PART 1:

ENVIRONMENTAL JUSTICE

CHAPTER 1: INTRODUCTION TO ENVIRONMENTAL JUSTICE

In this Chapter

- *Environmental justice and other terms defined*
- *The history and evolution of the environmental justice movement and the Kettleman City Case*
- *Environmental justice in South Asia and the Adivasi struggle*

Definitions

Environmental justice

In its most basic form, environmental justice is the struggle against the unfair environmental burden often placed on marginalised communities.

Marginalised communities

Marginalised communities, sometimes referred to as minority communities, are communities separate from the mainstream, majority sector of society. 'Marginalised' is a more appropriate term than 'minority' as the community facing marginalisation may not be a numerical minority.

Environmental justice is the struggle against the unfair environmental burden often placed on marginalised communities

A marginalised community may be separated from the mainstream by:

- race or ethnic origin
- class or economic status
- caste
- religion
- geographical remoteness or isolation

Communities can be marginalised in several ways, most commonly by:

- **Lack of political representation:** Lack of political representation can lead to poor political voice and the enactment of non-beneficial governmental policies and legislation.
- **Lack of social representation:** Lack of social representation often leads to a lack of political will or under-representation.

For example: If all people living in Bangladesh are considered to be Bengali, the existence of indigenous populations is ignored. As a result, the customs, traditions, religions, practices, and other aspects of indigenous cultures have no importance. This results in the marginalisation of indigenous peoples both socially and politically.

Ethnic minorities often have less access to resources, lower incomes, and lower levels of education, all examples of marginalisation.

Marginalised communities have less political power than mainstream communities. *For example*:

- They may have faced severe social repression — as in the case of Dalits in India and Nepal.

- They may also have faced political repression by governments — such as religious minorities in previously Taliban-controlled Afghanistan.
- They may also be living in rural areas with less developed infrastructure/less services and are more vulnerable to poverty.

Environmental burdens

Environmental burdens range from polluted air and water to diminished access to natural resources.

Environmental burdens range from polluted air and water to diminished access to natural resources.

Air and water pollution are beginning to spread outside of urban areas into rural areas. The high population density in South Asia exacerbates this trend. Urban centres are continually expanding, bringing urban pollution to rural areas. Air and water pollution affect marginalised communities to a greater degree than mainstream communities for several reasons:

- Marginalised communities often lack the resources to install water treatment processes, for instance, to ensure safe drinking water.
- Land next to polluting industries tends to be cheaper and, therefore, one of the few places where marginalised communities can afford to live.
- Many low-wage jobs such as rickshaw driving or manual labour take place outdoors and result in prolonged exposure to air pollutants.

Environmental burden can also refer to a difficulty in accessing natural resources. Often marginalised and rural communities find it difficult to access natural resources due to:

- Government action, such as the privatisation of forest lands or creation of national parks and protect areas.
- Historic land disputes resolved in favour of richer, more powerful members of a community.

Marginalised communities are very often either landless or small land holders. Additionally, whatever land they possess is often poor in quality, leading to a reduced livelihood. Marginalised communities also face the constant fear of displacement. Displacement can occur for a variety of reasons:

- a large dam project flooding their lands
- government occupation or privatisation of their forest lands
- large construction projects

Disproportionate environmental burdens

Environmental burdens can disproportionately affect marginalised communities because:

- Marginalised communities may be exposed to more toxins than mainstream communities.
- The same environmental burden may affect marginalised people's lives more than it would affect others.

For example: if water resources become scarce, those with more money and resources may be slightly inconvenienced by having to conserve or buy water. However, for a woman living in a rural community, a water shortage may mean that she has to walk further to fetch water. This places a greater physical burden upon her and also leaves her with less time to complete her other tasks.

Patanjali Yonzon

Women fetching water in Nepal

Environmental Justice Movement

The issues central to the idea of environmental justice existed long before the terminology evolved. The idea that marginalised communities bear a disproportionate burden of environmental harm can be traced back many years.

However, the term 'environmental justice' did not arise until the mid 1980s. Around that time, a study released in the United States of America found that minority communities were bearing a larger burden of environmental harm than others. The study found that over 90% of hazardous waste industries (industries that create harmful pollution such as waste incinerators or hazardous waste dumps) were located in 'communities of colour'.[1] Subsequent studies found that race was the number one factor in locating these industries. Areas where African American and Hispanic American communities lived were the most likely to be chosen as locations for the placement of hazardous industries. This led to the emergence of a movement now known as the environmental justice movement.

Environmental justice looks at environmental harm as an issue of environmental concern and as an issue of civil and human rights.

The environmental justice movement is distinctive because it looks at cases of environmental harm, not just as a purely environmental concern, but also as a civil rights or human rights issue. The idea of environmental justice recognises the fact that clean air and water and non-toxic living conditions are basic civil rights, not just environmental concerns.

The inclusion of human rights allows for the use of additional legal tools in the fight for environmental justice. Instead of using only environmental statutes, environmental justice advocates also look to civil rights law for protection.

Environmental justice advocates in the US, not only brought the idea of civil rights and the environment together, they also had a unique approach: Instead of a purely legal strategy of continually engaging in legal battles, environmental justice groups aim to increase a community's ability to effectively participate in the decision-making process. The legal aspects are just one part of a broader movement focused on changing the way decisions are made.

[1] 'Communities of colour' is a term adopted and used by people of colour as a chosen means of self-reference and nomenclature, especially in North America.

The Kettleman City Case

Background

In the early 1980s, the residents of Kettleman City, California discovered a toxic waste dump just a few miles from their town. Kettleman City is a small town of farm workers. Over 90% of the residents are Latinos and many of them speak only Spanish. While they are no longer a numerical minority in California, Latinos are still marginalised and thought of as a 'minority' community.

The toxic waste had been dumped near Kettleman City since the 1970s without the community's consent or knowledge. The situation became urgent in 1988 when the residents discovered that there were plans to build a toxic waste incinerator at the same location. Chem Waste proposed to build an incinerator that would burn up to 108,000 tons of toxic waste every year. This meant that 5,000 truck loads of toxic waste, in addition to the hundreds of daily trucks, would pass through Kettleman City.

Remarkably, the residents did not come to know about this from Chem Waste, the owner of the dump, or state or local officials. Instead, an organiser for Greenpeace, an international environmental NGO, notified the residents of the plans.

Community action

Local residents mobilised and began to gather information. They formed an organisation called El Pueblo para el Aire y Agua Limpo (People for Clean Air and Water). During their research, they found a report that confirmed that marginalised communities do indeed face a disproportionate environmental burden. The report suggested that companies and localities should place garbage incinerators in, among others:

- rural communities
- poor communities
- communities with low education levels
- small communities

The reason given was that these communities would offer the least resistance. It was a stark view of the reality of environmental decision making.

The legal battle

Under the California Environmental Quality Act (CEQA) an Environmental Impact Report (EIR) must be completed to examine the environmental impact of a proposed project on a location or community. If there is a negative environmental effect, alternative or mitigation measures must be proposed.

The EIR on the toxic incinerator was 1,000 pages, highly technical, and only in English. After much pressure from the community, Chem Waste prepared a scant five-page executive summary in Spanish.

In conjunction with the EIR, the Planning Commission held a public hearing on the incinerator proposal. About 200 Kettleman City residents attended, hoping to testify at the hearing. They even brought their own translator. However, the Commission refused their request, stating that translation was only allowed in the far back of the room and not during testimony. The residents testified anyway, in Spanish, from the front of the room. The Planning Commission approved the incinerator. The residents appealed, but their appeal also failed.

It seemed that the County — already receiving $7 million dollars per year in revenue from Chem Waste's existing dump — had too much to gain from the project. The incinerator would almost double the tax revenue that the County received from the toxic waste dump. With the incinerator, the County would receive about one sixth of its annual revenue from this single company.

Finally, the residents filed a law suit under the CEQA arguing that the EIR was not sufficiently analysed. The law suit ultimately succeeded.

The judge ruled that the EIR had not sufficiently analysed the toxic waste incinerator's impact on air quality and on agriculture in the area. The judge also ruled that the residents of Kettleman City had not been meaningfully included in the permitting process. In September of 1993, Chem Waste withdrew its application.

Strategies and Tools

The Kettleman City case highlights several important environmental justice strategies:

1. **Community mobilisation**
   The Kettleman City case shows the strength that communities have when they mobilise. The majority of the residents in Kettleman City were Latino and a great number of them did not speak English, yet they were able to mobilise enough support and pressure to force a major company out of their community.

2. **Effective use of environmental statutes**
   The key to stopping Chem Waste from building a toxic incinerator was for El Pueblo to act as a citizen enforcer and diligently watch Chem Waste's movements. Through this, the citizens' group was able to point to the inadequacy of the EIR and use the environmental statute to take their cause to court.

3. **Effective use of non-legal tools**
   While the legal aspect was decided in El Pueblo's favour, the struggle would not have been as successful without the use of non-legal tools. The fight against Chem Waste began as a media campaign with the help of the Greenpeace organiser. Action was taken though citizens' groups, NGOs, and media outlets. Ultimately, the combined pressure forced Chem Waste to abandon their original proposal.

4. **Interlinking of civil rights and environmental rights**
   Not only did Chem Waste fail to adequately consider the EIR, it did not allow for effective public participation in the decision making process. Two laws were violated:

   - the environmental statute (the CEQA) requiring an EIR assessment
   - the right to public participation

   The first is purely an environmental concern. The second is purely a civil right — the right to effective participation. Through the combination of the two rights, El Pueblo was able to stop the toxic waste incinerator from entering their community.

Environmental Justice in South Asia

In South Asia, the goal of environmental justice is still to eliminate the disproportionate environmental burden placed on marginalised communities. There are, however, a few different points of emphasis in the South Asia context:

- In South Asia, there are many more factors leading to marginalisation, including religion, class, and ethnic background. In the US, the issue revolves almost exclusively around race and poverty.
- The scope of environmental issues in South Asia includes access to natural resources and land for livelihood and equitable sharing of benefits arising from the utilisation of natural resources, as well as urban pollution concerns.

The emphasis on using human rights protection against environmental harms remains the same. It is this emphasis on human rights that led many courts in South Asia to find that the right to live in a clean environment is part of the fundamental right to life

In South Asia there are many more factors leading to marginalisation, and the scope of environmental issues includes access to resources.

The Adivasi Struggle

Background

In the Indian state of Andhra Pradesh, the indigenous Adivasi population is nearly 100,000 people, roughly 2% of the total population. The Adivasi population in India is estimated at 10% of the total population. The Adivasis in Andhra Pradesh mainly rely on subsistence farming and the collection of non-timber forest products for their livelihood.

Tribal rights

Several pieces of legislation grant rights to Adivasis in relation to land ownership:

- The Fifth Schedule of the Constitution of India restricts the entry and ownership of land and immoveable resources in Adivasi areas by non-Adivasis and outsiders.
- The Scheduled Area Land Transfer Regulation Act of 1959 voids the transfer of land or immovable property from tribal to non-tribal in scheduled areas (areas reserved for scheduled tribes).
- At a more regional level, the Andhra Pradesh Scheduled Area Land Transfer Regulation (Amendment) Act, Section 1 of 1970 prohibits the transfer of land from non-tribal to non-tribal in scheduled areas.

The displacement of Adivasis has been happening for decades: In the 1950s and 1970s by multipurpose projects like reservoirs and hydroelectric projects; in the 1980s by mineral-based projects, paper, pulp, and wood projects; and since the 1990s, by multi-national companies. These projects appropriated large tracts of tribal and forest lands and natural resources. State policy also turned to the private sector for industrialisation, particularly in the power and mining industries.

Most of the mineral deposits in India are found in tribal and forest regions (almost 90% of coal mining in India is in tribal areas). Nearly 2 million people, 70% of which were Adivasi, have been displaced by mines in tribal areas. The impact of mining on the Adivasi has been devastating. Problems include:

- loss of control over resources and common property
- increasing pressure on land for local communities
- no economic gain for local communities
- loss of food security and domestic fulfilment
- deteriorating status and health of tribal women
- political unrest
- environmental destruction

Struggle to reclaim lands in Visag District

The Adivasis' struggle in the Visag District began in 1970s when the Government denied 14 tribal villages the title deeds to their land, instead granting mining leases to non-tribals and private companies. This was illegal according to the Scheduled Area Land Transfer Regulation Act of 1959.

The Adivasis petitioned the government, unsuccessfully, for two decades to grant title deeds. Finally, they enlisted the help of SAMATA, a small voluntary social action group. SAMATA successfully filed public interest litigation (PIL) writs on their behalf. The PILs were filed on the basis that the Government was also a 'person' and as such, was a non-tribal and did not have the power to transfer tribal lands to non-tribals.

As a result of their judicial success, the Adivasis gained courage and organised themselves to demand land rights. After a drawn out, two-and-a-half year legal battle at the provincial High Court and a two-year battle at the central Supreme Court, the Supreme Court gave its historic judgement in July 1997.

The 1997 SAMATA judgement

The Supreme Court ruled as follows:

- The Court recognised the 73rd Constitution Amendment Act and the Andhra Pradesh Panchayat Raj (Extension to Scheduled Areas) Act allows local bodies to act as institutions of self-government.
- The Court ruled that Government lands, forest lands, and Adivasi lands in Scheduled Areas cannot be leased out to non-Adivasi or private industries, including the mining industry.
- The Court held that the transfer of leases is prohibited.

- The Court reiterated the need to give the right of self-governance to Adivasis.
- The Court directed that at least 20% of the net profits of companies be set aside in a permanent fund for the establishment and maintenance of water resources, schools, hospitals, sanitation, and transport facilities, and that this 20% allocation did not include expenditure for reforestation and the maintenance of the ecology.

All mining operations in the region came to standstill during the legal battle. The company finally offered Rs.1,500,000 compensation per acre of wetland, instead of the original Rs.1,500 per acre. A joint petition by the State of Andhra Pradesh and the Central Government asking the Court to modify the SAMATA order was dismissed. The original court decision stands.

Strategies and Tools

Environmental justice must be a multi-tiered approach that encompasses media, community organisations, non-government organisations (NGOs), and any other willing participant. Together, they can achieve more than could be achieved through individual action. The strategies and tools used in the SAMATA case include:

1. **Community mobilisation**
   While SAMATA brought the PIL to court, the local community initiated civil society measures, such as protests, through their own initiative. Organising protests indicates a certain level of confidence. For a community that has historically faced severe oppression, the confidence to organise protests is a great gain.

2. **Effective use of constitutional provisions**
   The SAMATA writ petition successfully used two constitutional provisions in arguing for the revocation of the mining leases: The Fifth Schedule of the Constitution, which forbids the transfer of tribal land to a non-tribal, and Article 21 of the Constitution, which guarantees the right to life.

3. **Effective use of non-legal tools**
   The Adivasi struggle in Andhra Pradesh encompassed the use of media outlets and networks of community organisations in a struggle against the government and mining industry. The government and industry had access to more monetary and legal resources than the Adivasis. However, the use of multiple non-legal tools (networking with other campaigns and movements, linkages with scientific and academic communities, media advocacy, dialogue with the government, and legal action and advocacy) gave the community groups the ultimate edge in their struggle.

4. **Interlinking of civil rights and environmental rights**
   The Court stated that the right to life is beyond mere survival or an animal existence. Instead, the right to life means a right to live with human dignity with a minimum sustenance and shelter. The Adivasis, therefore, have a fundamental right to social and economic empowerment — the lands in scheduled areas are preserved for the social and economic empowerment of the Adivasis. The combined force of constitutional provisions granted environmental rights using human rights provisions, without explicitly listing environmental rights. This interlinking of environmental rights and human rights is fundamental to environmental justice.

CHAPTER 2: LEGAL GATEWAYS

In this Chapter

- *Legal gateways defined*
- *Five gateways to environmental justice*

Definition

Legal systems are the primary way in which rights are enforced and protected. However, they are often criticised for being too complex, time-consuming and expensive. The environmental justice context is no different. In fact, there are added complications in environmental justice cases because:

- Environmental justice cases often centre on sensitive issues, such as land rights for marginalised communities.
- Environmental protection suffers more from judicial time delays because every passing day can result in additional damage to the environment and/or communities or public health that is often irrevocable.

The ability of individuals to access legal systems and law-making processes is a primary focus of environmental justice advocates. The ways in which legal systems and laws can be accessed are called legal gateways. The abundance, or conversely lack, of available gateways indicates an individual's level of access to the legal system.

The ways in which legal systems and laws can be accessed are called legal gateways.

Legal gateways can be classified into two different categories:

1. Gateways that access the way laws are made.
   - Lobbying or administrative review (i.e., the review of administrative agency actions by a neutral party)

2. Gateways that access the way laws are applied.
   - Litigation activities to enforce laws that have already been created, and public interest litigation where individuals bring a legal action to protect the existence of fundamental rights.

Legal gateways are important because, no matter how active the judiciary may be, without access to legal measures the legal system is a meaningless tool to the people who cannot access it.

For access to environmental justice there are five commonly used gateways:

1. Actual legal remedies
2. Statutory consultation procedures
3. Administrative review
4. Defensive use of the legal system
5. Alternative dispute resolution

Actual Legal Remedies

Actual legal remedies are remedies provided by laws and regulations, e.g., public interest litigation (PIL) writ petitions.

Actual legal remedies are remedies that are provided by laws and regulations. Any time the legal system is used to enforce a legally guaranteed right is an example of an actual legal remedy.

For example: Many environmental protection regulations impose fines on violators. Going to court to enforce those fines is an example of an actual legal remedy.

Public interest litigation (PIL) writ petitions fall under the actual legal remedies gateways. A more detailed analysis of PIL is presented in Annex 2. Briefly, public interest litigation is a form of legal action that allows individuals to access the judicial system with more relaxed procedural rules. PIL writ petitions may only be filed for issues of public interest, such as environmental protection or the protection of fundamental rights. Apart from PIL, some environmental protection legislation includes a provision which allows citizens to enforce the content of the legislation. Using the 'citizen suit' provision, individuals can bring suit before the court when the state fails to enforce the statute.

One of the benefits of PIL is that writ petitions can be filed directly with a competent court or judge and are not subject to the same rigorous and tedious procedural rules as other petitions. However, due to the large judicial backlog that exists in most countries, even with the relaxed procedural rules, PIL writ petitions can take years to be reviewed. However, even if unsuccessful, PILs can be used as mobilising tools to gather community support and momentum on issues of environmental justice.

Statutory Consultation Procedures

Statutory consultation procedures refer to statutory requirements for community consultation.

For example: Within a statute that governs construction projects or permitting procedures, the section that requires some form of community consultation is a statutory consultation procedure.

Many statutes require an environmental impact assessment (a document that states the environmental impact a project may have) before a permit can be issued or construction can take place. As part of the assessment, communities must be consulted to inform them of the project, what the environmental impacts will be and how these impacts will be mitigated. This process is an example of a statutorily required consultation procedure.

Administrative Review

Administrative review is the review of an administrative act or decision of an agency or branch of the government (such as government departments or ministers) by a neutral party. Administrative review improves the public accountability of government. There are two main benefits to administrative review:

- It enables citizens to monitor the legality and merits of governmental decisions that affect them.
- It is a measure of accountability for government decision-making.

Traditionally, one of the main functions of the judiciary is to conduct administrative reviews of government agencies or administrative acts to determine whether they conform to legal requirements.

For example: If the Forest Department passed a regulation impacting on community forestry, the community affected could ask the judiciary to review the Forest Department action to see if it abides by existing laws and regulations. If the judiciary determines that the action is not legal, the Forest Department would be forced to withdraw its action.

This is different from a legal action because there are no rights involved. The community asking for administrative review is only asking the judiciary to review the legality of the decision-making process and result. They are not asking for any rights to be protected or created.

Defensive Use of the Legal System

Defensive use of the legal system is for citizens who want to use the legal system, not to positively assert a right, but to block an action or policy. In essence, the legal system is used to 'defend' citizens against government policy or action. Normally, the courts are approached to protect or assert the rights of citizens. When using the legal system in a defensive way, the courts are approached to stop the government from enacting a policy or regulation. Further, when an individual or corporation's action is likely to violate the rights guaranteed by the Civil Liberties Act, the legal system is used in a defensive way to prevent violation of those rights.

For example: If the government were to pass a regulation banning NGO activity in certain areas, such as areas where natural resource uses are in conflict, citizens could approach the courts to block this regulation. The courts would then be asked to defend the citizens and NGOs against a government action.

The legal system can be used defensively to block an action or policy, instead of merely positively asserting a right.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) is an alternate way of resolving disputes without going to court. Typically, in an alternative dispute resolution both parties agree to be bound by the decision of a neutral arbitrator. The neutral arbitrator is someone who both parties have agreed to present their cases to. The arbitrator, after hearing both sides, comes to a conclusion that both parties must accept based on the guiding legal principles that govern the case.

Once parties have agreed to ADR, the decision of the arbitrator cannot be appealed to a court, unless there is gross misconduct by the arbitrator. The benefit of ADR is that it is a much quicker way of resolving disputes. The risk, however, is that any decision must be accepted without any availability of appeal.

For example: If two families were fighting over a plot of land, both parties could agree to go through ADR to resolve their dispute, instead of filing a claim in court. The arbitrator does not need to be a judicial administrator. The parties could appoint a community leader or elder to hear the claim and come to a decision.

Table 1: Legal gateways

Legal Gateway	Use	Advantages	Disadvantages
Actual Legal Remedies (e.g. PIL)	To enforce remedies provided by law, e.g., to protect the environment or fundamental rights	• PIL writs can be filed directly with a judge. • Not subject to strict procedural rules. • Even if not successful, PIL publicises the issue and may lead to policy change.	• Litigation may take many years. • Costly
Statutory Consultation Procedures	To ensure community consultation	• Enforced by an application to the court, not a full court case; therefore, quicker and less expensive than some other legal actions. • Allows community to voice concerns and express how they feel about the project. • Gives community notice of project so that action can be taken if opposed to the project.	• Limited effectiveness — can only result in the court ordering community consultation. • There is no requirement for community concerns to be followed.
Administrative Review	To review an administrative act of a government body	• Allows citizens to monitor government decisions. • Encourages government accountability. • Less formal than some other legal actions. • Less expensive than some other legal actions.	• No rights are involved so the court can only hold that the government action is legal or illegal.
Defensive Use of Legal System	To block an action or policy of the government	• Allows citizens to stop the government from doing something. • Quicker and less expensive than some other legal actions.	• Formal legal procedures must be followed.
Alternative Dispute Resolution	To resolve disputes without going to court	• Accessible • Inexpensive or free • Informal • Can be very quick • Decision is made by someone with local knowledge at the local level. • Education no bar to access.	• Decision is binding; cannot be appealed to a court. • Sometimes considered 'rough justice'.

CHAPTER 3: CUSTOMARY AND FORMAL LAW

In this Chapter

- *Customary law and legal systems defined*
- *Comparison of customary law and formal law*
- *Conflict between the two systems*

Definition

Every country has a formal legal system that is defined by a uniform set of state-made, formal laws. Customary law, on the other hand, is a non-state legal system that parallels the system of formal laws.

Customary law, also called traditional law, is not a fixed set of rules or instructions on how to use land and other resources. Instead, customary law is more of an expression of social relationships. It is an evolving body of norms and rules that governs the behaviour of a community. Formal law is *for* the community. Customary law is *within* the community.

Customary law, or traditional law, is an evolving body of norms and rules that governs the behaviour of a community.

Customary laws are an integral part of the social, political and economic ways of the societies that follow them. Customary laws are integrated into the moral code of a community. There is no separate legal system or sphere in communities that follow customary law. Customary law covers issues ranging from conflict resolution mechanisms, to irrigation, to social customs and morals.

The use of customary law has three distinct advantages.

1. The officials presiding over the dispute live within the community and are, therefore, very familiar with the applicable customary law.
2. The customary court procedures are relatively flexible, especially when compared to formal legal systems.
3. There is a high possibility of reconciliation and compromise because the dispute usually goes through several steps of resolution.

For example: In the Chittagong Hill Tracts a dispute is first taken before the karbari (village chief or elder) who sits with a council of influential social leaders and other village elders who try to resolve the matter through informal hearings. If the matter cannot be resolved by the karbari it goes before the headman or clan chief.

Customary and Formal Law Compared

There is often a struggle between formal legal systems and customary systems. Formal legal systems, by their very nature, are strict and inflexible. In contrast, customary laws are the exact opposite and remain fluid and easily adaptable. Problems occur when formal legal systems try to force formal legal rules on communities that follow customary norms and laws.

Sanjoy Madnani

Local community leaders meeting in Nagaland, India

For example: Many customary legal systems encourage group ownership of resources, such as forests. This is incompatible with the more individualistic nature of formal law. Trying to force the customary notion of group ownership into a formal, individualistic regime would not result in any workable compromise.

Table 2: Comparison of customary and formal law

Customary Law	Formal Law
Customary law is usually unwritten and is not codified. It is not restricted and limited to a set definition or meaning.	**Formal laws**, or statutory laws, are written and codified. They are formally recorded and referenced in writing.
Customary laws are created from within a community and are socially accepted and observed.	**Formal law** is created by a state-entity, such as the parliament or legislature. It is accepted and observed, not necessarily through social acceptance, but through a formalised system of rule-making.
Customary laws, due to their more informal nature, can change more easily than formal laws. Customary laws change when the particular needs and interests of a social group change.	**Formal laws** are more difficult to change. Formal laws can be changed only by following certain set criteria and rules.

Formal legal systems are strict and inflexible; customary laws are fluid and adaptable.

For example: In the natural resource context, an example of customary law would be the community forest management methods used by indigenous people who work and live within the forests. There are rules and norms by which people are expected to abide. However, they are unwritten and they are created out of and by the community. An example of formal law would be the actual statutes that govern the land according to the government. For example, the Indian Forest Conservation Act, which sets out who can control the forests and who can benefit from the forests, is formal law. It is written and it was passed by the legislature and is meant to govern all individuals, not just specific communities.

Conflict between Customary and Formal Systems

In the environmental justice context, the distinction between customary and formal law is particularly relevant.

For example: In South Asia, there are several indigenous communities that practise jhum, or shifting cultivation. The ways in which the shifting cultivation is regulated and how the land is divided is provided for in customary rules and norms. However, if jhum cultivation is outlawed in the formal legal system, the communities practising jhum are left without a livelihood and the formal legal system comes into direct conflict with the customary system.

On an individual dispute level, there are two different conflilct scenarios:

1. Conflict between individuals both of whom are bound by customary law.
2. Conflict between individuals where only one abides by customary law.

Table 3: Conflict scenarios in customary law and formal law

Scenario 1: Conflict between individuals where both follow customary law Under this scenario, customary law would bind both individuals and the dispute resolution mechanisms provided for by customary law would be used.	Advantages: • The individual or group that would determine the outcome of the dispute would be from the same community and familiar with the community's customs and practices. • Due to the informal nature of customary law, disputes can be resolved quickly and without the same restrictive procedures as formal law. Disadvantages: • The decision of the elder, tribal council or arbitrator is final and cannot be appealed to a higher body. • While customary law may have evolved out of the community's customs and practices, this does not guarantee that it is equitable. • Customs take years to evolve and change. Inherent discrimination, such as caste or gender discrimination, can appear in customary laws and may result in an unjust decision.
Scenario 2: Conflict between individuals where one follows customary law Under this scenario, two issues arise:	Issue One: • What venue will hear the dispute; will it be a formal legal court or will it be a customary court? Issue Two: • What law will be applied? Customary law binds those that follow the set customs and norms of a certain community. Formal law binds those that do not follow customary law.

Customary and Formal Law in the Chittagong Hill Tracts

Background

The Chittagong Hill Tracts (CHT) are located in the south-eastern corner of Bangladesh. Historically, the CHT had its own governing administration separate from the rest of Bangladesh. As a result, the CHT today applies a mixture of customary, regional, and national laws.

The traditional institutions of the CHT, to a limited extent, regulate the use of natural resources in their respective jurisdictional areas or territories. The jurisdiction of the traditional institutions, however, applies only in the administration of customary laws, not formal laws. While customary laws on personal matters, such as family laws, do not face much interference from State or national laws, customary laws with respect to land and other natural resources are much more contested. Customary land and forest rights are upheld only when they do not conflict with state law.

Formal and customary land laws

Since the CHT was annexed to British Bengal in 1860, both customary and formal land laws have been in place. However, the two systems are often in conflict. This conflict is not surprising as customary land laws evolved around communal and subsistence resource management. Formal land laws, on the other hand, focus more on individual ownership or commercial resource management and are exchange-oriented.

The authority over the management and administration of customarily held lands, such as forests, jhum land, and grazing commons, lies mainly with the headmen and the chiefs of the community. At the same time, this authority is also held by the State at the district level. The district level authority is more clearly defined than the authority of the traditional leaders. This results in the authority of government officials over untitled and recorded lands being more highly regarded than the authority of the indigenous institutions.

For example, the overall authority to regulate jhum cultivation lands is expressly given to the Deputy Commissioner, the central government's representative in the hill districts. In practice, however, the allocation of jhum lands is done according to customary law and local practice and usage. The process is completed under the authority of the headmen. The role of customary practices is not explicitly mentioned, but allowing the traditional authorities to have a direct role in land and natural resource management and administration is an implicit acknowledgement of customary law by the formal legal system.

Customary resource rights

In addition to jhum, customary resource rights over grazing lands, water bodies, and hunting are also important. Some of these rights, such as the rights over water bodies and hunting, are not directly acknowledged by legislation. Others, in relation to grazing commons and grasslands, are indirectly acknowledged in a manner similar to the jhum example. Finally, some rights, such as the right to use timber, bamboo, and other minor forest products for domestic purposes are explicitly acknowledged by formal legislation.

The problem with the co-existence of formal and customary legal systems is that when a conflict arises, the formal legal system rules are likely to prevail. Indigenous peoples' customary rights have come to be regarded as mere privileges that can be revoked by the State at will.

See Chapter 4 for more information on the CHT.