities are the repositories of vast accumulations of traditional knowledge and experience, [and] larger society ... could learn a great deal from their traditional skills in sustainably managing very complex ecological systems”² This proclamation by the United Nations, recognised the role of indigenous people in environmental management and governance at an international level.

Before we move further, let us understand the definition and meaning of indigenous people. There is no universal definition of indigenous people but the United Nations and several international organisations like the ILO, like in ILO Convention No. 169³, have come up with objective and subjective criteria for identifying the people concerned. The subjective criteria define it as Self-identification as belonging to an indigenous people, while the objective

¹ Benjamin J. Richardson, “The Ties That Bind: Indigenous People and Environmental Governance”, Peer Zubansen et al, (eds.), *INDIGENOUS PEOPLE AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES*, 1st ed. 2009, p. 1.

² World Commission on Environment and Development, *OUR COMMON FUTURE*, Oxford University Press, 1987, pp. 114-15.

³ C-169, Indigenous and Tribal Peoples Convention, 1989, International Labour Organisation, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (May 7, 2018)

criteria give two important markers – First, they descent from populations, who inhabited the country or geographical region at the time of conquest, colonisation or establishment of present state boundaries. Second, they retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status. This definition is accepted by UN and its sister organisations although it has not yet been considered a universal definition. However, country wise the definition might vary. For example, in India, there is no specific definition of indigenous people and hence the term ‘scheduled tribe’ is preferred.

Northeast India is home to over 200 different indigenous groups, who have been living in harmony with nature since time immemorial. The region comprises an area of 262,230 square kilometres (101,250 sq mi), almost 8 percent of that of India, spread across 8 states (originally 7). Northeast India, located between South and Southeast Asia is surrounded by countries like China, Myanmar, Bangladesh and Bhutan and most people of the region share cultural affinities with the neighbouring countries. The region also falls within two global biodiversity hotspots which is Eastern Himalayan and Indo-Malayan. Indigenous people of Northeast India are divided as tribal and non-tribal. Indian legal system however does not recognise the non-tribal indigenous groups as any special group but the tribal groups are recognised as scheduled tribes and enjoy several privileges under the law.

Environmental Governance in context of Northeast India is governed by national legislations as well as district council laws and customary laws. The Constitution of India gives special privileges to the tribal areas of Northeast especially in regard to law making through their respective autonomous district councils. The members of the autonomous district councils are elected by the people and belong to certain scheduled tribes of the area. The 6th Schedule of the Indian Constitution recognises the autonomous district councils and each state has from single to multiple number of such councils. The following is a list of the various such councils in different states of Northeast-

Assam: Bodoland Autonomous District Council, Karbi Anglong Autonomous District Council and Dima Hasao Autonomous District Council.

Meghalaya: Khasi Hills Autonomous District Council, Jaintia Hills Autonomous District Council and Garo Hills Autonomous District Council.

Mizoram: Chakma Autonomous District Council, Lai Autonomous District Council and Mara Autonomous District Council.

Tripura: Tripura Tribal Areas Autonomous District Council.

Apart from the above, there are several autonomous and developmental councils in the state of Assam and Manipur but those are not recognised under the Sixth Schedule of the Constitution and hence does not have law making powers, but only focus on developmental and cultural preservation activities of their respective communities/regions.

Most of the above mentioned Autonomous district councils have their own laws as regards the management of forests in their respective areas. Most of the legislations focus primarily on customary laws and confer significant rights to the tribal people over the forests and forest-based resources. The laws also recognise ‘sacred groves’ and the role of the community in management of forest and environment. As an instance, in Meghalaya, there is a specific legislation - The United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958, which confers most powers and rights for the management of the forests to local communities and village councils.

The customary laws along with legislations derived from the Sixth Schedule of the Constitution of India have given a very crucial role to the indigenous people (read scheduled tribes) in environmental governance in Northeast India. Their role can further be strengthened by bringing together certain international mechanisms like United Nation’s REDD Plus initiative in consonance with already existing local laws and legislations.

The United Nation’s REDD Plus scheme involves indigenous communities in protection, enhancement and management of forests. It not only involves them in forest management but also gives them benefits which accrues out of the scheme through the process of carbon trading. The formal adoption of the REDD plus initiative took place at the UNFCCC’s 13th Conference of Parties in Bali in 2007 under the “Bali Action Plan”⁴. The seeds of this concept however were planted 10 years back at the Kyoto Protocol on Climate Change in 1997. Article 2 of the Protocol gives certain commitments to parties falling under Annex 1 countries; it specifically speaks about protection and enhancement of sinks and reservoirs of

⁴ Vivienne Holloway and Esteban Giandomenico, “The History of REDD Policy”, http://redd.unfccc.int/uploads/2_164_redd_20091216_carbon_planet_the_history_of_redd_carbon_planet.pdf (May 8, 2018)

greenhouse gases, promotion of sustainable forest management practices, afforestation and reforestation.⁵

Further, more substantive information on requirements for REDD+ including participation of full and effective engagement of indigenous communities, national forest monitoring system, systems for providing information on addressing of safeguards and modalities on relating to forest reference emission levels and forest reference levels and so on were adopted at Conference of Parties (COP) – 15, 16 and 17 held at Copenhagen, Cancun and Doha respectively.

Then the emergence of the Warsaw Framework on REDD+ was seen as a major development in this regard at COP 19 in 2013. Furthermore, each year newer strategies are being added to the REDD plus initiative and it is seen as a major action plan to combat climate change, reduce emission as well as empower indigenous communities by ensuring their livelihood and subsistence.

India has always been on the forefront of climate negotiations. India has played a very crucial role in in shaping the evolution of the comprehensive concept of REDD+ at the international level, but domestically it has not been able to purposefully implement REDD+ due to lack of proper policy and failure to introduce a specific legislation in that regard. In 2013, an Expert Committee was formed to with the responsibility to come up with a draft policy for REDD Plus and it came up with a draft policy on REDD Plus. However, the policy missed out certain important factors and was a mere nine pages long.

Apart from the draft policy on REDD Plus, the Draft National Forest Policy of 2018 clearly states implementation and adoption of REDD+ mechanism for climate action plans. The goals of REDD+ are in conformity with India's National Forest Policy, 1988, which aims to ensure environmental stability and maintenance of ecological balance through protecting, conserving and enhancing the existing forests of the country.⁶

A publication by India's Ministry of Environment and Forest stated that 'Community-based Forest Governance' is essential for the success and proper implementation of the REDD+ mechanism. Northeast India, due to its unique community based customary laws and

⁵ UNFCCC (1997), Kyoto Protocol to United Nations Framework Convention on Climate Change, <https://unfccc.int/sites/default/files/kpeng.pdf> (May 8, 2018)

⁶ Ministry of Environment and Forests, National REDD+ Policy and Strategy, <http://envfor.nic.in/sites/default/files/Draft%20National%20Policy%20&%20Strategy%20on%20REDD.pdf> (May 8, 2018)

significant rights of the indigenous people is one of the best places in India for the implementation of this mechanism.

1.2 RESEARCH PROBLEM

Indigenous people have always shared a close and unique relationship with the environment. The concept of sustainable living has been practiced by these communities since millennia. Due to their proximity with environment and their vast resources of traditional knowledge, they can play a very crucial role in environmental governance. The problem which arises now is the involvement of the indigenous people in the environmental governance of the nation through introduction and adoption of more inclusive policies, strategies and legislations; also, assessment of the existing legal framework at local, national and international level.

1.3 AIM AND OBJECTIVES

The aim of the study is to establish the crucial role played by indigenous people in environmental governance.

The following are the objectives of the study:

- To understand the concepts of indigenous people and environmental governance, especially in regard to the proximate and inter-dependent relationship between them.
- To assess the various policies, strategies and laws relating to environmental governance, mainly those concerned with the role of indigenous people.
- To explain and showcase the implementation of the REDD+ mechanism in Northeast India and the benefits accruing out of it to both the environment and the local communities.
- To suggest further involvement of indigenous people in environmental governance through adoption and introduction of existing and new policies and mechanisms in different areas of the country.

1.4 SCOPE AND LIMITATIONS

The scope of the study is restricted to the role of indigenous people in environmental governance. The India's North-Eastern states have been taken as a universe for the study and the locality for the study will be restricted to the State of Meghalaya in the districts of East Khasi Hills, South Garo Hills and West Garo Hills, however references and examples from

the other seven states will also be taken into account. The scope of this study also encompasses the REDD+ mechanism of the United Nation right from its inception to its implementation with special references from Northeast India. The study also engulfs the provisions and the intricacies of the Sixth Schedule of the Indian Constitution and the various local laws which derive out of it. Further, the assessment and analysis of the local customary laws especially those relating to environment and forest management in particular also had to be done. Therefore, the scope of the study comprises of three important elements- indigenous people, environment and REDD+ mechanism with all the laws and policies in place, right from the international level to the local ones.

The following are the limitations of the research:

- There is a significant crisis of literature on the topic. This area of study has not been touched upon by researchers, especially in regard to Northeast India. Hence, not much literature could be found on it.
- Due to sudden riot-like situation in Shillong and adjoining areas of Meghalaya, the interview and the field study had to be limited to two visits.
- The remoteness of the study sites also poses as a limitation to the research. The research site at Mawphlang in East Khasi Hills was visited twice, however, the site which is located in South and West Garo Hills district near Balpakram National Park could not be accessed due to its remoteness. The information for the same was taken from certain pioneers of that project who reside in Guwahati.
- Most of the customary laws and the laws passed by the autonomous district councils are yet to be made available online. Hence, a lot of struggle had to be gone through to collect such material and not much material could be found.
- The time limit for the research which is around four to five months is significantly less keeping in view the locations of the study and the lack of materials available online.
- There was also a language problem at the research sites. Most of the people in those sites spoke the local Khasi and Garo languages and had little knowledge about English except for a few people. This created certain communication issues and therefore the need for a translator was felt.

- Climatic conditions of Northeast, and Meghalaya in particular too became a major limitation for the research. The heavy pre-monsoon and monsoon showers, further added to the issue of inaccessibility of the villages and sites of research.

1.5 LITERATURE REVIEW

- Kirsty Galloway McLean, et al, “The Role of Indigenous People in Global Environmental Governance: Looking through the lens of Climate Change”, Jose A. Puppim De Oliveira, GREEN ECONOMY AND GOOD GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: OPPORTUNITIES, PROMISES AND CONCERNS, United Nations University Press, 2012

The theme of this article is on the participation by indigenous groups at international environmental governance. It focuses on how in recent times, there has been a significant upscale in the number of non-state actors, particularly groups representing indigenous people in several international environmental events like – Conference of Parties, Meetings of the different organs under UNFCCC and so on. The article traces the step by step involvement of indigenous people in global environmental governance. It begins from the several international conventions which highlighted the plight of the indigenous people and also the importance for their involvement in policy making. Many of those conventions also recognized the importance of indigenous people in global environmental governance. The article however fails to touch upon the issues concerning indigenous people at national and local level. Due to a more globalist approach, the article is limited to an international level analysis.

- Benjamin J. Richardson, “The Ties That Bind: Indigenous People and Environmental Governance”, Peer Zubansen et al, (eds.), INDIGENOUS PEOPLE AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES, Oxford Hart Publishing, 1st ed. 2009

Borrowing examples from many countries, this article analyses the relationships between Indigenous peoples and environmental governance. It endeavours to look at the natural qualities and practices of Indigenous people groups, particularly keeping in mind the end goal to evaluate their suggestions for the Indigenous stake in environmental governance. It distinguishes no less than six noteworthy speculations or points of view concerning Indigenous environmental values and practices. However, just like the previous article, this

article too fails to touch upon the national and local issues concerning indigenous people. Apart from the global level, the indigenous people have a more role to play at the local level. Also, a large number of environmental issues arise at the grass root level and hence analysis of the same at that level becomes more important, which the article failed to address.

- Suzzane von der Porten, “Collaborative Environmental Governance and Indigenous Governance: A Synthesis”, Doctoral Thesis submitted to University of Waterloo, 2013

The main theme of this thesis is collaborative governance. It focuses on how the indigenous people can be involved in environmental governance as a part of a collaborative scheme. The thesis focuses on Canadian issues in this respect. Indigenous people in Canada in the present date have asserted themselves as a self-determining within their traditional homelands, rather than considering them just as a stakeholder. This perspective is reflected in the Indigenous governance literature, which provides a window into how Indigenous peoples view themselves. In its literature review, certain terms like governance, indigenous governance and collaborative environmental governance have been very clearly defined in terms of Canada. However, the paper is totally focussed on the Canadian scenario and an in-depth analysis of Canadian policies have been done. The Indian context is very different from the Canadian one and hence the thesis has not been able to contribute much to my own research topic.

- Rebecca Tsosie, “Indigenous People and Environmental Justice: The Impact of Climate Change”, Vol. 78, University of Colorado Law Review, 2007

This article scrutinizes the American model of environmental justice wherein lines between federal, state, and tribal sovereignty over environmental conditions are still ambiguous. The same issue can be seen in our case as well, especially in Sixth Schedule areas where, customary laws, state laws and federal laws at times overlap one another and there exists no line of separation between the three at times. The article further states that the term “environmental justice” is used to denote the distributional impacts of the dominant society's environmental decision-making process on weaker or lesser advantaged communities, like indigenous people in particular. The article touches upon the “environmental self-determination” among the indigenous groups throughout the world and how this right for environmental self determination can be derived out of human rights due to the unique cultural and political status of those groups. The article in particular examines the impacts of

climate change on the indigenous people and probes the ethical as well as legal arguments like self determination which could help protect the indigenous people from climate change and also give them a chance to be a part of climate justice and environmental justice as a whole. However, this article does not give us much clue about the Indian scenario and hence not much help could be taken from it.

- Cherie Metcalf, “Indigenous Rights and Environment: Evolving International Law”, 35 Ottawa Law Review, 2009

This paper focuses on the inter-relationship between indigenous rights on one hand and international law and international environmental law on the other. It suggests two models for the protection of indigenous environmental rights namely- ‘cultural integrity model’ and ‘self determination model’. The paper depicts the emergence of indigenous people from mere objects of study to participants in several conventions like “Declaration of the Rights of Indigenous People”. The paper also examines the international instruments which establishes the relationship between indigenous rights and international environmental law. This paper has been instrumental in our research from the jurisprudential view of indigenous rights especially in the international context.

- Harsha S., et al, “Environmental Governance in Northeast India and the Role of the Judiciary”, 3 IJLSR 2014

The article begins by describing the rich biodiversity of Northeast and then stating some quotes from local environmentalists who see new hydroelectric and infrastructure projects as a threat to the biodiversity. It then criticizes non-recognition of rights of the indigenous people over the forest land and continuous effort of the state apparatus to place the forests as ‘unclassified forest’ under the control of state forest department. Moving ahead, it discusses the landmark cases which has had long lasting impact on the environment of Northeast like the TN Godavarman case. The article also discusses other important cases relating to community rights versus environmental law. In a number of such cases, the court took both sides, at times siding with the rights of the community and at times siding with forest department. The article has been helpful in understanding the laws and case laws which governed the people of northeast especially relating to their rights over forests.

- Mark Poffenberger, et al, “Indigenous Forest Stewards of Northeast India”, Community Forestry International, 2007

This is one of the primary literature for our research. Unlike the various other papers which were mainly concerned about the international scenario or those in other countries, this paper focuses exclusively on the relationship between indigenous people and the environment (forestry in particular) in Northeast India. It touches upon all aspects of the mutual relationship which includes laws and policies, historical background, good practices and many more. This report has been made under the supervision of Community Forestry International, an organisation totally dedicated in working towards the betterment of the community managed forests. The organisation was also key in starting the first REDD+ project in Northeast India. The report was published for the World Bank and work has been done by a core group of researchers who have worked in different parts of Northeast. The report analyses the role of indigenous institutions as well as courts in the management of forests. It also suggests policy measures and strategies to promote community forest management in Northeast India. Apart from that, the report gives very crucial data and facts on the current status of forests in the region. This data has been very useful for our research as well.

- Raghav Gupta, “Powers of Autonomous Council in Tribal Areas of Northeast”, iPleaders Blog, 2017

This blog is a summary article on the Sixth Schedule of the Indian Constitution which gives recognition and powers to the Autonomous District Councils in Tribal Areas of Northeast. It explains the executive, legislative and even the judicial powers of the Councils. It further states the new power allotted to the councils under the 73rd and 74th Amendments. However, the article is more based on the financial side and investment opportunities. Yet, the blog helps us understand the basic principles of the Sixth Schedule.

- Vivienne Holloway, et al, “The History of REDD Policy,” Carbon Planet Limited, 2009

This is a white paper by a global carbon emission management company. It has been prepared for the basic information on the evolution of the REDD policy and then its further development in REDD+ mechanism and then regional and national adoptions across the world. It traces the development from Kyoto Protocol in 1997 through the various SBSTA

and Conference of Parties. The same is even explained through graphical representation. However, the paper lacks country wise data and it very concise; the information from this paper is therefore quite low.

1.6 HYPOTHESIS

The indigenous people, due to their proximate relationship and interdependence with the environment, play a very crucial role in environmental governance.

1.7 RESEARCH METHODS

For the purpose of this research, both doctrinal as well as empirical method have been adopted. However, for the empirical research, the method that has been adopted is interview method. Among the several types of interview methods, we have adopted the Directive interview which is a standardized technique with predetermined questions in order to procure the data/information as regards the research.

Target groups-

- Indigenous people who are a part of the environmental governance and several community forest management projects.
- Renowned civil society members involved and working in this field.
- Members of autonomous district council
- Lawyers specialised in customary laws
- Esteemed International Scholars and Faculty members.
- Village chiefs (*Syiem*) and heads (*Rangbah Shnong*)

In addition to this, questionnaire tool has been used to gather information and data. The questions have been usually open ended and the questions have been preferably asked to the target groups as a part of casual conversation.

1.8 RESEARCH DESIGN

This is a descriptive and exploratory study that has employed mixed methods of data collection and analysis – both quantitative and qualitative. The aim of the study is to expand theory and practice knowledge in relation to the role of indigenous people in environmental governance and the positive results accruing out of it using survey, interview, focus group and case study methods within an action research approach. The qualitative aspects of the

study are the result of a desire to observe naturally occurring activities and practices in context especially within the research sites. Analytical research has been applied in critical appraisal of secured data and information. The phenomenon has been systematically investigated to gather quantitative data and analyse the same. The quantitative research takes help of numbers and figures to establish the fact the indigenous groups play a very crucial role in environmental governance.

Mode of Citation

The researcher will follow the standard mode of citation as used and prescribed to students at the National Law University and Judicial Academy, Assam.

Sources of Data

For this research, both primary and secondary sources of data will be referred, which includes:

Primary Sources-

- UN, UNFCCC, UNEP database
- Constitutions, National Legislations, reports, policies, fact finding documents etc. from different countries as well as India
- Interview reports and statistical data
- Case Laws

Secondary Sources-

- Journals of International and National repute
- News dailies, footage, newsreels, videotapes and audiotapes
- Documentaries and some direct field resources
- Books
- PhD thesis

II. THE ROLE OF INDIGENOUS PEOPLE IN ENVIRONMENTAL GOVERNANCE

Widening participation in international governance especially in regard to environment and climate change has been a prominent characteristic of the last 40 years. This is illustrated in the rising influence of unelected bodies, which are mostly non-governmental such as private sector, civil society groups, NGOs and local and indigenous communities. Increased participation of non-governmental actors in international governance is thought to accomplish several objectives, including more effective and efficient development, increased equity, legitimacy, transparency and accountability, and enhanced diversity and resilience.⁷ Empowering productive interest in governance at the global level has been viewed as a standout amongst the most critical undertakings for policy-makers worried about enhancing the viability of global governance. An important aspect of this widened participation has been the increased engagement of local and indigenous communities.

Indigenous peoples, at least traditionally, have often been regarded as exemplars of environmentally sustainable living. The impact of their subsistence livelihoods was apparently kept in check by customary laws to ensure they lived by the laws of nature.⁸ Today, many of the answers to environmental issues and crisis lie in these traditions and customs. The United Nations' pioneering report, *Our Common Future*, proclaimed that: 'these communities are the repositories of vast accumulations of traditional knowledge and experience, [and] larger society ... could learn a great deal from their traditional skills in sustainably managing very complex ecological systems'.⁹ It could thus be assumed that upholding Indigenous rights and conserving the environment can go hand-in-hand. So, while states have often been hostile to Indigenous interests since the colonial times, but in today's times, with the changing scenario in environmental governance, the role and voices of Indigenous peoples are being respected.

A common perspective in the literature portrays Indigenous peoples as prototypical environmentalists, living harmoniously with nature without indulging in the profligacy

⁷ Benjamin J. Richardson, "The Ties That Bind: Indigenous People and Environmental Governance", Peer Zubansen et al, (eds.), *INDIGENOUS PEOPLE AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES*, 1st ed. 2009, p. 2.

⁸ *Ibid*

⁹ World Commission on Environment and Development, *OUR COMMON FUTURE*, Oxford University Press, 1987, pp. 114-15.

associated with Western culture.¹⁰ The close attachment to the land and the environment is described by some commentators as the ‘defining characteristic of indigenous peoples’.¹¹ A study by a task force of the International Union for the Conservation of Nature (IUCN) trumpeted that Indigenous peoples ‘are the sole guardian of vast habitats critical to modern societies ... [and] their ecological knowledge is an asset of incalculable value’.¹² Other commentators contend that ‘commercial consumption, exploitation of natural resources, and notions of enrichment are not part of indigenous cultures’.¹³ Thus, they should provide a salutary model for the rest of humanity.¹⁴ This perspective also strongly implies that protecting Indigenous rights should dovetail with those forms of modern environmental governance that stress sustainability. Indeed, the environmental movement often touts indigenous people as unfailing allies.¹⁵

However, for many reasons, the indigenous and environmental agendas often do not coincide. Putting aside the contrary historical record - when European colonisers plundered Indigenous lands¹⁶, exterminating the herds of buffalo, tigers, elephants and other wildlife, damming the rivers, and felling the forests - the supposedly heightened environmental-cognizance of modern Western societies has not necessarily mollified Indigenous peoples. The history of nature conservation in Africa provided one of the first hints that a vast chasm can arise between Western environmental policies and the interests of local communities. When colonial authorities in Africa set aside large territories as game reserves and parks, they evicted the native inhabitants to make way for places that would primarily serve the recreational and scientific interests of outsiders.¹⁷ Areas occupied by subsistence hunters and farmers for thousands of years suddenly were relabelled as ‘wildernesses’. These callous policies set precedents that continue today, such as the evictions of the Bushmen of the Kalahari by the Botswana government.¹⁸

¹⁰ Supra Note 7, p. 6.

¹¹ *Ibid*

¹² IUCN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions*, IUCN, 1997, p. 35.

¹³ JP Kastrup, “The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective”, 32 *Texas International Law Journal* 97, 1997, p. 114.

¹⁴ AT Durning, “Guardians of the Land: Indigenous Peoples and the Health of the Earth”, Worldwatch Institute Report, 1992, p. 6-7.

¹⁵ Supra Note 7, p. 6.

¹⁶ *Ibid*

¹⁷ JM MacKenzie, *THE EMPIRE OF NATURE: HUNTING, CONSERVATION AND BRITISH IMPERIALISM*, Manchester University Press, 1988

¹⁸ C Timberg, “Eviction of Bushmen Is Ruled Illegal”, *Washington Post* (14 December 2006) p. 20.

The same callous colonial policies of eviction of indigenous people from their native lands even continued in India almost till the beginning of 21st century; only thereafter the law makers became conscious and introduced the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The Act recognised the historical injustices committed against the tribal people living in and around forest areas and gave them, rights to own and live on the land they held, apart from making them a part of community or joint forest management.

Likewise, modern environmental policy in the West can be the context for bitter disputes between Indigenous and non-Indigenous interests. They arise for many reasons. Sometimes governments' lofty environmental policies are sacrificed to short-term development interests, where the seeming riches of a new mine or logging concession trump any rival values Indigenous peoples or other environmentally-minded communities may attach to such lands.¹⁹ Conflicts may also arise in reconciling Indigenous traditional knowledge with the supposed hard 'objectivity' of Western science in environmental decision-making.²⁰ Also, because of the prevalent belief that nature conservation depends on separating nature from humankind, the presence of Indigenous peoples can be seen as incompatible with the protection of endangered species and their habitats.

This chapter explores the relationships between Indigenous peoples and environmental governance at various levels – international, national and local in terms of policies, laws, strategies and frameworks. 'Governance', defined broadly, means the norms and decision-making processes by which society and its organisations are controlled and coordinated.²¹ While governance is habitually associated with official regulation by states,²² scholars in the field of legal pluralism are advancing more nuanced understandings that also emphasise the roles of non-state institutions in the market and civil society in policy-making, norm-setting, implementation, and other aspects of governance.²³ Indigenous scholars such as John Borrows also stress the role of Indigenous communities and their legal traditions as a critical source of social ordering.²⁴ For this chapter, therefore, environmental governance covers a range of values, norms, institutions and processes, both state- and non-state-based, that shape

¹⁹ Supra Note 7, p. 4.

²⁰ *Ibid*

²¹ M MacNeil, N Sargent and P Swan (eds), *LAW, REGULATION AND GOVERNANCE*, Oxford University Press, 2003.

²² OECD, "Reforming Environmental Regulation in OECD Countries", OECD Report, 1996.

²³ S Merry, "Legal Pluralism" 22 *Law and Society Review* 869, 1988.

²⁴ J Borrows, "With or Without You: First Nations Law (in Canada)", 41 *McGill Law Journal* 629, 1995.

entitlements to use or benefit from natural resources, and to control their exploitation or protection.

Nominally, the importance of Indigenous involvement in environmental governance is now affirmed in many laws and policies. It is commonplace, for instance, to find references to Indigenous peoples in international environmental declarations, resolutions and policies.

The following sub-chapters shall discuss and explain the various laws, policies and frameworks at international, national and local levels giving recognition to the role and participation of indigenous communities in environmental governance.

2.1 INTERNATIONAL FRAMEWORK

The international community now recognizes that effective global action requires meaningful local participation in international policy-making and implementation. But this was not always the case. International interest in indigenous issues began formally only in the late 1970s, when the United Nations Economic and Social Council appointed a Special Rapporteur, Mr José Martínez Cobo of Ecuador, to study patterns of discrimination against indigenous peoples around the globe²⁵. In 1975, the World Council of Indigenous Peoples was founded in Canada and was tasked with dealing with the economic, cultural, political and social rights of indigenous peoples²⁶. In 1982, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (UNSCPD) responded to reports documenting a wide range of human rights issues by appointing a Working Group on Indigenous Populations²⁷. Subsequently, based on the findings of the UNSCPD, the International Labour Organization (ILO) promulgated the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) in 1989. ILO 169 remains one of the most important operative international laws guaranteeing the rights of indigenous peoples.²⁸ Among other provisions, it requires that special safeguards be put in place to protect the rights of indigenous peoples concerning the natural resources pertaining

²⁵ Kirsty Galloway McLean, et al, “The Role of Indigenous People in Global Environmental Governance: Looking through the lens of Climate Change”, Jose A. Puppim De Oliviera, GREEN ECONOMY AND GOOD GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: OPPORTUNITIES, PROMISES AND CONCERNS, United Nations University Press, 2012, p. 247.

²⁶ Poka Leinui, et al, “The World Council of Indigenous Peoples an Interview with Pōkā Laenui (Hayden Burgess)”, 2 The Contemporary Pacific, 1990, p. 336-338.

²⁷ Supra Note 25, p. 248.

²⁸C-169, Indigenous and Tribal Peoples Convention, 1989, International Labour Organisation, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (May 14, 2018)

to their lands, including their rights to participate in the use, management and conservation of these resources.²⁹

The Rio Declaration on Environment and Development of 1992 was one of the first major international framework which recognised the rights and importance of indigenous people in environmental governance. It thus, declared³⁰:

“indigenous people ... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

The adoption of Agenda 21, the Programme of Action for Sustainable Development, by the United Nations Conference on Environment and Development (UNCED) in Rio in 1992 then set the international stage for indigenous peoples’ engagement in global governance. Agenda 21 contains a series of recommendations specifically addressing the relevance of traditional knowledge to the implementation of sustainable development policies and programmes³¹. These recommendations address a wide range of sustainable development issues: human health, land resources, deforestation, desertification and drought, sustainable agriculture and rural development, marine resources, freshwater resources, the role of farmers, the role of science, education, public awareness and information, and information for decision-making.³²

Recommendation 35.7 in the chapter on Science for Sustainable Development is perhaps one of the most significant recommendations on indigenous peoples’ traditional knowledge (UNCED, 1992)³³:

“Countries, with the assistance of international organizations, where required, should: . . . (h) Develop methods to link the findings of the established sciences with the indigenous knowledge of different cultures. The methods should be tested using pilot studies. They should be developed at the local level and should concentrate on the links between the traditional knowledge of indigenous groups and corresponding,

²⁹ *Ibid*

³⁰ U.N. General Assembly, Rio Declaration on Environment and Development, U.N. document A/CONF.151/26 (Vol. I), (12/08/1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (May 15, 2018).

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

current “advanced science”, with particular focus on disseminating and applying the results to environmental protection and sustainable development.”

Since then, issues relating to indigenous peoples and traditional knowledge have been addressed in a number of international agreements focusing on different development issues. For example, the Convention on Biological Diversity (CBD), which entered into force in 1993, contains innovative and far-reaching provisions on traditional knowledge (CBD, 1992: Article 8(j)):

“Each contracting Party shall, as far as possible and as appropriate . . . (j) Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.”³⁴

The adoption of the CBD marked the first time that a binding international instrument not only acknowledged the relevance of traditional knowledge to the resolution of global problems but also placed an obligation on governments to respect, preserve and maintain it. Developments under this Convention continue to promote the rights of indigenous peoples in this regard.³⁵ For example, a major recent accomplishment under the CBD was the adoption in 2010 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.³⁶ The purpose of the Nagoya Protocol is to effectively implement one of the three core objectives of the Convention: the fair and equitable sharing of benefits arising from the utilization of genetic resources – an issue of great importance to the holders of traditional knowledge.³⁷

Encouraged by the milestones set by the CBD, in 2000 the Economic and Social Council established the United Nations Permanent Forum on Indigenous Issues as part of the International Decade of the World’s Indigenous Peoples, with a mandate to discuss

³⁴ Article 8(j), Convention on Biodiversity, <https://www.cbd.int/traditional/> (May 15, 2018)

³⁵ *Supra* Note 25, p. 249

³⁶ *Ibid*

³⁷ *Ibid*

indigenous issues related to economic and social development, culture, the environment, education, health and human rights³⁸.

The contribution of indigenous peoples to cultural diversity has been recognized in various United Nations Educational, Scientific and Cultural Organization (UNESCO) instruments, including the 2001 Declaration on Cultural Diversity and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage³⁹.

The International Treaty on Plant Genetic Resources for Food and Agriculture entered into force in 2004, featuring as its centrepiece a “multilateral system for access and benefit-sharing”, which guarantees facilitated access for certain categories of plant genetic resources for food and agriculture in return for benefit-sharing. In terms of traditional knowledge, the Treaty recognizes “the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world”⁴⁰; and requires contracting Parties to protect and promote farmers’ rights, including specific reference to the protection of traditional knowledge, the sharing of benefits, and the right to participate in making decisions at the national level on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.⁴¹

Indigenous peoples’ prominence in international governance culminated in 2007 when the United Nations General Assembly adopted the landmark Declaration on the Rights of Indigenous Peoples outlining the rights of the world’s indigenous people and outlawing discrimination against them⁴². Although the Declaration is not legally binding, it does set out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues.⁴³ The Declaration emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions,

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ FAO, The International Treaty on Plant Genetic Resources for Food and Agriculture, <http://www.fao.org/plant-treaty/overview/en/> (May 16, 2018)

⁴¹ *Ibid*

⁴² UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295,

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (May 16, 2018)

⁴³ *Ibid*

cultures and traditions and to pursue their development in keeping with their own needs and aspirations.⁴⁴

As indigenous peoples have gained more recognition in international treaties, international bodies have begun demonstrating increased engagement with indigenous peoples. For example, the World Intellectual Property Organization established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in September 2000⁴⁵. Primary themes addressed by this Committee include the intellectual property questions raised by access to genetic resources and benefit-sharing; the protection of traditional knowledge; and protection of expressions of folklore. Negotiations are currently under way regarding an international legal instrument (or instruments) under this framework.⁴⁶

In 2001, the Commission on Human Rights appointed a Special Rapporteur on the rights of indigenous peoples. The World Bank Operational Policy and Bank Policy on Indigenous Peoples (OP/BP 4.10) of 2005 demands, wherever possible, the active participation of indigenous peoples in the development of their projects.⁴⁷ The United Nations University Institute of Advanced Studies (UNU-IAS) established a research programme on traditional knowledge (the “Traditional Knowledge Initiative”) in 2007 in preparation for developing a research institute focusing on traditional knowledge⁴⁸; and a special inter-agency United Nations Indigenous Peoples’ Partnership was established in 2010.

In recent years, international knowledge institutions – such as the Millennium Ecosystem Assessment, the Arctic Climate Impact Assessment, the Global International Waters Assessment, and the Intergovernmental Panel on Climate Change – have also contributed to opening up spaces for indigenous peoples to participate in global governance processes by consolidating and legitimizing support for indigenous peoples’ contributions, and by expanding indigenous participation within their own processes. The Millennium Ecosystem Assessment, for instance, deliberately sought to engage with local and indigenous peoples and encouraged them to adapt the assessment to their own conceptual frameworks and policy

⁴⁴ *Ibid*

⁴⁵ *Supra* Note 25, p. 250-252

⁴⁶ *Ibid*

⁴⁷ *Ibid*

⁴⁸ About UNU-IAS, The United Nations University Institute of Advanced Studies, <https://ias.unu.edu/en/about-unu-ias#overview> (May 12, 2018)

needs.⁴⁹ Although to a lesser extent, the Intergovernmental Panel on Climate Change has also created opportunities for indigenous peoples to participate in their assessment reports as lead authors and contributing authors. As these international knowledge institutions have become increasingly important as powerful sources of expert authority in international governance, the ability to effectively engage with these institutions, has proven invaluable for indigenous peoples.⁵⁰

The Conference of Parties, which are held each year under the United Nations Convention on Climate Change (UNFCCC), also encourages participation of indigenous people. The COP-21 held in Paris, has recognized the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change.⁵¹ It has also established a special platform in this regard - Local Communities and Indigenous Peoples Platform (LCIPP). The platform has been established to strengthen the knowledge, technologies, practices, and efforts of local communities and indigenous peoples related to addressing and responding to climate change, to facilitate the exchange of experience and the sharing of best practices and lessons learned on mitigation and adaptation in a holistic and integrated manner and to enhance the engagement of local communities and indigenous peoples in the UNFCCC process.⁵²

At COP 21, Patricia Espinosa, Executive Secretary of the UNFCCC, declared that, “Indigenous people must be part of the solution to climate change. This is because you have the traditional knowledge of your ancestors. The important value of that knowledge simply cannot—and must not—be understated. You are also essential in finding solutions today and in the future. The Paris Climate Change Agreement recognizes this. It recognizes your role in building a world that is resilient in the face of climate impacts.”⁵³

These advances in international thinking, knowledge creation and action on indigenous issues and rights have been motivated by the growing affirmation of indigenous rights around the world, by strengthened commitments to equitable government on the part of national authorities and by the growing recognition that indigenous peoples have valuable information and insight to inform decision-making. Despite the broad coverage of this range of global

⁴⁹ Supra Note 25, p. 252-253

⁵⁰ *Ibid*

⁵¹ UNFCCC, Introduction to the Local Communities and Indigenous Peoples Platform (LCIPP), <https://unfccc.int/10475> (May 11, 2018)

⁵² *Ibid*

⁵³ *Ibid*

governance instruments, there are still some important gaps – most clearly evidenced in the lack of a legal guarantee to indigenous peoples, as communities, to their traditional lands with which they have deep, often spiritual, ties and upon which they rely for their livelihoods. The Kyoto Protocol, 1997, one of the most important agreements in global environmental governance, didn't mention a single word on indigenous people. However, with active participation and importance given to indigenous people from Paris Agreement onwards, much positive results can be expected in this regard.

2.2 NATIONAL LAWS AND POLICIES

India is home to the largest population of indigenous peoples of any country in the world. Roughly a quarter of the world's indigenous population – around 80 million people – are scattered across India, their numbers a staggering diversity of ethnicities, cultures and socioeconomic situations.⁵⁴ They include a wide range of indigenous communities, like the Sentinelese of the Andamans, who are considered to be the last uncontacted people on earth, to some of the largest, such as the Gonds and Santhals of central India. These communities in India live in varied economic conditions. While some of them face staggering levels of destitution, some living especially in Northeast India have high levels of literacy and standard of living. But across circumstances and areas, like other indigenous communities around the world, India's indigenous peoples do share one characteristic – social, political and economic marginalisation.

India's recognition of Indigenous Peoples in international and domestic law, policy, and practice is paradoxical. While India voted in favour of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and signed the ILO Convention 107, the government continues to deny the term and concept of "Indigenous Peoples" claiming that all Indians are Indigenous.⁵⁵ In India, therefore, the term 'Scheduled Tribe' is often used as synonymous to indigenous people.

At present, over 705 communities living in India are recognised as Scheduled Tribe (ST) as per Indian laws. The 2011 census, cites the ST population at 104.3 million people, which comprised 8.6% of India's total population; of which 90% live in rural areas. It is estimated that they inhabit nearly 15-20% of India's land area and are largely concentrated in certain

⁵⁴ Luchie Maranan (ed.), "India and the Rights of Indigenous People", AIPP Foundation Report, 2010, p. 10.

⁵⁵ Cultural Survival, Observations on the State of Indigenous Human Rights in India, Report for United Nations Human Rights Council Periodic Review, 2016, <https://www.culturalsurvival.org/sites/default/files/INDIAUPR2016final.pdf> (May 17, 2018)

contiguous zones which include- the central India plateau and highlands especially in the states of Madhya Pradesh, Chattisgarh, Jharkhand and Orissa; the Northeast Indian belt, which is home to over 220 ethnic tribal groups and are quite well off both-socially and economically as compared to those living in other parts of India; and the Southern belt, especially in the Eastern and Western Ghats.

The term Scheduled Tribe (ST) is an administrative term which is used to denote a specific section of people and administer certain privileges, protection and benefits to them as they have been considered historically disadvantaged and backward. Article 366 (25) of the Constitution of India defines Scheduled Tribes as ‘such tribes or tribal communities or parts of, or groups within such tribes, or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution’.

As per Clause 1 of Article 342, the Scheduled Tribes are the tribes and tribal communities or part of or groups within these tribes and tribal communities which have been declared as such by the President of India through public notification. There are no such defined criteria to denote a certain community as ST, however, a few characteristics like – backwardness, primitive traits, distinctive culture, geographic isolation, among others are taken into account.

The governance in tribal areas, especially in Northeast, since the colonial era, has been done differently from the rest of the country. During the British times, the tribal areas, and particularly Northeast Indian states were divided into two specific categories⁵⁶-

- Agency (Tribal) areas or the partially excluded areas where the Agent governed in the name of the Crown but left the local self-governing institutions untouched.
- Excluded Areas (northeast) where the representatives of the Crown were a figure head.

This erstwhile colonial arrangement of governance was carried over into the Indian Constitution in the form of Article 244 – the V Schedule and VI Schedule.⁵⁷ The partially excluded and excluded areas were, by and large, brought under the V and VI Schedule. The term ‘Scheduled Tribes’ was adopted in the Constitution along with certain special privileges, protection and benefits.

⁵⁶ Supra Note 54, p. 33.

⁵⁷ Supra Note 54, p. 18

The British Government, during its 200 years of colonial rule, mostly refrained from applying their laws on these 'Agency' and 'Excluded Areas'. However, post-independence, at the stroke of a pen, the Indian Government brought all these areas under a uniform forest policy adopted by the British and overnight, homes and dwellings of the tribal people were turned into reserved forests, and they in turn became encroachers in their own homes.

Apart from this, the tribal communities practiced community ownership of land, while right after independence, the Indian Government's property related regime recognised private ownership; this created a lot of difficulties for the tribal people. The post-independence land reforms also could not benefit the tribal communities, in fact they suffered because of that. Their common lands were divided and distributed. Some of them were even distributed to non-tribal people. This led to a lot of resentment among the tribal people.

The legal sources which govern the tribal people and recognise their rights and provide them certain privileges are-

- The Constitution of India

In the Constitution, as many as 209 articles and 2 special schedules are relevant for the tribal people (STs). This includes, article 338A, which calls for setting up of a National Commission for Scheduled Tribes to investigate, monitor and evaluate all matters relating to the Constitutional safeguards provided for STs. Apart from this, we have Schedule- V and VI. This sub-chapter will deal with Schedule V and the consequent sub-chapter shall get into Schedule VI- which gives special powers to the tribal people living in Northeast India especially in land rights and governance.

- Legislations by Parliament and State Legislatures, Rules and Government Notifications

A number of laws have been made by both state and central legislature to give rights and privileges to the tribal communities. The Government has also made several rules and issued many notifications in this regard. But, for the purpose of this research, in this sub-chapter, the focus shall be on- The Forest Rights Act of 2006, The National Forest Policy of 1988 and the Draft National Forest Policy of 2018.

- Judicial Precedents

Indian Courts have made a number of laws and delivered several judgements in favour of the indigenous people (read Scheduled tribes). In several cases, they have also criticised Government policies and upheld indigenous and tribal rights. The same shall be discussed in the sub-chapter concerning 'Case laws'.

- Customary Laws

Article 13 of the Constitution recognises 'custom or usage having in the territory of India the force of law' as part of the term 'law'. Some basic conditions for their recognition as customary law includes whether it finds its source in antiquity; is reasonable; is in conformity with statutory law; is followed openly and freely (as opposed to under coercion) and is consistent with morality and public policy. In certain aspects of personal laws, such as marriage, divorce and inheritance, religious texts are also accepted to a limited extent as an additional source of law.

The following is a brief description of a few important laws and policies which govern and recognise the rights of indigenous people in India:

Schedule V of the Indian Constitution

Also known as the Fifth Schedule, is mentioned in Article 244(1) of the Indian Constitution, which recognises Scheduled Areas and the Fifth Schedule. As per Article 244(1), "The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Area and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram." The purpose of Scheduled Areas, as also recognised in several judgments, is to preserve the tribal autonomy, their culture and economic empowerment, to ensure social, economic and political justice, and preservation of peace and good governance.⁵⁸ It is with this object in mind that the Constitution created the Fifth Schedule which has famously been called "A Constitution within a Constitution" by late Dr. B.D. Sharma, former Commissioner for Scheduled Castes and Scheduled Tribes.⁵⁹

The Fifth Schedule comprises of seven paragraphs, the following is a detailed analysis of the important provisions under the Schedule-

⁵⁸ Samatha v. State of Andhra Pradesh (1997) 8 SCC 191.

⁵⁹ Ministry of Tribal Affairs, Land and Governance under the Fifth Schedule, <https://tribal.nic.in/FRA/data/LandandGovernanceunderFifthSchedule.pdf> (May 18, 2018)

Paragraph 1 interprets the expression “State” for the purposes of this Schedule. Paragraph 2, while stating what Scheduled Areas are, further provides that subject to the provisions of the Schedule, executive power of the State extends to the Scheduled Areas located in such State.⁶⁰ This provision makes it clear that the power of ‘administration and control’ of the state extends to these areas, removing doubts, if any, whether these areas are subject to the overarching authority of the state and its machinery.⁶¹ It has been held by the courts that the power of ‘administration and control’ referred to in this clause is wide enough to embrace exercise of governmental power of every description – executive, legislative and judicial.⁶²

Paragraph 3 requires the Governor of the State, who as we shall see below is vested with enormous legislative powers, to make a report annually, or when required to do so by the President of India, to the President regarding the administration of the Scheduled Area.⁶³ It further provides that the Executive power of the Central government will extend to the giving of directions to the State government for the administration of these areas. This provision is significant, as it makes a sharp divergence from the non-Scheduled Areas where the executive power of the Centre extends only insofar as the subject matters which fall within its legislative domain under the Seventh Schedule. In Scheduled Areas, however, the executive power of the Central government extends to all subject matters, even those which are within the domain of the State government.⁶⁴

Paragraph 4 provides for the setting up of a Tribes Advisory Council (or ‘TAC’) to be set up in each State where there are Scheduled Areas, and also in those States with a significant tribal population, to give advice on matters relating to the welfare and advancement of the Scheduled Tribes in these States.⁶⁵ The TAC should have not more than twenty members, of whom at least three-fourths must be drawn from the elected representatives of the Scheduled Tribe communities in the State Legislature. Further, if the number of elected representatives is less than twenty, then the remaining seats can be filled with other members of the Tribal communities.

Under Paragraph 5 the Governor has been empowered to direct, by public notification, that any particular Act of Parliament or of the State Legislature shall not apply to the Scheduled

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² Amarendra Nath Dutta v. State of Bihar AIR 1983 Patna 151, para 18, 46.

⁶³ *Supra* Note 58, p. 11.

⁶⁴ *Ibid*

⁶⁵ *Ibid*

Area of that state or shall apply subject to exceptions and modifications.⁶⁶ Paragraph 5 also empowers the Governor to make Regulations to restrict or prohibit transfer of land by or among members of Scheduled Tribes, regulate allotment of land, and also money-lending, subject to the assent of the President.⁶⁷

Paragraph 6 provides the constitutional design for the creation of Scheduled Areas, making it very clear that any kind of alteration of boundaries of a Scheduled Area, whether it is increase, decrease, cessation, or declaration, is only permitted by an order of the President of India.⁶⁸ The President is bound by the aid and advice of the Council of Ministers at the Centre. In certain situations, consultation with the Governor is necessary, but the provision is quite categorical that the location of this power is at the Centre, and then at the highest level.⁶⁹

Paragraph 7 states that provisions in the Fifth Schedule may be amended, altered, or repealed by Parliament, and no such amendment will be construed to be an amendment to the Constitution under Article 368.

Central Legislations

Until up recently, the policy of the Union Government towards involving indigenous people in environmental governance, and forests management in particular, has been abysmal. It has been contended that the biggest seizure of indigenous resources that has occurred in free India has happened in forest territories and in the zones delegated as “forest lands”. India’s forests are governed by a several laws, policies, and executive instructions, both at the Central and the State level, which are established on the parent statute, the British devised, Indian Forest Act, 1927. It is trite that this law, and the orderly legitimate and also administration, was developed by the British to encourage better administration of India's forests towards unhindered abuse of timber. It is toward this end the provincial state declared its possession and control over forests, and all assets subsumed in them, riding roughshod over the customary forest dwelling communities and their indigenous techniques for use, preservation and access. The heap employments of forests and forest assets, and their all-encompassing interconnectedness, ended up divided into exclusionary arrangements and

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ *Ibid*, p. 14.

⁶⁹ *Ibid*, p. 15.

lawful definitions. Right around a century later, a considerable lot of these limits and orders stay dark and boundless to the layman.

The Forest Conservation Act, 1980 and the Wildlife Protection Act, 1972 while implying to be founded on more current objectives of conservation and protection of environment, kept on utilizing the colonial forest law, as the basis for their foundation, along these lines strengthening its entrenchment. In this way the approach kept on being founded on statutory arrangements, regularly constrained, and an exclusionary approach upheld by lawful approvals, frequently as criminal offenses. The outcome was comparative seizure and disavowal of rights.

In 2006, there was a drastic shift in the policies with the enactment of a new Act. To address the antagonistic living states of numerous tribal families living in forests was by virtue of non-acknowledgment and vesting of previous rights, a landmark legislation viz. Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, was enacted to recognize and vest the forest rights and occupation of forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers, who have been living in such forests for ages, yet their rights couldn't be recorded.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, better known as the “Forest Rights Act”, not only recognized the rights to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood, but also grants several other rights to ensure their control over forest resources which, inter-alia, included right of ownership, access to collect, use and dispose of minor forest produce, community rights such as *jhumming*; habitat rights for primitive tribal groups and pre-agricultural communities; right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use.⁷⁰

The transformative potential of the Forest Rights Act has been noted in a recent judgment of the Supreme Court in the Niyamgiri case⁷¹ where the constitutional and statutory scheme relating to the rights of Scheduled Tribes over land and its resources has been explicated at some length. The Court traces the right of forest dwelling Scheduled Tribes to be consulted

⁷⁰ Press Information Bureau, Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=108222> (May 18, 2018)

⁷¹ Orissa Mining Corporation v. Ministry of Environment and Forest, (2013) 6 SCC 476

before their traditional lands are diverted for commercial non-forest purpose to the fundamental right to protect and preserve religious and cultural rights in Article 25 of the Constitution. The court has also held that the prior decision of the Gram Sabha is a necessary ingredient of the law.⁷²

This Act has significantly enhanced the role and participation of tribal people in environmental governance. Not just the Niyamgiri Case, but the preamble of the Act also recognises the important role of the Scheduled tribes in the well being and conservation of the environment; the Preamble of the Act says as follows-

“And whereas the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State Forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dweller who are integral to the fore very survival and sustainability of the forest ecosystem.”⁷³

The Act also provides for diversion of forest land for public utility facilities managed by the Government, such as schools, dispensaries, fair price shops, electricity and telecommunication lines, water tanks, etc. with the recommendation of Gram Sabhas.⁷⁴ In addition, several schemes have been implemented by the Ministry of Tribal Affairs for the benefit of tribal people, including those in the forest areas such as "Mechanism for marketing of Minor Forest Produce (MFP) through Minimum Support Price (MSP) and development of Value Chain for MFP".⁷⁵ Funds are released out of Special Central Assistance to Tribal Sub Plan for infrastructure work relating to basic services and facilities viz. approach roads, healthcare, primary education, minor irrigation, rainwater harvesting, drinking water, sanitation, community halls, etc. for development of forest villages.⁷⁶

Besides the statutes, the Central Government had also come up with several policies, rules and action plans, which had recognised the importance of indigenous people in environmental governance. For instance, National Mission for a Green India under the National Action Plan on Climate Change clearly recognises the need to involve local people

⁷² *Ibid*

⁷³ Preamble, Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

⁷⁴ *Supra* Note 69.

⁷⁵ *Ibid*

⁷⁶ *Ibid*

in preservation of local ecosystems as well as in regeneration of degraded forests and other afforestation measure. The core principles of the Mission have been stated as-

“The Mission would contribute to empowerment of communities and strengthen the decentralized local governance of forests. The Mission would support revamping of the existing institutions and working with plurality of institutions at the local level to strengthen decentralized forest governance.”⁷⁷

Another key element of the Mission strategy has been stated as-

“Local communities will be required to play a key role in project governance and implementation. The Mission will bring primacy to Gram Sabha as an overarching institution to oversee Mission implementation at the village level. The committees set up by the Gram Sabha, including revamped JFMCs, CFM groups, Van Panchayats, Committees set up under Forest Rights Act, Biodiversity Management Committees etc., will be strengthened as the primary institutions on the ground for nested decentralized forest governance in rural areas. Similarly, in the schedule VI areas, the traditional village level institution/Village Councils will be supported. The Mission will also support revamping/strengthening of the Forest Development Agencies to support the field institutions.”⁷⁸

The Mission also aimed at developing a cadre of Community Foresters. These foresters would be recruited from local indigenous youth to ensure the implementation of the mission.

Besides this, the Draft Forest Policy of 2018 also emphasizes on the involvement of local and indigenous communities in environmental governance. It pushed for more community participation in forest management and promotes the application of the REDD+ mechanism, which by default gives livelihood and opportunities to the local communities, besides their role in management.

State Legislations

Apart from the Parliament made laws and policies, the State Legislatures have also come up with different laws for the protection of the rights of the tribal people, most of it relating to the non-alienation of their lands.

⁷⁷ Ministry of Environment and Forest and Climate Change, National Mission for a Green India, http://www.moef.gov.in/sites/default/files/GIM_Mission%20Document-1.pdf (May 19, 2018)

⁷⁸ *Ibid*

The following is a list of laws passed by different State Assemblies for the protection of the rights of the tribal (read indigenous) people⁷⁹-

Sl. No.	State/UT	Legislation in Force	Main Features
1.	Andaman and Nicobar Islands	The Andaman and Nicobar Protection of Aboriginal Tribes Regulation, 1956	Mandated to protect the Scheduled Tribes in the four tribal reserves, this Regulation empowers the government to prohibit and regulate the entry of outsiders and restricts the transfer of lands to non-tribal people in the Reserves.
2.	Andhra Pradesh	The Andhra Pradesh (Scheduled Areas) Land Transfer Regulation, 1959, amended by The Andhra Pradesh (Scheduled Areas) Land Transfer (Amendment) Regulations of 1970, 1971, and 1978.	Prohibits all transfer of land to non-ST in Scheduled Areas. Authorises government to acquire land in case a tribal purchaser is not available. No protection to ST land outside Scheduled Areas.
3.	Assam	Assam Land and Revenue Regulation 1886, amended in 1981	Prohibits alienation of land in tribal belts and blocks of the State.
4.	Arunachal Pradesh	Bengal Eastern Frontier Regulation, 1873	Prohibits transfer of tribal lands.
5.	Chattisgarh	(a) Sections 165 & 170 of Madhya Pradesh Land Revenue Code, 1959. (b) Madhya Pradesh Land	Sections 165 and 170B of the Code protect STs against land alienation. The 1964 Act is in force in

⁷⁹ Ministry of Tribal Affairs, Land and Governance under the Fifth Schedule, <https://tribal.nic.in/FRA/data/LandandGovernanceunderFifthSchedule.pdf> (May 18, 2018)

		Distribution Regulation Act, 1964.	the scheduled areas.
6.	Dadra and Nagar Haveli	Dadra & Nagar Haveli Land Reform Regulation, 1971.	Protects tribal interest lands.
7.	Gujarat	The Bombay Land Revenue Code as amended by Bombay Land Revenue (Gujarat Second Amendment) Act, 1980.	Sections 73A, 73AA, 73AB, 73AC and 73AD prohibit transfer of tribal lands and provide for restoration of alienated land, in entire State of Gujarat.
8.	Himachal Pradesh	The Himachal Pradesh Transfer of Land (Regulation) Act, 1968.	Prohibits the transfer of lands from tribal to non-tribal.
9.	Jharkhand	(a) Chhota Nagpur Tenancy Act, 1908 (applies to old Ranchi district, mostly comprising Mundas and Uraons). (b) Santhal Parganas Tenancy (Supplementary Provision) Act, 1940. (c) Bihar Scheduled Areas Regulation, 1969. (d) Wilkinson's Rule, 1837 (applies to Hos of Singhbhum).	Prohibit alienation of tribal land and provide for restoration of alienated land.
10.	Karnataka	The Karnataka Scheduled Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1975.	Prohibits transfer of land assigned to SCs and STs by government. No provision to safeguard SC/ST interest in other lands.
11.	Kerala	The Kerala Scheduled Tribes	Act of 1975 made applicable

		(Regulation of Transfer of Land and Restoration of Alienated land) Act, 1975.	with effect from 1st June, 1982 by notification of January, 1986 prohibits transfer of land of tribal people and provides for its restoration.
12.	Lakshadweep	The Laccadive Islands and Minicoy Regulation I of 1912. Lakshadweep (Protection of Scheduled Tribes) Regulation, 1964.	Alienation of tribal lands prohibited in entire UT of Lakshadweep.
13.	Madhya Pradesh	(a) Sec 165 & 170 of Madhya Pradesh Land Revenue Code, 1959. (b) Madhya Pradesh Land Distribution Regulation Act, 1964.	Sections 165 and 170B of the Code protect STs against land alienation. The 1964 Act is in force in Scheduled Areas of MP.
14.	Maharashtra	(a) The Maharashtra Land Revenue Code, 1966. (b) The Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974.	Prohibits alienation of tribal land and provides for restoration of both illegally and legally transferred lands of a ST
15.	Manipur	Manipur Revenue and Land Reforms Act, 1960.	Section 153 forbids transfer of tribal land non-tribal people without permission of the District Collector. Act has not been extended to hill areas and therefore hill area tribes not covered.
16.	Meghalaya	Meghalaya Transfer of Land (Regulation) Act, 1971.	Prohibits alienation of tribal lands.
17.	Nagaland	Bengal Eastern Frontier	Prohibition of transfer of tribal

		Regulation, 1873 and Assam Land and Revenue Regulation, 1866, as amended vide Nagaland Land and Revenue Regulation (Amendment) Act 1978.	lands.
18.	Odisha	The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956. The Orissa Land Reforms Act, 1960	Prohibits transfer of tribal land and provides for its restoration, both in Scheduled Areas (1956 Regulation) as well as non-Scheduled Areas (1960 Act).
19.	Punjab	The Punjab Land Alienation Act, 1916	Prevents alienation of tribal lands to non-tribal people.
20.	Rajasthan	The Rajasthan Tenancy Act, 1955, The Rajasthan Land Revenue Act, 1956.	Section 175 and 183B specifically protects tribal interest in land and provides for restoration of alienated land to them.
21.	Sikkim	Revenue Order no. 1 of 1917 The Sikkim Agricultural Land Ceiling and Reform Act, 1977	Order of 1917 still inforce. Chapter 7 of 1977 Act restricts alienation of lands by STs but is not in force.
22.	Tamil Nadu	Standing Orders of the Revenue Board BSO 15-40. Law against land alienation not enacted.	BSO 15-40 applies only to Malayali and Soliga tribes. Prohibits transfer of assigned land without approval of District Collector.
23.	Tripura	Tripura Land Revenue and Land Reform Act, 1960, as amended in	Act prohibits transfer of ST land to others without

		1974.	permission of the Collector. Only lands transferred after 1.1.1969 are covered under restoration provision.
24.	Uttarakhand/Uttar Pradesh	Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as amended by U.P. Land Laws (Amendment) Act, 1981	Provides protection of tribal land. However, amending Act stayed by Allahabad High Court in Swaran Singh vs State Govt (1981).
25.	West Bengal	West Bengal Land Reforms Act, 1955, as amended.	Chapter II-A prohibits alienation of tribal land and provides for restoration.

The Constitutional validity of a number of these laws have also been upheld by the Supreme Court in a number of cases. For instance, The Punjab Land Alienation Act, 1916, Constitutional validity of which had been upheld by the courts in *Lala Khazanchi Shah v. Haji Niaz Ali*⁸⁰; *Wazir Mohd & Ors. vs. Said Alam & Ors.*⁸¹; *Ram Swarup vs. Ram Chander & Ors*⁸².

Similarly, The Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974, was upheld by Supreme Court of India in *Lingappa Pochanna Appelwar v. State of Maharashtra*.⁸³

There has been a lot of criticisms of many of these state legislations as they have not been able to do much justice to the tribal people. For instance, the Assam Land and Revenue Regulation Act, 1886 provides for tribal belts and blocks in the state of Assam. In these block and belt areas, no land can be bought or sold to non-tribal people.

The background in which the Protected Belts and Blocks of Assam were created has been lucidly articulated in the very introductory Para of the ALRR, 1886 as follows⁸⁴:

⁸⁰ AIR 1940 Lahore 126

⁸¹ AIR (34) 1947 Peshawar 25

⁸² AIR 1976 Punjab & Haryana 246

⁸³ (1985) 1 SCC 479.

⁸⁴ The Assam Land and Revenue Regulation Act, 1886

“Large areas in plains districts are inhabited by plains tribal people. Simple in nature, these people were living in primitive conditions, and due to lack of education and material advantages, they could not look after their own welfare and were incapable of protecting their own interest. A large number of outsiders mostly from East Bengal began to pour in large numbers in to Assam from the beginning of the present (i.e. 19th) century. They began to spread in to the areas occupied by these tribal people. The tribal people being naturally shy and unable to live in peace with these newcomers began to recede in to the interior. To protect these people from the onslaught of these land hungry outsiders, imaginary lines were drawn dividing the areas occupied by the tribals from the areas occupied by these outsiders. This was known as the Line system which, however, did not work satisfactorily, due to undeterred encroachment inside the demarcated line by the immigrant Muslim peasants. Later, some development works under what is known as the Colonization Scheme were taken up. But these also did not give the necessary protection to these backward/tribal people, and their lands continued to pass on to the hands of the outsiders and the backward classes of people were gradually driven in to the still interior places. In order to give them necessary protection, therefore, the Protected Belts and Blocks were constituted”.

The principles followed as pre-conditions for constituting Protected Belt are- that the area must be predominantly inhabited by the tribal people and; that there must be sufficient lands for constituting a Tribal Belt and Block and; that the lands constituted in to Tribal Belt must be compact. It is only when the lands predominantly inhabited by the Tribal people are not compact, that Tribal Blocks are formed. However, the inhabitants of the Tribal Belts and Blocks of Assam or parts thereof are neither predominantly tribal people nor are these Belts and Blocks free from encroachment by non-eligible persons, mostly illegal immigrants. The unabated encroachment on these Belts and Blocks is supported by the harsh truth that the tribal population in the protected class now constitutes only 29% while the remaining 71%, comprise non-tribal people.⁸⁵

A number of such belts and blocks have been encroached upon, even those in and around the capital city of Guwahati. As per the data furnished by the Government of Assam, a total area

⁸⁵ Information gained through interview of Mr Hari Shankar Brahma, former Chief Election Commissioner of India and head of COMMITTEE FOR PROTECTION OF LAND RIGHTS OF INDIGENOUS PEOPLE OF ASSAM.

of 2046 bighas of land included in Kamrup Rural District (including Chaygaon Tribal Belt and Guwahati Tribal Belt) are under encroachment.

After the commencement of the Assam Land and Revenue Regulation (Amendment) Act, 1964, transfer of land in the protected belts/blocks to non-eligible class of people in any form, in contravention of the provisions as amended is banned and such transfer shall not be registered under the Indian Registration Act, 1908. However, in spite of such legal restraining provisions, registration of sale or other kind of transfers of land in the protected belts and blocks is routinely going on. It is reported that the general modus operandi of causing such illegal transactions is through the mechanism of what is called Power of Attorney or, as it happens, such transactions take place as '*Benami*'.

Likewise, in other states too, due to loopholes in the law, the rights of the tribal people are being violated and hence the legislations have not been able to meet their real objectives. In a number of cases, non-tribal people and industrialists take such lands on lease for an extensive period like 99 years, thus affecting tribal rights.

2.3 CUSTOMARY AND AUTONOMOUS DISTRICT COUNCIL LAWS

The Sixth Schedule of the Indian Constitution governs the functioning and powers of the Autonomous District Councils in the state of Assam, Meghalaya, Mizoram and Tripura.

The history of these Autonomous Councils goes back to the British era, when the Interim Government of India had appointed a Sub-Committee to the Constituent Assembly of North-East Frontier (Assam) Tribal and Excluded Areas Committee under the chairmanship of first Assam Chief Minister Gopinath Bordoloi. The committee recommended setting up of autonomous district councils to provide due representative structures at the local level to the tribal population. The recommendation was later incorporated into Sixth Schedule, Article 244 (2) and Article 275(1) of the Indian Constitution.⁸⁶

The Article 244(2) of the Constitution, says- The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in States of Assam, Meghalaya, Mizoram and Tripura. Article 275(1) provides for grants to the Scheduled Areas in other states and the Autonomous District Councils of Northeast India, which shall be paid out of the Consolidated Funds of India as grants in aid.

⁸⁶ Raghav Gupta, "Powers of Autonomous Councils in Tribal Areas of Northeast", iPleaders Blog, <https://blog.iplayers.in/autonomous-councils-north-east-india/> (May 20, 2018)

Even prior to the formation of the Interim Government of India, the British Government in the Government of India Act, 1935 came up with the initial idea of the Sixth Schedule for the tribal areas of Assam. But this Schedule was withdrawn and the designation of the areas was done by the Government of India (Excluded and Partially Excluded Areas) Order 1936, dated March 3, 1936. The distinction between the excluded and partially excluded areas was this: Excluded areas came directly under the Governor in his discretion and therefore the administration of the areas was a direct responsibility of the Governor himself.⁸⁷ The position about the Excluded Areas was summed up in paragraph 144 of the Order as:

“It is proposed that the powers of a Provincial Legislature shall not extend to any part of the Province which is declared to be an "Excluded Area" or a 'Partially Excluded Area'. In relation to the former, the Governor will himself direct and control the administration; in the case of the latter he is declared to have a special responsibility. In neither case will any Act of the Provincial Legislature apply to the Area, unless by direction of the Governor given at his discretion, with any exceptions or modifications which he may think fit. The Governor will also be empowered at his discretion to make regulations having the force of law for the peace and good government of any Excluded or Partially Excluded Area. We have already expressed our approval of the principle of Excluded Areas, and we accept the above proposals as both necessary and reasonable, so far as the Excluded Areas proper are concerned. We think, however, that a distinction might well be drawn in this respect between Excluded Areas and Partially Excluded Areas and that the application of Acts to, or the framing of Regulations for, Partially Excluded Areas is a Sup. CI/66-5 Executive Act which might appropriately be performed by the Governor on the advice of his Ministers, the decisions taken in each case being, of course, subject to the Governor's special responsibility for Partially Excluded Areas, that is to say, being subject to his right to differ from the proposals of his Ministers if he thinks fit.”⁸⁸

This paved the way for autonomy within these areas and the powers of the Governor over the ministers in relation to these regions. Paragraph 1 of the Sixth Schedule gives powers to the Governor to declare or alter and define the boundaries of the autonomous regions.

⁸⁷ *Edwingson Bareh v. State of Assam*, 1966 AIR 1220

⁸⁸ *Ibid*

Paragraph 2 of the Sixth Schedule states the creation of a separate district council for each autonomous district as:

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

Sub-paragraph 4 of Paragraph 2 gives powers to the district councils for the administration of the autonomous districts. The same has been stated as:

“Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.”

Paragraph 3 of the Schedule provides for the powers of the District Councils, which are stated as follows-

- The allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town.
- The management of any forest not being a reserved forest.
- The use of any canal or water-course for the purpose of agriculture.
- The regulation of the practice of jhum or other forms of shifting cultivation.
- The establishment of village or town committees or councils and their powers.
- Any other matter relating to village or town administration, including village or town police and public health and sanitation
- The appointment or succession of Chiefs or Headmen
- The matters relating to marriage, divorce, social customs and other personal laws of the tribal people.
- The inheritance of property.

Paragraph 4 of the Schedule gives provisions for Administration of justice in autonomous districts and autonomous regions. It clearly states as –

“The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.”

These provisions in total has given significant powers to the tribal (read indigenous) people to govern over their land and people and also secures their rights to self-rule.

Apart from the Sixth Schedule, a few more provisions of the Constitution give significant self-governance powers to the people living in the states of Arunachal Pradesh, Assam (Autonomous Districts only), Manipur (Hill Areas only), Nagaland and Mizoram.

The following table is a provides a comprehensive list of those article-

State	Special Constitutional Provisions	Applicable Areas
Arunachal Pradesh	Article 371 H	Entire State
Assam	Article 371 B	The Autonomous Regions of -Karbi Anglong (both East and West), North Cachar Hills (Dima Hasao) and BTAD
Manipur	Article 371 C	Hill Areas only
Mizoram	Article 371 G	Entire State
Nagaland	Article 371AA and Article 371 A	Entire State

These special Articles give special status to the above-mentioned states. A number of Central legislations are not applicable to these regions especially in matters of⁸⁹ –

⁸⁹ Luchie Maranan (ed.), “India and the Rights of Indigenous People”, AIPP Foundation Report, 2010, p. 44.

- religious or social practices of the concerned communities;
- customary law and procedure of the concerned communities;
- administration of civil and criminal justice in areas covered by customary law; and
- ownership and transfer of land and its resources.

These special Constitutional provisions have also given rise to a number of local statutes passed by the Autonomous district councils and other local bodies upholding their customary practices and laws. One such practice is in the field of environmental governance and the involvement of indigenous people.

Northeast India is home to the largest concentration of community managed forests. In most of these forests, customary laws are applicable. Certain forest legislation in the North-Eastern states, especially those enacted by autonomous district councils provides for a supportive policy environment, one that promotes community forestry. For instance, the United Khasi Jaintia Hills Autonomous District Act (1958) gives recognition to the customary patterns of landholding, though the management and control of these forests remains subject to the rules made by the district council.⁹⁰

In Mizoram, the Mizoram Forest Act of 1955 has provisions for village forest reserves and protected forest reserves, constituted for the benefit of the village community. Acts such as the Mikir Hills District (Transfer of Land) Act of 1959, and the Meghalaya Transfer of Land (Regulation) Act of 1971, ensure continuity of communal title within a tribal community. The Arunachal Pradesh Anchal and Village Forest Reserve (Constitution and Maintenance) Act, 1984, mandates sharing of revenue from lands at the disposal of the government between the government and the villagers in equal proportion.⁹¹

Each of these local statutes and customary laws categorises the forests as – sacred groves, village forests, community forests, protected forests and so on. Each category has a special set of customary law governing it. The same shall be discussed in details with the help of excerpts from a Gauhati High Court case – Amster Lyngdoh v. State of Meghalaya, 2007 (3) GLT 1

⁹⁰ Mark Poffenberger, et al, “Indigenous Forest Stewards of Northeast India”, Community Forestry International, 2007, p.42-43.

⁹¹ *Ibid*, p. 43.

In this case, a case study was presented before the court stating the importance of the community forests and the customary laws which govern it. The study of a patch of forest in the city of Shillong was done. To quote from the texts of the case, it is as follows-

“The Raid Laban is a conglomeration of eight village councils known as "Dorbar Shnong" under the Syiem of Myllem, an erstwhile Khasi State, known as such in pre-independence India. When the British paramount lapsed, then under Section 7 of the Indian Independence Act all the agreements and covenants between the native states and the British Government lapsed and that was substituted by instrument of Merger and instrument of Accession signed by the native states with the Government of India, thereby becoming a part of Dominion of India. As the native Khasi State has a unique social system, the Government of India agreed with them to protect and preserve the distinct cultural identity and for that purpose the Constitution of India paid special attention providing mechanism enshrined in the Constitution in the form of Sixth Schedule. Social customs, practice and their system of administration of land and forest are complementary to each other and the existence of forest along with its bio-diversity is a part of their identity/psyche of the Khasi Tribes. In the Khasi Hills, Village Administration, like preservation of forest, the general cleanliness in the Village, peace and tranquillity, management of village common land, etc. is entrusted to a Village Council known as "Dorbar Shnong" which consists of village elders and is headed by a Headman called "Rangbah Shnong". This system of Village Administration is prevalent in this part of the country from time immemorial and recognised as such in the Sixth Schedule to the Constitution of India. The entire area of the State particularly, Lawsohtun area is full of forest covers having many precious species of plant, animal, several streams coming from the Shillong Peak which is the immediate vicinity of Lawsohtun, flows through the area which is the source of drinking water to the inhabitants of the city of Shillong. It is the integral part of the Khasi Tribal custom to preserve forest for various purpose such as religious, social purpose etc. These forests are revered by the community and human habitation is never allowed in those forest hillocks. In the vicinity of forest in the Lawsohtun area, there are several habitation centres of the tribal people, who, despite the ever-

increasing pressure of population have succeeded in maintaining the sanctity of those forests.”⁹²

Although the customary and the district council laws have been able to preserve the forests and maintain the sanctity and harmony between the communities and the environment, yet these laws are however not free from criticism. Many allege that, some of the laws and rules on forestry that have been framed by the district councils are based on the model of the Indian Forest Act of 1927 or Assam forest regulation with similar categorization of forests.⁹³ The sole reason why the district council administration system was established in the Northeast was to protect the traditional customary practices of the indigenous people inhabiting these areas. However, under the present scheme, the body that was created to protect the practices had adopted the same colonial model that it was going to replace. This raises critical questions on the role of district or regional councils as true community-based institutions.⁹⁴

2.4 CASE LAWS ON RIGHTS OF INDIGENOUS PEOPLE

This sub-chapter concentrates on the various case laws right from the historical times, ranging from different countries across the globe, all concerned about the rights of the indigenous people and mostly in regard to environment.

The following are a summary of such cases:

- Kailas and Others v. State of Maharashtra, (2011) 1 SCC 793

In this case, the Supreme Court defined the indigenous people in India, which always remained a paradox. As per the Supreme Court of India, the scheduled tribes are the original inhabitants of the country, who were the first people to reside in India and hence they be recognised as the indigenous people. Although, the main matter of the case was a criminal appeal case involving physical and mental abuse of a tribal woman, yet it gave a significant recognition to the indigenous people of India.

⁹² Amster Lyngdoh v. State of Meghalaya, 2007 (3) GLT 1

⁹³ Supra Note 87, p. 44.

⁹⁴ *Ibid*

- *Samatha v. State of Andhra Pradesh and Others*, AIR 1997 SC 3297

A writ petition was filed by Samatha, a social action group working for the rights of tribal people in the High Court of Andhra Pradesh in 1993 on the ground that the government was also a 'person' and hence does not have the power to grant lease in a scheduled area to non-tribal people for mining purpose. The A.P. High Court dismissed the writ petition. Then a Special Leave Petition was filed before the Supreme Court where by full bench judgement Court decided in favour of the tribal people and held that Government lands, forest lands and tribal lands in the scheduled area cannot be leased out to non-tribal people or to private industries. The issue which started as non-settlement of lands in reserve forest enclosures in Borra Panchayat was addressed by the bench by directing the State Government to immediately issue title deeds to tribal people in occupation of these lands and ruled that government has no right to grant mining leases in these enclosure lands belonging to tribal people. Government cannot lease out lands in schedule areas for mining operations to non-tribal people as it in contravention of the Fifth Schedule of the Constitution; Mining activity in scheduled area can be taken up only by Andhra Pradesh State Mineral Development Corporation or a cooperative of tribal people and that too if they are in compliance with the Forest (Conservation) Act 1980 and the Environment (Protection) Act 1986. The Court recognised the 73rd Constitution Amendment Act and the Andhra Pradesh Panchayat Raj (Extension to Scheduled Areas) Act by stating that the Gram Sabha shall be competent to safeguard and preserve community resources and thereby reiterated the need to give the right of self-governance to tribal people. The Court also felt that it would be appropriate to constitute a conference of chief ministers and concerned union ministers to take a policy decision so as to bring about a suitable enactment for a Consistent scheme throughout the country in respect of tribal lands and exploitation of mineral wealth. The State Government was, therefore, directed to stop all industries from mining operations. The Court opined that since the Executive is enjoined to protect social, economic and educational interests of the tribal people, when the state leases out the lands in the scheduled areas to the non-tribal people or industries for exploitation of mineral resource, it transmits the above correlative constitutional duties and obligation to those who undertake to exploit the natural resources. The Court directed, that at least 20 per cent of the net profits should be set apart as a permanent fund as part of industrial/business activity for establishment and maintenance of water resources, schools, hospitals, sanitation and transport facilities by laying roads, etc. This 20 per cent allocation would not include the expenditure for reforestation and

maintenance of the ecology. This is a crucial case in indigenous governance as it reassured them rights over their own land and also gave them significant powers to govern certain spheres and subjects through their traditional institutions like Gram Sabha.

- Orissa Mining Corporation v. Ministry of Environment and Forest, (2013) 6 SCC 476

Also, popularly known as the Niyamgiri Case, the constitutional scheme relating to Scheduled Areas and the statutory scheme under the Forest Rights Act was considered by the Supreme Court. The Court unambiguously upheld the provisions of the Forest Rights Act and various government circulars issued under it which require prior decision of the Gram Sabha before their traditional habitats in forest areas are diverted for non-forest purposes.⁹⁵ The Court was of the view that:

“Of late, we have realised that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.”⁹⁶

In this case, the Supreme Court clearly recognised the importance of indigenous people in environmental governance, and also, the mutual inter-dependence of nature with the people. It recognised that for conservation and preservation of forests, the participation of indigenous people becomes very important.

- District Council of United Khasi and Jaintia Hills and Ors. v. Sitimon Sawian, 1972 SCR (1) 398

The Supreme Court in this case referred to the report of the Sub-Committee on North-East Frontier (Assam) Tribal and Excluded Areas submitted in July, 1947 to the Advisory Committee on “fundamental rights, minorities, tribal areas etc.” of the Constituent Assembly, entrusted with the task of framing the Constitution of India.

In that report, emphasis was laid on the anxiety of the Hill people of the North-Eastern Frontier areas about their land and fear of their exploitation by the people from the more

⁹⁵ Orissa Mining Corporation v. Ministry of Environment and Forest, (2013) 6 SCC 476

⁹⁶ *Ibid* at Para 42.

advanced and crowded areas in the plains. The atmosphere of fear and suspicion prevailing in the hill areas even though considered by some to be unjustified, was felt to be a reality, and in order to allay those suspicions and fears the necessity of making requisite provisions by way of constitutional safeguards was emphasised. According to the report there was an emphatic unanimity of opinion among the hill people that there should be control of immigration of outsiders and of allocation of land to them, such control being already vested in the hill people themselves. In the areas where no right to private property or proprietary right of the hereditary chief was recognised, the land, including the forests, was regarded as the property of the clan. It was accordingly recommended in the report, to quote its own words:

“Accepting this then as a fundamental feature of the administration of the hills, we recommend that the Hill Districts should have powers of legislation over occupation or use of land other than land comprising reserved forest under the Assam Forest Regulation of 1891 or other law applicable. The only limitation we would place upon this is to provide that the local councils should not require payment for the occupation of vacant land by the Provincial Government for public purposes or prevent the acquisition of private land, also required for public purposes, on payment of compensation.”

The Supreme Court in this case held that the Autonomous District Councils had full rights to enact laws relating to land transfer, thereby giving full powers to the indigenous people’s body over the land.

- Nongkhlaw Clan and Ors. v. Union of India and Ors., 1997 (2) GLT 652 (FB)

In this case, unlike other cases wherein the Court upheld the rights of the community, the right over a patch of forest was given to the Army. The Court held that-

“All powers, rights, authority or jurisdiction in respect of the tribal areas had vested in the new dominion of India in view of the Indian Independence Act, 1947. It has further held that on merger of Khasi States with Assam and on coming into being of full-fledged State of Meghalaya, the State of Meghalaya, within the Union of India became the successor Government with suzerainty and sovereignty vesting first in the Dominion of India and on coming into force of the Constitution of India, in the Union of India, therefore, the claim of the petitioner that the land in question, belongs to the Khasi *Dorbar* is not correct. It has further been contended that Army authorities are

not against the maintenance of eco system, green coverage, pollution free, air etc. as well as local custom and tradition. On the contrary, the depletion of the forest coverage/green coverage could not be attributable to the army installation inasmuch as, army authorities resort to felling trees only when it becomes absolute necessity on their own land and that too after ensuring the plantation of even more than numbers of the trees likely to be felled. As such, the allegation made in the PIL petition against the Army authority alleging felling of trees, soil erosion etc. are not correct and deserves to be rejected.”⁹⁷

⁹⁷ Nongkhaw Clan and Ors. v. Union of India and Ors., 1997 (2) GLT 652 (FB)

III. UNITED NATION'S REDD+ MECHANISM

Indigenous peoples confront particular difficulties as an outcome of climate change and related policy measures. Indigenous people groups are among the communities who contribute the least to carbon emissions, and in the meantime are probably the most helpless against the effects of climate change. As a rule, indigenous peoples have been pushed to climate sensitive, asset poor territories due to outside improvements and authentic underestimation from basic leadership. At the same time, the potential for indigenous peoples to add to the plan and usage of sustainable mitigation and adaptation measures is significant.

Because of their long narratives of adjusting to climatic variability and ecosystem changes and since their occupations are so firmly connected to their indigenous habitats, they offer significant long-haul perceptions and cases in light of their traditional knowledge, innovations and practices. These include traditional methods of fire and water management, agro-forestry techniques, shoreline reinforcement and seasonal migration.⁹⁸

Albeit such methodologies have expanded their flexibility to environmental variety over hundreds of years, their adaptability today is frequently obliged by the seriousness of climate change impacts and also limitations forced by the more extensive socio-political setting including diminished access to key terrains and resources. Because Indigenous Peoples' vulnerability to climate change impacts is largely determined by the degree to which their full range of rights is recognised and secured, a rights-based approach (RBA) to mitigation and adaptation initiatives can help increase their resilience.⁹⁹

REDD-plus is a climate mitigation mechanism under negotiation at the UNFCCC (UN Framework Convention on Climate Change) that aims to generate financial flows for forest related CO₂ emissions reductions and removals.¹⁰⁰ In line with the Bali Action Plan and the Copenhagen Accord, REDD-plus includes reductions in deforestation and forest degradation as well as the conservation, sustainable management and enhancement of forest carbon stocks.¹⁰¹ REDD-plus can include payments for indigenous peoples and other communities that have managed and conserved forests and whose continued conservation or management efforts can protect the forest against possible deforestation and /or degradation. While

⁹⁸ IUCN, Indigenous Peoples and REDD Plus, <https://www.iucn.org/theme/governance-and-rights/our-work/indigenous-and-traditional-peoples/indigenous-peoples-and-redd-plus> (May 23, 2018)

⁹⁹ *Ibid*

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid*

contributing to the fulfilment of mitigation objectives, REDD-plus can also contribute to adaptation of vulnerable groups.¹⁰²

All things considered, despite the fact that REDD can possibly make new open doors for indigenous people groups it might likewise bring extra dangers. Despite the fact that REDD-plus could upgrade limits, attest rights and increment the potential commitments by indigenous people groups to forest conservation, if not drew closer with mind, it could really undermine these advantages. Indigenous peoples' vulnerabilities are intensified by the lack of clear land tenure and policy frameworks in regard to indigenous peoples, ineffective law enforcement and unrecognised customary and ancestral rights. This may create situations where REDD-plus could represent an additional threat.

The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP).¹⁰³ The UN-REDD Programme supports nationally-led REDD+ processes and promotes the informed and meaningful involvement of all stakeholders, including Indigenous Peoples and other forest-dependent communities, in national and international REDD+ implementation.¹⁰⁴

Reducing emissions from deforestation and forest degradation (REDD) is a mechanism that has been under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005, with the objective of mitigating climate change through reducing net emissions of greenhouse gases through enhanced forest management in developing countries.¹⁰⁵

¹⁰² *Ibid*

¹⁰³ UN-REDD Programme, <http://www.un-redd.org/AboutUN-REDDProgramme/tabid/102613/Default.aspx> (May 23, 2018)

¹⁰⁴ *Ibid*

¹⁰⁵ Myers, Erin C., "Policies to Reduce Emissions from Deforestation and Degradation (REDD) in Tropical Forests", *Resources Magazine*: 7, (Dec 2007).

In the last two decades, various studies estimate that land use change, including deforestation and forest degradation, accounts for 12-29% of global greenhouse gas emissions.¹⁰⁶ REDD has emerged as a central strategy in efforts to reduce global greenhouse gases emissions. By creating financial incentives to reduce forest-sourced greenhouse gases, REDD projects could generate funding from developed to developing countries.¹⁰⁷ This can yield significant sustainable development benefits and may generate a new financing stream for sustainable forest management in developing countries such as India. REDD+ goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks.¹⁰⁸

In the light of the discussions and definitions made above, REDD can be defined in a very simple sense as - governments, companies or forest owners in developing countries should be rewarded for keeping their forests instead of cutting them down. This will lead to protection of forests by the local communities in consideration of the incentives which they will receive and will in turn lead to reduction in emission of greenhouse gases. This concept of REDD later was enhanced in scope and was broadened to REDD+ and included not only reduction of emission but also sustainable management of forests and the enhancement of forest carbon stocks in developing countries across the world.

Historical Development of REDD+

Although REDD was formalised as an idea at the thirteenth Session of the Conference of the Parties (COP-13) to the United Nations Framework Convention on Climate Change (UNFCCC) in Bali, 2007, and in its current form, is considered a success of COP-16 in Cancun (2010), its roots extend back to the adoption of the Kyoto Protocol in 1997.¹⁰⁹ Within the context of emissions limitation and reduction commitments in Article 2, the Kyoto Protocol refers to the protection and enhancement of sinks and reservoirs of greenhouse gases, sustainable forest management practices and afforestation and reforestation

¹⁰⁶ Philip Fearnside, "Global warming and tropical land-use change: Greenhouse gas emissions from biomass burning, decomposition and soils in forest conversion, shifting cultivation and secondary vegetation", *Climatic Change* 46: 115–158., 2000.

¹⁰⁷ Chauhan Suresh, Methodology for assessing carbon stock for REDD+ project in India, TERI, <http://www.moef.nic.in/assets/redd-bk2.pdf> (May 24, 2018)

¹⁰⁸ *Ibid*

¹⁰⁹ Vivienne Holloway and Esteban Giandomenico, "The History of REDD Policy", http://redd.unfccc.int/uploads/2_164_redd_20091216_carbon_planet_the_history_of_redd_carbon_planet.pdf (May 28, 2018)

activities.¹¹⁰ The inclusion of the above practices was restricted, as it was only afforestation and reforestation activities that were considered eligible for generating credits under the Clean Development Mechanism.¹¹¹

Despite the inclusion of deforestation as an important land use issue, confusion existed over the role of Land Use, Land Use Change and Forestry (LULUCF) activities in countries' commitments under Kyoto and there was a significant lack of information and technology to guide the measurement, reporting and verification of such activities.¹¹²

At COP-7 in 2001 it was decided, as part of the Marrakesh Accords, that only afforestation and reforestation qualified as LULUCF activities capable of generating carbon credits under the Clean Development Mechanism of the Kyoto Protocol (Decision 17/CP.17).¹¹³ Reducing deforestation or forest degradation was excluded from the decision due to concerns of leakage. The concern was that reducing emissions from deforestation and forest degradation was unlikely to achieve a net reduction in emissions due to the fact that whilst reduced in one area, the same pressures may present themselves elsewhere, as the emissions producing activity is merely relocated.¹¹⁴ Other concerns originally raised over REDD included issues to do with: permanence, the idea that carbon is only ever temporarily stored and at some point is always re-released into the atmosphere; additionality, the notion that identifying any improvements in emissions reductions is complicated by complexities of predicting what eventualities would have occurred in the absence of the REDD project; and measurement, difficulties in accurately ascertaining the levels of carbon stored in soils and trees.¹¹⁵

Throughout 2005, there had been increasing attention paid to the individual roles of countries at different developmental stages in efforts to combat climate change.¹¹⁶ The European Commission laid the foundations for a climate change strategy with measures targeting both industrialised and developing countries.¹¹⁷ Given the respective contributions of countries to global greenhouse gas emissions, the decreasing share attributable to developed countries

¹¹⁰ *Ibid*

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ United Nations Framework Convention on Climate Change 2002, Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001, <http://unfccc.int/resource/docs/cop7/13a02.pdf> (May 30, 2018)

¹¹⁴ *Supra* Note 108

¹¹⁵ Transparency International, "Keeping REDD+ clean: A step-by-step guide to preventing corruption", Transparency International, Berlin, Germany, 2012.

¹¹⁶ The REDD Desk, "What is REDD+?", <https://theredddesk.org/what-redd> (May 30, 2018)

¹¹⁷ *Ibid*

within the EU along with the growing role of developing countries in emissions generation, in February 2005, the European Commission adopted a communication entitled “Winning the battle against global climate change” (SEC(2005)180) (COM/2005/0035) recognising the need to broaden country participation in order to achieve the global action required.¹¹⁸ Despite their growing share of emissions, developing countries expressed concerns that imposing reduction targets could hamper their economic development.¹¹⁹ Meanwhile, some developed countries, such as the U.S., argued that exclusion of developing countries from commitments not only undermined the environmental effectiveness of an agreement but also jeopardised their own industry’s competitiveness.¹²⁰ From either viewpoint, the benefits of positive incentives that would permit developing countries to participate in emissions reduction efforts whilst maintaining progress towards their wider development goals were clear. As well as appreciating the varying capacities of countries on the basis of ‘common but differentiated responsibilities and respective capabilities’, the communication also highlighted the importance of including more policy areas, in particular emphasising the need for a fresh approach to halting deforestation.¹²¹

A key milestone was subsequently achieved at COP-13. The two previous years, following COP-11 in Montreal, had seen extensive discussion and deliberation by the SBSTA on policy, scientific, technical and methodological issues, culminating in a decision at COP-13 in Bali, 2007. The Bali Action Plan, under Decision 1/CP.13, outlined a commitment of the Parties to address enhanced action on climate change mitigation, including the consideration of “Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and forest carbon stocks in developing countries”.¹²² The Bali Action Plan also established a subsidiary body to conduct the process, the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA). The AWG-LCA was to conduct a comprehensive process to enable full, effective and sustained

¹¹⁸ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “Winning the Battle Against Global Climate Change”, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0035:FIN:EN:PDF> (May 31, 2018)

¹¹⁹ *Ibid*

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² United Nations Framework Convention on Climate Change, 2008, “Report of the Conference of the Parties, on its thirteenth session held in Bali, from 3 to 15 December 2007”, <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> (May 1, 2018)

implementation of the Convention through long-term cooperative action¹²³, with the aim of completing its work in 2009 and presenting its outcomes at COP-15.¹²⁴

A further decision (Decision 2/CP.13): ‘Reducing emissions from deforestation in developing countries: approaches to stimulate action’ was adopted.¹²⁵ Whilst the Decision itself in referring explicitly to deforestation maintains the limited scope of RED, it also importantly acknowledges that “forest degradation also leads to emissions, and needs to be addressed when reducing emissions from deforestation” and affirms “the urgent need to take meaningful action to reduce emissions from deforestation and forest degradation in developing countries” (REDD).¹²⁶

This decision provided a mandate for several elements and actions by Parties relating to RED, including¹²⁷:

- strengthening and support of current efforts;
- capacity-building, technical assistance and technological transfer to support methodological and technical needs of developing countries;
- identifying and undertaking activities to address the drivers of deforestation, enhance forest carbon stocks via the sustainable management of forests, and;
- mobilise resources to support the above.

At COP-14 in Poznań, the SBSTA reported on the outcomes of its programme of work on methodological issues associated with REDD policy approaches and incentives.¹²⁸ In its report, in response to pressure from some developing countries, the role of conservation, sustainable management of forests and enhancement of forest carbon stocks countries was upgraded so as to receive equal emphasis as deforestation and forest degradation.¹²⁹ This saw the early progression of REDD to REDD+¹³⁰ and recognised that conservation, the sustainable management of forests and the enhancement of forest carbon stocks play as

¹²³ *Ibid*

¹²⁴ *Ibid*

¹²⁵ *Ibid*

¹²⁶ *Ibid*

¹²⁷ United Nations Framework on Climate Change, “Background (REDD)”, 2012, http://unfccc.int/methods_science/redd/items/4547.php (June 1, 2018)

¹²⁸ *Ibid*

¹²⁹ *Ibid*

¹³⁰ *Supra* Note 108

equally an important role in emissions reductions through protecting carbon stocks, as preventing deforestation and forest degradation.¹³¹

The aim of expanding the scope of REDD to REDD+ was to thwart the development of a mechanism that would reward only historically high emitters in favour of one that could incentivise regions with low deforestation rates to keep them as such. The “+” improved the potential of REDD to achieve co-benefits such as poverty alleviation, improved governance, biodiversity conservation and protection of ecosystem services.¹³²

The Copenhagen Accord (Decision 2/CP.15) explicitly recognised the crucial role of both REDD and the emissions removals provided by forests and agreed on the need to incentivise related activities through the establishment of a REDD+ mechanism that would aid in mobilizing financial resources from developed countries.¹³³ It was stated that “scaled up, new and additional, predictable and adequate funding as well as improved access” would be provided to developing countries for improved mitigation including for REDD+. To this end, developed countries committed to providing resources approaching USD 30 billion for adaptation and mitigation for 2010-2012 (of ‘fast-start finance’) and jointly mobilising USD 100 billion by 2020 for transparent, meaningful mitigation actions in developing countries. This funding was expected to come from public and private and bilateral and multilateral sources.¹³⁴

Following the formulation of a decision on REDD+ in Copenhagen, COP-16 in Cancun saw its adoption with only minor modification. The Cancun Agreements (Decision 1/CP.16) affirmed that “in the context of the provision of adequate and predictable support to developing country Parties, Parties should collectively aim to slow, halt and reverse forest cover and carbon loss”.¹³⁵ Parties established a technology mechanism to facilitate in the advancement and transfer of technology to support adaptation and mitigation actions, including the full range of REDD+ activities, in developing countries.¹³⁶

¹³¹ *Ibid*

¹³² Campbell, B. M., “Beyond Copenhagen: REDD+, agriculture, adaptation strategies and poverty”, *Global Environmental Change*, 2009, p. 397-399

¹³³ *Supra* Note 115

¹³⁴ *Ibid*

¹³⁵ *Ibid*

¹³⁶ *Ibid*

The Cancun Agreements (Paragraph 73 of Decision 1/CP.16) also decided on a phased approach to REDD+ implementation adopting with the following steps¹³⁷:

- the development of national strategies or action plans, policies and measures, and capacity building;
- the implementation of national policies, measures, strategies or action plans for further capacity building, technology development and transfer, and results-based demonstration activities, evolving into;
- results-based actions to be fully measured, reported and verified.

Outcomes for REDD+ from COP-17 at Durban related to financing options, safeguards and reference levels.¹³⁸

With regards to financing, in Decision 2/CP.17, it was agreed that results-based financing for developing country Parties may come from a variety of sources, including public, private, bilateral and multilateral. Notably, within this decision it was considered that market-based approaches could be developed as a means to support results-based actions.¹³⁹ The decision, however, failed to clarify a number of issues. It neglected to identify the specific meaning of market-based approaches, whether sub-national activities could be supported by markets, or whether bilateral or non-convention developed mechanisms would be recognised by the UNFCCC. It also failed to specify whether any market-based mechanism would relate to those under the UNFCCC and future commitments under a second commitment phase of the Kyoto Protocol or a new legally binding agreement post-Kyoto.¹⁴⁰ The Decision invited Parties to submit their views on ways to finance results-based activities in order for the AWG-LCA to consider these at the next SBSTA meeting.¹⁴¹

Relating to safeguards, discussions focused on the reporting of how they are being respected and addressed - that is, the kind of information to be submitted, when and to whom.¹⁴² Specifically, Decision 12/CP.17 provided guidance on systems for providing information on

¹³⁷ United Nations Framework Convention on Climate Change, 2011, “Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010”, <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2> (May 3, 2018)

¹³⁸ Climate Focus, CP17/CMP7 Durban Debrief, 2012, http://www.climatefocus.com/documents/files/cp17cmp7_durban_debrief.pdf (May 3, 2018)

¹³⁹ United Nations Framework Convention on Climate Change, 2012, Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, <http://unfccc.int/resource/docs/2011/cop17/eng/09a02.pdf#page=16> (May 4, 2018)

¹⁴⁰ Supra Note 137.

¹⁴¹ Supra Note 138.

¹⁴² Supra Note 115

how safeguards are addressed and respected. The decision agreed that systems providing information on how safeguards are addressed and respected should, respective of national circumstances, capabilities, sovereignty and legislation, provide transparent and consistent information, be implemented at the national level and build upon existing systems.¹⁴³ It was also agreed that developing country Parties should periodically report on how social and environmental safeguards are being addressed and respected within their National Communications.¹⁴⁴ Despite some progress in this area, there was little guidance on the level of detail required within reporting and discussions concluded with the understanding they would be further elaborated upon at COP-18.¹⁴⁵

The main areas of debate on REDD+ at COP-18 were measurement, reporting and verification (MRV) and REDD+ financing.¹⁴⁶

Technical issues regarding MRV were addressed under the Subsidiary Body for Scientific and Technological Advice (SBSTA). These included¹⁴⁷:

- how to design national forest monitoring systems;
- how to create an appropriate MRV framework for result-based payments;
- how to link this in with reference levels;
- the need for additional guidance on designing REDD+ safeguards and
- the drivers of deforestation.

The SBSTA did not complete its work on these matters but aimed to finish by its 39th session at the 19th COP in December 2013.

The 19th Conference of the Parties (COP-19) held in Warsaw in November 2013 saw a number of decisions adopted. This produced the ‘Warsaw Framework for REDD+’; a package of decisions, which along with those adopted at previous COPs completes the ‘REDD+ Rulebook’ and gives guidance for the full implementation of REDD+.¹⁴⁸

¹⁴³ *Ibid*

¹⁴⁴ *Ibid*

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

REDD is dealt with in the two paragraphs of Article 5 of the Paris agreement or COP 21.¹⁴⁹

The first paragraph states that-

“Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1(d), of the Convention, including forests.”¹⁵⁰

While the second paragraph states that-

“Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.”¹⁵¹

Then paragraph 55 mentions about the financing part for REDD+ which it states as follows-

“Recognizes the importance of adequate and predictable financial resources, including for results-based payments, as appropriate, for the implementation of policy approaches and positive incentives for reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks; as well as alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests; while reaffirming the importance of non-carbon benefits associated with such approaches; encouraging the coordination of support from, inter alia, public and private, bilateral and multilateral sources, such as the Green Climate

¹⁴⁹ Chris Lang, COP21 Paris: REDD and carbon markets, <http://www.redd-monitor.org/2015/12/15/cop21-paris-redd-and-carbon-markets/> (May 7, 2018)

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid*

Fund, and alternative sources in accordance with relevant decisions by the Conference of the Parties.”¹⁵²

3.1 INDIA’S POLICIES AND STRATEGIES ON REDD+

India is world’s 4th largest economy and 5th largest GHG emitter, accounting for about 5% of global emissions. Its emissions increased to 65% between 1990 and 2005 and are projected to grow another 70% by 2020. On a per capita basis, India’s emissions are 70% below the world average. Forests neutralize 11% of India’s GHG Emissions. India added around 3 mha of forests in the decade of 1997-2007.¹⁵³

Forest sector in India is facing unprecedented challenges, which, of course, can be turned around as opportunities as well. Forests are being increasingly recognized as a key resource in resolving global issues such as poverty, climate change, biodiversity loss and dwindling goods and services from natural resources. And consequently, growing interest in forests is opening up a wide range of promising new funding sources, instruments and mechanisms like REDD+. ¹⁵⁴ These opportunities, if effectively realized, could both enhance the livelihoods of forest-dependent people and also simultaneously improve the state of the world’s forests by providing steady flow of funds, and ultimately reposing trust in the forest-dependant people by allowing them to sustainably manage the nearby forests, and rise out of poverty.¹⁵⁵

There is also a significant scope for improving quality of forest cover by addressing drivers of degradation as a significant part of the country’s forest cover falls in the open to medium categories owing to various drivers of degradation. As estimated, REDD+ programme could provide for capture of around 1 billion tonnes of additional CO₂ over the next 3 decades and significant financial incentives as carbon services under REDD+ including flow of positive incentives to local communities. REDD+ can be a part of an effective strategy and tool for mitigation and adaptation of climate change, improving ecological and environmental

¹⁵² *Ibid*

¹⁵³ Ministry of Environment and Forest and Climate Change (MOEFCC), NATIONAL REDD+ POLICY & STRATEGY, Zero Draft, http://www.indiaenvironmentportal.org.in/files/file/Draft%20National%20Policy%20&%20Strategy%20on%20REDD_0.pdf (May 10, 2018)

¹⁵⁴ Ministry of Environment and Forest, Reference Document for REDD+ in India, 2014, <http://envfor.nic.in/sites/default/files/press-releases/Reference%20Document%20For%20REDD+%20in%20India.pdf> (June 7, 2018)

¹⁵⁵ *Ibid*

services, biodiversity conservation as well enhancing forest-based livelihood of forest dependent communities.¹⁵⁶

If we look into the existing policy and legislative framework which includes National Forest Policy 1988, Indian Forest Act 1927, Wild life (Protection) Act, 1972, Forest (Conservation) Act, 1980, Environment (Protection) Act, 1986, Biological Diversity Act, 2002 etc. and rules there under for guiding forest conservation and management are all supportive of REDD+ elements. The goals of REDD+ are in conformity with India's National Forest Policy, 1988, which aims to ensure environmental stability and maintenance of ecological balance through protecting, conserving and enhancing the existing forests of the country. The Forest (Conservation) Act, 1980 regulates diversion of forest land for non-forestry purpose and provides for compensatory afforestation. Recently, enacted "The Scheduled Tribes and Other Traditional Forest Dwelling Communities (Recognition of Forest Rights) Act, 2006", aims to recognize and vest the forest rights and occupation in forest land on forest dwelling Scheduled Tribes and other traditional Forest Dwellers, who have been residing in such forests for generations, but whose rights could not be recorded.¹⁵⁷ This legislation has also given significant empowerment to forest dwelling communities, and has enabled them to manage and conserve forest resources. The NTFP sector has good potential in creating jobs and supplement income of local poor people by way of enhancing the NTFP resource base, by modernizing processing and improving the market access for finished products. The Biological Diversity Act, 2002 provides framework for biodiversity conservation at the grass-roots level by involving the local communities.¹⁵⁸

In some regions of the country, especially in Schedule VI areas, the forests are traditionally owned and managed by the tribal community and under the aegis of Autonomous District Councils. The Forest Rights Act and the Rules made thereunder give details of institutional arrangements for the protection, management and regeneration of Community Forest Resources (CFR), defined in section 2(a) of FRA as customary common forest land where the communities had traditional access, or which could be construed to be customary boundaries of a village, in other words, areas where communities can demonstrate their traditional

¹⁵⁶ *Ibid*

¹⁵⁷ Ministry of Environment and Forest, Reference Document for REDD+ in India, 2014, <http://envfor.nic.in/sites/default/files/press-releases/Reference%20Document%20For%20REDD+%20in%20India.pdf> (June 7, 2018)

¹⁵⁸ *Ibid*

access.¹⁵⁹ The holders of right are empowered to conserve and protect wildlife, forest and biodiversity.

Thus, most of the existing laws and policy framework is supportive of implementation of REDD+.

The principal aim of National Forest Policy, 1988 (NFP) is to ensure environmental stability and maintenance of ecological balance. The policy aims for maintaining one-third of the country's geographical area under forest and tree cover and calls for massive afforestation and social forestry programmes with people's participation for increasing the forest and tree cover in the country.¹⁶⁰ This strategy will also meet the domestic requirements of forest products including fuelwood, fodder, minor forest produce and small timber of the rural and tribal populations. NFP calls for increasing the productivity of forests to meet essential national needs and encouraging efficient utilization of forest produce through the application of scientific and technical inputs.¹⁶¹

The NFP also provides for protection of rights and concessions of tribal people and other poor people living in and around forests while making their domestic requirements of fuelwood, fodder, minor forests produce and construction timber to be the first charge on forest produce, within the carrying capacity of the forests. The policy recommends to closely associate the tribal people in the protection, regeneration and development of forests as well as to provide gainful employment to people living in and around the forested areas.¹⁶²

NFP calls for increasing the productivity of forests to meet essential national needs, and also encourages efficient utilization of forest produce through appropriate scientific and technological applications. Pursuant to the NFP 1988, Joint Forest Management (JFM), was started in India in 1990 based on the principle of "Care and Share".¹⁶³ Presently, there are more than 100,000 JFM Committees involving around 20 million people managing approximately 22 million hectare of forest area. JFM has contributed significantly in stabilizing forest and tree cover of the country.¹⁶⁴

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*

¹⁶¹ *Ibid*

¹⁶² *Ibid*

¹⁶³ *Ibid*

¹⁶⁴ *Ibid*

A closer look at the NFP and legal framework prescriptions makes it amply clear that the emphasis on maintaining ecological balance and environmental stability, giving high priority to meeting the forest-based needs of the local communities, creating a movement for increasing the forested area in the country, and strictly regulating the diversion of the forest land, are all indicators of a positive REDD+ performance.¹⁶⁵ Similarly, the Draft Forest Policy of 2018 clearly states the employment of the REDD+ mechanism and further pushes this agenda in clear words.

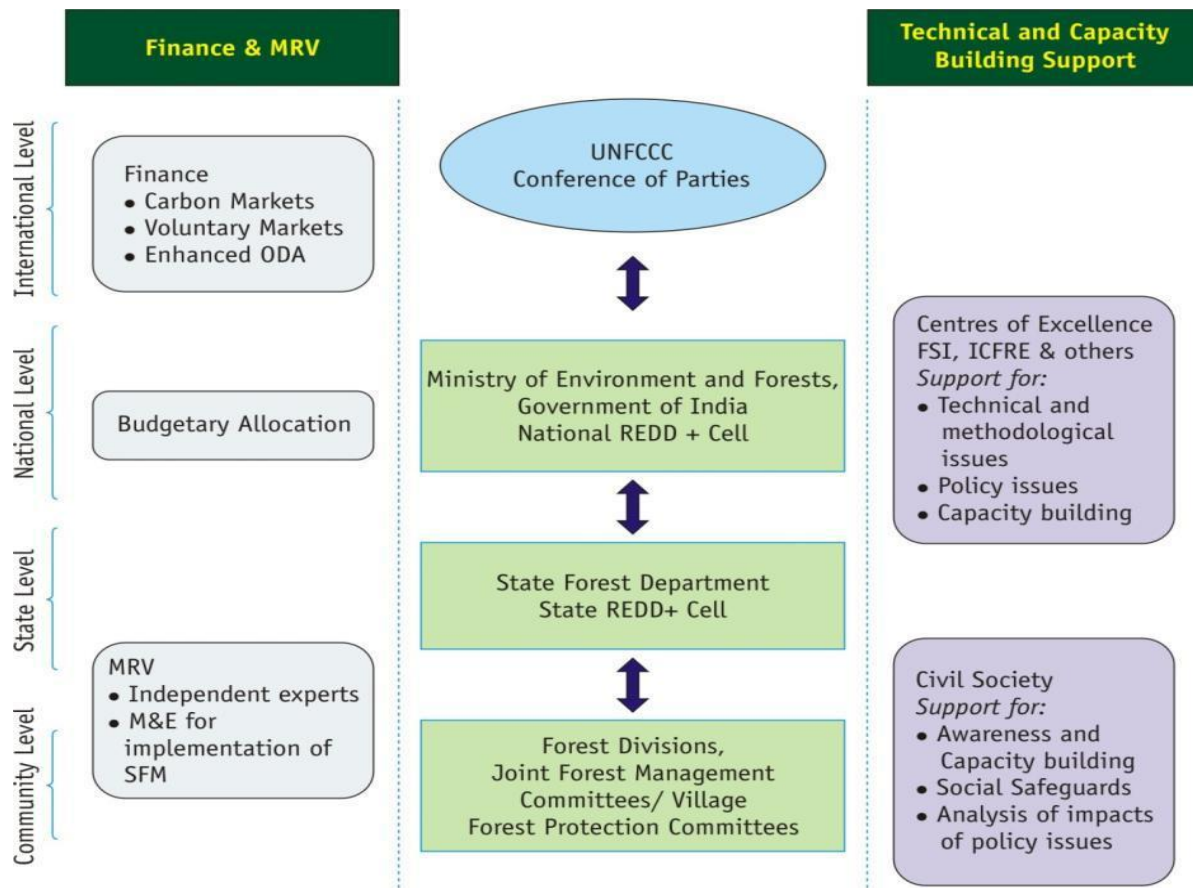
Apart from the current laws and policies, Certain policy prescriptions and government support will be required for REDD+ implementation across the country in all States and UTs. Some of the major policy requirements are enumerated below¹⁶⁶:

- A strong and enabling policy and legal framework for forest and biodiversity conservation.
- Strengthening cross sectoral cooperation in the forestry sector for realizing multiple benefits of forests and enhancing forest resource base for sustainably meeting livelihood needs of forest dependent communities.
- REDD+ readiness to be ensured through a) full stakeholder participation and consultation; b) existence of clear tenurial rights; c) formulation of guidelines for equitable REDD+ benefit distribution and conflict resolution; d) establishment of transparent systems for revenue management and non-carbon monitoring; and e) institutionalization of cross-sectoral coordination.
- Effective national REDD+ governance based on transparency, inclusiveness and effective participation of all relevant stakeholders including tribal and forest dwelling people, civil society, NGOs and other stakeholder departments in national and international REDD+ decision making, strategy development and implementation.
- Transparent, equitable and accountable management of financial incentives and funds from Central Government to States and UTs and thence to local communities on account of REDD+ performance-based payments.
- Development of MRV and monitoring systems.
- Enabling of forest sector through strengthened national and sub-national capacities to develop sustainable REDD+ investment strategies and portfolios.

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid*

India has a long history of scientific forest management, spanning over a century and a half. This resulted in the formulation of a robust legal and regulatory framework and formalized system of forest governance. The broad institutional framework for implementing REDD+ is already in place. However, for REDD+ to be functional, a system capable of forest carbon stocks accounting, Measuring, Reporting and Verification (MRV), and of enforcing social and environmental safeguards, will be required. The institutional arrangement for the implementation of REDD+ in India is shown in the following diagram:



Source: Ministry of Environment and Forest, Government of India

3.2 IMPLEMENTATION AND ACTION PLANS IN NORTHEAST INDIA

Inhabited by over 250 indigenous communities and home to most of India's last remaining dense tropical rainforests, Northeast India can without any inhibitions be regarded as the best region in the country to implement the REDD Plus project. This might have been the reason for the first and the most successful pilot projects of REDD+ to have started in Northeast.

Over the last century, the North-Eastern region India has gained worldwide attention for its bio-diversity and extensive forest cover. The forests of this region are remarkable, both in

their structure and in their species diversity. The locale is a gathering ground for temperate east Himalayan flora, Palearctic flora of the Tibetan highlands, and wet evergreen flora of Southeast Asia and Yunnan, shaping a bowl of biodiversity. Arunachal Pradesh occupies an important place and is a hotspot for the evolution of flora in northeast India and for speciation. The Brahmaputra valley, sandwiched between the eastern Himalaya in the north and the Garo-Khasi-Jaintia and Mikir- Cachar-Barail hill ranges in the south, is a meeting ground for temperate east Himalayan flora and wet evergreen and wet deciduous floristic elements. The Khasi-Jaintia Hills function as a corridor of the Southeast Asia floristic elements into the Indian subcontinent through the Arakan arc. The distinctions in altitude and rainfall patterns of the southwest and northeast monsoon play a significant role in the development of ecological niches in this region of India.

According to an official estimate based on satellite images, the North-Eastern Region has 163,799 square kilometres of forest, which is about 25 percent of the total forest cover in India.¹⁶⁷ The territory under forest constitutes approximately 64 percent of the total area of the North-Eastern Region, compared to 19.4 percent for India as a whole.¹⁶⁸ This reflects the importance of forest resources for the north-eastern part of the country.

Besides, large forest cover and rich biodiversity, the region is also number to a number of indigenous communities who follow their own system of laws, which are called customary laws. Most of these laws are recognised by the Indian Government through a number of provisions in its Constitution especially the Sixth Schedule. The laws help to give the communities, the control over their land and resources, especially forest. This has been the reason that unlike other parts of India, two-third of Northeast's forests are under community control. This community control over forests has been a boon in certain instances and bane in some other instances. For example- the community method of shifting cultivation also known as *jhum* has led to degradation of thousands of square kilometres of lush rainforests of the region. But in the same way, the community conservation methods especially in the form of sacred groves and village forests have also been able to save forests and wildlife from vanishing. An example can be taken from the Garo community in Meghalaya, who have conserved the 'hoolock gibbon', the only ape in India through their efforts in community forest conservation. Another such instance is, in East Kameng District of Arunachal Pradesh, the Nishi tribe has established elaborate controls over critical watersheds and forests with

¹⁶⁷ Forest Survey of India, Yearly Reports, http://fsi.nic.in/details.php?pgID=sb_64 (June 7, 2018)

¹⁶⁸ *Ibid*

high natural beauty and biodiversity, including the protection of hilltop forests, forests around lakes and mountains (*sineiak*), forests in the vicinity of villages (*myoro tom*), and forests in niches and along drainages (*changtam bote*).¹⁶⁹ In addition to forest protection, a variety of animals and plants are considered sacred and cannot be harmed.¹⁷⁰

The Jamatia people of Killa District, Tripura, have traditions of forest conservation, but have also revitalized these strategies to restore forests that have been degraded in the past.¹⁷¹ The Naga Ao of Mokokchung District in Nagaland have historically divided their forests into blocks, one of which has for generations been designated as a conservation area. In recent years, they have decided to add two more blocks for conservation, as they no longer require them in their jhum land pool.¹⁷² In the East Khasi Hills of Meghalaya, the villagers of Mawphlang and adjoining regions are reviving up centuries old sacred forest traditions by ordaining new forests in 18 other nearby villages. This initiative in Meghalaya is also the first and the most successful REDD+ project in India. Let us discuss about it in details.

The Khasi Hills REDD+ Project

The Khasi Hills Community REDD Project was started to investigate whether a group of forest depending communities could build up a successful REDD Plus project that could be certified under global principles and be utilized to finance conservation and reclamation exercises. While REDD strategies have been a subject of worldwide atmosphere dialogs for almost 10 years, there was minimal experimental confirmation from Asia that sub-national projects could accomplish REDD objectives and other advancement destinations under existing project plan and specialized conventions. The Khasi Hills was chosen as a site for this exploration action in light of the demand of neighbourhood communities to start a REDD project keeping in mind the end goal to moderate and end loss of community forests whereupon the villages are intensely dependent.

Khasi communities of Northeast India possess indigenous forest conservation values and management systems reflected in an unbroken 500-year-old tradition of protecting their sacred forests and ancient stone megaliths. Indigenous institutions including multi-village governments (*hima*) and tribal village councils remain the active governance organisations

¹⁶⁹ Mark Poffenberger, et al, "Indigenous Forest Stewards of Northeast India", Community Forestry International, 2007, p. 9.

¹⁷⁰ *Ibid*

¹⁷¹ *Ibid*

¹⁷² *Ibid*

for civil society at the local level. These institutions set and enforce traditional social norms and rules through participatory meetings and group activities that characterize Khasi society.¹⁷³

Khasi communities put a high social incentive on their forests, as reflected in their oral narratives, and many Khasi individuals are worried over forest loss. Ceremonies keep on being performed in sacred places inside and around the forests, while rules for forest conservation and utilization are by and large all around highly regarded by the community. The Khasi, likewise esteem their forests for their ability to secure springs and streams and conserve wildlife. Similarly, vital, the forests give a decent variety of sustenance items including mushrooms, green leaves, natural products, and nuts that are a vital commitment to the family kitchen. Bamboo and timber for development and apparatuses are drawn from community forests. A recent survey of four Khasi hills villages found that community members collected non-timber forest products from 137 different plant species found in the surrounding forests.¹⁷⁴ This high social and economic dependency upon the forests has energized the Khasi response to forest loss.

The Khasi Hills of Meghalaya is a propitious site for REDD pilot projects because of the age-old traditions of community forest management, the revival of community interest in strengthening protection of sacred groves and communal forests, and the recent high rates of deforestation that create opportunities for substantial CO₂ emissions reductions. Khasi community leaders approached Community Forestry International staff at a workshop in Shillong, Meghalaya in 2005 to request institutional, technical, and financial assistance to strengthen the capacity of their traditional management systems to conserve and restore community forests.¹⁷⁵ This request was in response to community concerns about degradation of forests and growing pressures on sacred groves and other natural resources both from their own community meeting fuelwood needs as well as from private sector firms engaged in quarrying, mining, and logging.¹⁷⁶

¹⁷³ Mark Poffenberg, et al, "Restoring and Conserving Khasi Forests: A Community-Based REDD Strategy from Northeast India,"

https://www.researchgate.net/publication/287331631_Restoring_and_Conserving_Khasi_Forests_A_Community-Based_REDD_Strategy_from_Northeast_India (June 12, 2018)

¹⁷⁴ Community Forestry International (CFI), "Socio-Economic Baseline Survey for Khasi Hills Community REDD Project Area"; Community Forestry International: Antioch, CA, USA, 2012.

¹⁷⁵ *Supra* Note 172, p. 78.

¹⁷⁶ *Ibid*

In the East Khasi Hills District where the project is located, between 2000 and 2006, forest loss exceeded a staggering 5 percent per year, contributing to rapidly deteriorating surface and ground water supplies, erosion, and sedimentation problems, and perceived changes in the micro-climate.¹⁷⁷ Approximately 39 percent of forest lands in the project area are severely degraded as a result of unsustainable fuel wood harvesting, grazing, and fire, as well as by quarrying and timber extraction.¹⁷⁸ Over 95 percent of families in the project area rely on fuelwood for cooking and heating.¹⁷⁹

The indigenous communities seemed very concerned about the problems of the lack of drinking water especially during winter season. While the Khasi Hills has some of the highest recorded annual rainfall levels in the world, a longer and hotter dry season due to climate change and deforestation are reported by community members to be causing growing water shortages. Growing threats to these valued ecosystems catalysed 62 villages within 10 indigenous governments to establish a Federation to coordinate the protection and restoration of their community forests within the Umiam sub-watershed.¹⁸⁰ The project represents locally-driven response to forest pressures that utilizes innovative financing mechanisms including payments for ecological services (PES) such as the sale of REDD carbon offset credits.

In preparing for the project in 2012 community leaders held over 70 village-level meetings with the 62 participating Federation communities to explain and discuss the proposed project. Under the Federation, a project office was created with a coordinator, bookkeeper, and secretary. In subsequent months, a project field team with 18 community facilitators was established, each responsible for one of the 18 micro-watersheds in the project area.¹⁸¹ The facilitators are local community members who are selected to coordinate resource management planning, identify degraded forests areas for restoration through closure and enrichment planting, and monitor changes in forest cover. In addition, 62 youth volunteers were selected, one from each village, to assist the facilitators with awareness raising, fire control, and monitoring forest conditions, biodiversity and other project components.¹⁸² During the first-year planning phase, a grant of \$150,000 from the United Kingdom's

¹⁷⁷ *Ibid*

¹⁷⁸ *Ibid*

¹⁷⁹ *Ibid*

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

¹⁸² *Ibid*

Waterloo Foundation supported the project design, after which funding to support the project has been generated through carbon offset sales and revenue from PES agreements with international organizations.¹⁸³

The Umiam sub-watershed that defines the 27,000-hectare project area is situated at an elevation that varies from 150 m to 1961 m above the mean sea level. The plateau is highly dissected where the steeply-sloped Umiam River valley drains into the Bangladesh plain to the south.¹⁸⁴ The project area encompasses the Umiam River valley which is surrounded by rolling upland topography intersected by rivers and rounded hills of soft rock. The Umiam River is one of the state's major rivers and an important source of water for the state's capital, Shillong. The project team has worked with the indigenous governments to identify a long-term management plan for the Umiam sub-watershed which includes community conservation forests and a wildlife corridor along the steep banks of the Umiam River gorge, with sacred groves and community forests protected and gradually linked to the larger forest area within the upper watershed.¹⁸⁵

Under the REDD project framework, the local Khasi Federation is implementing a 30-year climate adaptation strategy for their upper watershed. The project is designed to establish an initial 10-year income stream to support the Federation, which could be further extended.¹⁸⁶ Based on initial projections of the impact of community-based activities to avoid deforestation and forest degradation (avoided deforestation), as well as through forest restoration (sequestration), approximately 20,000 tCO₂ of CO₂ emission reduction offset credits are being generated each year, yielding a potential income of USD 100,000 annually to finance the project.¹⁸⁷ Credits come from avoided deforestation and sequestration including the 9270 ha of dense forest under REDD project conservation and an additional 5947 ha of open forests that is being regenerated.¹⁸⁸

The Khasi Hills Community REDD Project is still at an early stage having been certified under Plan Vivo (Edinburgh, UK) standards in March 2013. In June 2013, 21,805 tCO₂ emission certificates were issued in the Markit Registry.¹⁸⁹ The Markit Registry acts as a

¹⁸³ *Ibid*

¹⁸⁴ *Ibid*

¹⁸⁵ *Ibid*

¹⁸⁶ *Ibid*

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

clearing house for project carbon allowing credits to be transferred or retired by buyers. Three carbon brokers, including U and We/Zero Mission (Stockholm), C-Level (London), and COTAP (San Francisco) entered into agreements to market the Federation's carbon credits. From May 2013 to October 2015 the brokers were able to sell 26,116 tons of CO₂, valued at \$140,439.¹⁹⁰

In addition, in 2015 the Federation signed a contract with WeForest, a Belgian NGO, to reforest 500 hectares of degraded land for approximately \$83,000, with an additional \$166,000 scheduled for 2016 when 1000 additional hectares are taken up.¹⁹¹ This represents the first phase of a ten-year agreement to regenerate 5000 hectares of degraded land. Under the WeForest contract, each micro-watershed committee identifies degraded open forest areas with 10 to 40 percent forest cover to regenerate.¹⁹² The LWC, together with local villages, are responsible for protecting the area from forest fire and closing it to grazing and fuelwood collection. Natural seedling and coppice growth is encouraged through thinning, weeding, and multiple-shoot cutting. Village-based nurseries provide seedlings for enrichment planting in gaps, while volunteer trees that are generated through seeds and coppice growth are protected and provide much of the regenerative biotic material.¹⁹³ The reforestation agreement with WeForest requires the use of native species. The reforestation areas are managed by the village responsible for the forest, with coordination from the LWC and the Federation.¹⁹⁴

Apart from the Khasi Hills Project, another similar project has been going on in Garo Hills of Meghalaya. Wildlife Trust of India (WTI) and World Land Trust (WLT), in partnership with the GHADC and the state forest department, have been working with these communities for over a decade now. The principal aim is to connect the fragmented forest patches located in Garo Hills, between Nokrek National Park and Balpakram National Park, with a view to establishing a contiguous area of forest as wildlife corridor. This network of forest patches forms the backbone of the region's biodiversity and has been designated the Garo Green Spine.

The Garo Green Spine Conservation project aims to protect the canopies, corridors and catchments of the Garo Green Spine. The idea is to increase the total area under conservation

¹⁹⁰ *Ibid*

¹⁹¹ *Ibid*

¹⁹² *Ibid*

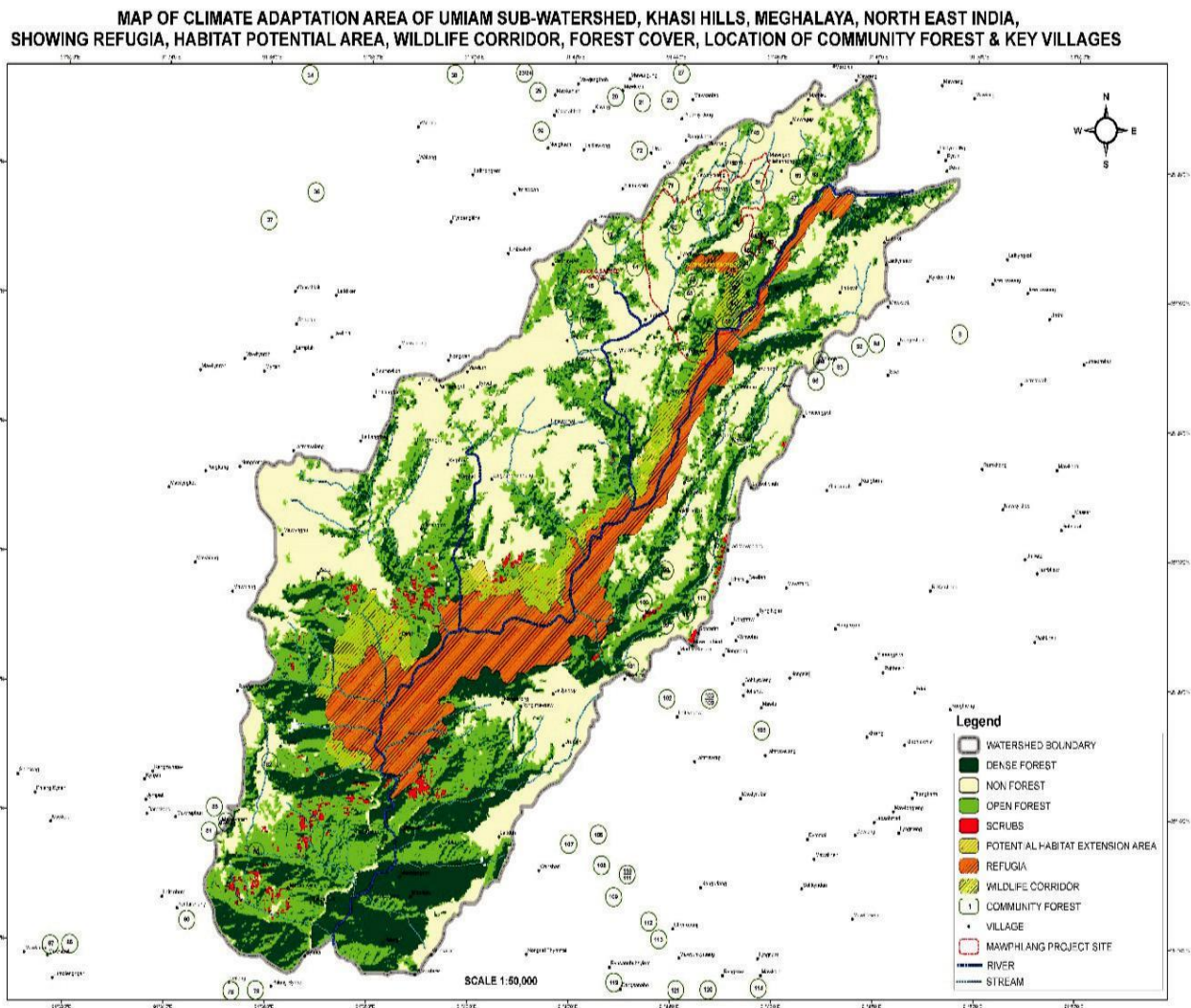
¹⁹³ *Ibid*

¹⁹⁴ *Ibid*

by¹⁹⁵: (a) legally notifying larger lands for wildlife conservation, (b) restoring jhummed fallow lands, (c) sensitising local communities about the importance and benefits of wildlife conservation through campaigns, (d) optimising social and biodiversity benefits by strengthening livelihood and employment opportunities, (e) reducing the people's dependency on forests through the use of fuel efficient stoves on a pilot basis to reduce fuel wood extraction, and (f) sharing experiences, learnings and success models with the public through workshops and meetings.

The Project is however yet to be designated as a REDD+ project and has not been able to fulfil all the requirements for REDD+.

A map of the Khasi Hills REDD+ project site sourced from Community Forestry International has been given below-



¹⁹⁵ WTI, Garo Green Spine Conservation Project, <http://www.wti.org.in/projects/garo-green-spine-conservation-project/> (June 18, 2018)

3.3 INTERVIEW DATA

An interview was conducted with Mr. Tambor Lyngdoh, Secretary of Ka Synjuk cum Project Director of Khasi Hills REDD+ Project.

Apart from a casual conversation about the project, a questionnaire was also given to him. The following are the details of the questionnaire and the answers provided:

Q1.	<p>The Location of the Project?</p> <p>The project is currently located in East Khasi Hills District of Meghalaya.</p>
Q2.	<p>Where and When did the project initially start?</p> <p>The project began in the year 2011 in the village of Mawphlang around the Umiam Reservoir Area.</p>
Q3.	<p>Which are the Organisations involved in the project?</p> <p>The Ka Synjuk Ki Hima Arliang Wah Umiam Mawphlang Welfare Society (KSKHAW-UMWS), also referred to as the Federation, is a non-profit organization representing 10 indigenous Khasi governments and their 62 villages is the main organisation coordinating the project. Apart from that, there has been support from the Khasi Hills Autonomous District Council besides organisations like Community Forestry International (CFI) which is a U.S.-based non-profit which creates legal, institutional, technical, and financial strategies for forest communities in Asia at the village, national, and global levels.</p>
Q4.	<p>Total Area covered under the project?</p> <p>An area of 9270 hectares have been covered under REDD plus project and another 5947 hectares under ANR (assisted natural regeneration) programme. The aim is to cover an area of 27,000 hectares. Currently 62 villages are involved in the project with around 25,270 individuals from 4,357 households being a part of it.</p>
Q5.	<p>What are the major aims and objectives of the project?</p> <p>The project aims to slow, halt and reverse the loss of community forests by providing support, modern technologies and financial incentives to conserve existing forests</p>

	<p>and regenerate degraded forests. Another primary objective of the project is to deliver long-term strategies to address extreme poverty facing rural families and is involved in the establishment of women-run microfinance institutions. the project focuses on reducing the number and severity of forest fires by establishing fire-lines which are maintained and monitored during the fire season by local communities. To reduce fuelwood collection, fast-growing woodlots are being established near villages to cover the demand for firewood.</p> <p>The project is manufacturing and installing fuel-efficient cook stoves and plans to subsidise the majority of the 5,000 households in the project area. Because of this activity, fuelwood consumption and indoor smoke pollution will be reduced improving forest and family health.</p> <p>At present the project fulfils six UN SDG (Sustainable Development Goals) which include:</p> <ul style="list-style-type: none"> • No Poverty • Affordable and Clean Energy • Life on Land • Climate Action • Gender Equality • Quality Education
Q6.	<p>How much money has the community been able to generate as per the Carbon Trading Scheme under REDD plus?</p> <p>The total income till 2016 has been 58,621 USD, the assessment for the year 2017 and 2018 is yet to be made, however the income is expected to increase several folds.</p>
Q7.	<p>Has there been any distribution of the income generated to the rural households?</p> <p>Around 250 USD aid is given to each of the 62 villages every year as community grant programme for the maximum benefit of the community.</p>
Q8.	<p>What are the employment/income generation schemes undertaken by your organisation?</p>

	<p>There are numerous income-generating activities beyond distributing carbon revenues to the 62 communities for meeting benchmarks under their forest management plans. One such is the Animal Exchange Program, wherein the project provides support for the construction of stalls and pens to reduce grazing and improve villager livestock income from more intensive stall feeding. In addition, to promote saving and setting up small enterprises among the villages, the project also trains and capitalizes women to lead village banking groups, referred to as Self Help Groups.</p> <p>Apart from that several village youths are also employed in forest fire mitigation work, management of nurseries for seedlings, plantation activities and many other activities associated with the project.</p>
Q9.	<p>What positive impacts on biodiversity/environment have been seen in last 7 years of the project?</p> <p>Several positive changes have been seen in this regard. In 2010, when we started the project, the total dense forest cover in the area was 10,186 hectares which increased significantly to 10,838 hectares in a span of six years. Apart from that there has been significant decline in barren and fallow land. The carbon stock of the forests has also enhanced. Several species of wildlife like deer, leopard, macaques and reptiles which were considered locally extinct have now been sighted at several places of the project area. In Perkseh village under Hima Mawphlang, leopards are now commonly sighted, which had almost become extinct till a few years ago.</p> <p>The streams which had dried up once, have now again come to life. There has been regeneration of as many as 22 streams in the region which are an important source of water for the communities both locally and in Shillong.</p>
Q10.	<p>What is the timeline of the project and what do you look forward to?</p> <p>The project has a total timeline of 30 years and in these 30 years we expect to bring in more and more villages under the project especially from the neighbouring districts of West Khasi Hills and Ri-Bhoi. We want to make people realise the benefits of the REDD plus project and how just by conservation of forests, we can not only tackle environmental problems but also enhance the income, health and employment opportunities of rural households.</p>

In regard to the community forest project in Garo Hills of Meghalaya, a former employee of Wildlife Trust of India, Mr. Sashanka Barbaruah was interviewed. He was instrumental in the beginning of the project. However, this interview was conducted in limited time and not much information could be gathered.

The following is the details of the interview in form of questionnaire and answers:

Q1.	<p>Kindly tell us about the location of the project.</p> <p>The project is located in Garo Hills region of Meghalaya situated in the village forests between Balpakram National Park and Nokrek Biosphere Reserve.</p>
Q2.	<p>Where and When did the project start?</p> <p>The project started in 2011 connecting two crucial Elephant corridors namely- Siju-Rewak Corridor and the Rewak-Emangre Corridor. It spreads across 17 village reserve forests declared by the Garo Hills Autonomous District Council.</p>
Q3.	<p>Which are the organisations involved in the project?</p> <p>Wildlife Trust of India (WTI) and World Land Trust (WLT), in partnership with the GHADC and the state forest department are involved in the project.</p>
Q4.	<p>What is the total area covered by the project?</p> <p>The project covers an area of 2822.3 hectares of land including 17 village reserve forests declared by the local Autonomous District Council.</p>
Q5.	<p>What are the major aims and objectives of the project?</p> <p>When the project started, the main aim was to secure an elephant corridor between two forest areas. Therefore, the project was aptly named as Garo Green Spine Conservation project as it connected a long ridge of forests between Nokrek National Park and Balpakram National Park.</p> <p>At present the main objectives of the project are to:</p> <ul style="list-style-type: none"> • protect the canopies, corridors and catchments of the project area. • to increase the total area under conservation.

	<ul style="list-style-type: none"> • legally notifying larger lands for wildlife conservation • restoring <i>jhummed</i> fallow lands • sensitising local communities about the importance and benefits of wildlife conservation through campaigns • optimising social and biodiversity benefits by strengthening livelihood and employment opportunities • reducing the people's dependency on forests through the use of fuel efficient stoves on a pilot basis to reduce fuel wood extraction • sharing experiences, learnings and success models with the public through workshops and meetings.
Q6.	<p>What are the positive outcomes of the project?</p> <p>Although the project is yet to become a full-fledged REDD Plus project as it has not fulfilled all the criteria required to be one. Yet it has been very successful in conservation of the ecology and biodiversity of the area as well as in mitigating man-elephant conflicts.</p>
Q7.	<p>Any reasons for the project not being as successful as the Khasi Hills carbon project, especially in terms of implementation of the REDD+ mechanism?</p> <p>Garo Hills region is one of the remotest regions of Meghalaya. Also, the region has its own set of problems like high crime rates, insurgency, conflicts, lack of proper communication and infrastructure.</p> <p>The initial aim of the project was to secure an elephant corridor. It was only at the later stages that the idea of REDD+ plus brought up by an organisation named IORA. However, due to one reason or the other, the work has not been able to progress. Yet, we are still positive about the project as the insurgency is on the decline and the new Government seems to be very dynamic.</p>
Q8.	<p>What are the project activities that you look forward to?</p> <p>We look forward to a number of livelihood creation activities apart from those which are going on. Also, promotion of scientific methods of settled cultivation through trainings and exposure visits is what we seek, besides preserving indigenous customs and culture.</p>

CONCLUSION AND SUGGESTIONS

After doing an extensive research on the topic for several months, which included intensive study on various related aspects like- rights of indigenous people, customary laws, case laws, historical development of indigenous laws, the development of REDD+ mechanism, carbon trading, relationship between indigenous people and environment to name a few; besides an extensive field study which included site visits, interviews and observations; finally, we have come to a conclusion.

First of all, there is no such proper definition indigenous people but in practical terms, the people who are the original inhabitants of a particular region are considered to be the indigenous of that area. These people groups once had full hold over their land and properties. However, since colonial times they have been marginalised and exploited. After independence things did start changing with recognition of their customary laws and giving them certain privileges under the Constitution, yet they still remain far from the reaches of development.

These communities share an intricate relationship with the environment and are often regarded as forest dependent communities. Due to this intimate relationship with the environment, they became the *de facto* guardians of nature. They protected and managed the forests and lived a sustainable life. But things changed soon after the Government took control over their lands and demarcated them as Government lands or reserve forests and other protected areas.

However, the circumstances changed in last few decades with various international instruments and frameworks like Convention on the Rights of the Indigenous People, ILO Convention and so on recognising their rights over their land and also recognising the fact that they play the most crucial role in environmental governance.

The same was adopted in the laws and policies of the countries who signed and ratified these Conventions. Several other international bodies like the World Bank, the United Nations Framework Convention on Climate Change (UNFCCC) also adopted these policies and promoted indigenous people in their plans and strategies.

Today a number of conservation initiatives and environmental programs involve indigenous people at their core. On such example is that of REDD+ mechanism. The REDD+ mechanism is a win-win situation for both the people and the environment. This project not

only provides incentives to the people but also gives them a chance of livelihood besides protecting their environment and the other things which they are dependent on.

North-East India is one such region in the world where there are high regards for the customary laws and the community management of forests. Since the region is largely inhabited by indigenous people, the Government lets the customary laws prevail and also recognises their rights over the land and the forests. Most of the forests in Northeast India are community managed forests and the Government rarely has any role to play in it. It is here where we see the crucial role played by the indigenous people in environmental governance. The forests as well as the indigenous people are both inter-dependent. While they protect the forests, the forest gives them sources of food, medicines and livelihood. Once during an interview of the “Forest Man of India”, Mr. Jadav Payeng, he said the following words to me-

“The Indigenous people of Assam does not need to buy anything besides salt, rest the nature gives us, since we respect and protect it.”

Community forest management and carbon trading initiative like REDD+ has proved to be a boon for these people. Through conservation and protection of forests, they are not only earning incentives and livelihood but also contributing towards the protection of nature and reversing climate change. From the field study and interviews, we saw a clear picture how the REDD+ projects greatly helped the people and the environment in those areas. Once dried up rivers and streams were coming back to life, the wildlife was returning, medicinal plants were growing again, plus the people had a new and secured source of livelihood and they no longer needed to cut down trees or forests to earn a living.

Therefore, we can we rightly conclude that indigenous people play a very crucial role in environmental governance and so we must ensure their full participation at all levels of governance from international to local. This will not only ensure their betterment but the betterment and safeguard of the environment as a whole. This is reason why at international level we see nowadays especially from COP-21 onwards, indigenous people have been given the most importance for both adaptation and mitigation of climate change. Today they form the most crucial element of climate action.

“When there was neither kingdom, nor king; there was neither governance, nor governor, the people protected themselves by dharma.” -Mahabharata, XII.59.14

The suggestions which we would like to make in this regard is to ensure full involvement of indigenous people at all levels by taking the following measures-

- First, there should be a proper REDD+ policy in India. As we currently see, there is no mention of REDD+ in Indian environmental laws and policies. Although the National Forest Policy of 1988 speaks on terms similar to REDD+ and the Draft National Forest Policy of 2018 also suggests the adoption of REDD+ mechanism as one of its goals but that does not seem enough. A separate policy would ensure a proper roadmap and mechanism for the implementation of the programme. Plus, it would give a strong legal backing to the initiative.
- Second, more self-governance and autonomy should be given to the indigenous people especially in Northeast. This would not only ensure the end of the insurgency problem but would also give significant powers to the native people for a proper governance over their land and also a recognition of their culture and customs.
- Third, the Government of India is yet to define the term 'indigenous people' but in common parlance, they tend to use the term 'tribal' denoting indigenous people. However, in many parts of the country a number of indigenous communities like the Meitei people of Manipur or the Assamese (particularly Ahom, Koch and other ethnic groups) have not been recognised as tribes and hence they do not enjoy the privileges even after being indigenous inhabitants of their regions.
- Fourth, a special cell for the implementation of REDD+ as well as involvement of indigenous people must be created in the Ministry of Environment, Forest and Climate Change. This would ensure easier application of the rules and a better administration of the same.
- Fifth, the Government should legally recognise the village reserve forests and other community managed forests and also allot budget for the same. They should further encourage the recruitment of community foresters to protect those areas as it was mentioned in the 'Mission Green India' plan.
- Sixth, at all the international conventions, there should be a special group for indigenous people, who would be allowed to take part in the discussions and also present their views.

Finally, I would like to say that – “Indigenous people are the souls of the forests, without their participation, neither the environment will be safe nor will the nation prosper.”

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