

Trans-boundary Legislative Impact Assessment of the Kailash Sacred Landscapes: Interpreting Legal Adaptation Through the Cross-Stakeholder Interface

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Abstract

The Kailash Sacred Landscapes evokes a deep-rooted religious affiliation for the Hindus in India, Nepal and the Buddhists in India, Nepal and Tibet Autonomous Region or the Xizang Autonomous Region. A myriad of international conventions, charters, declarations and guidelines emanating from The United Nations Educational, Scientific and Cultural Organization and International Council on Monuments and Sites and International Union for Conservation of Nature, pertaining to cultural landscapes and sacred sites have been documented and applied, but the issues relating to inclusive participation of the stakeholders are abstract. In India, China and Nepal, since the ratification of *World Heritage Convention* (1972), there are national legislation that recognise the notion of cultural heritage, relics, monuments and sites, but do not recognise the notion of cultural landscapes, primarily because the interpretation of heritage is often monument-based conservation or of built heritage. In the domain of natural heritage, the environment and the biodiversity Acts function in water-tight compartments and are not in coordination with their cultural counterpart, thus leaving room for interpretation of legal adaptation in consonance with cultural adaptation and ecological adaptation.

The uniqueness of the Transboundary Kailash Sacred Landscape is studied accordingly, to map the evolution of the international standards pertaining to the inclusive participation of indigenous communities in transboundary conservation. Thereafter, the domestic legislation of China, Nepal and India are re-assessed to comprehend the interconnected themes of custodianship of indigenous cultures coupled with the threat of cultural assimilation, traditional community livelihood, their intangible value systems for protection and management of diverse informal ecosystems in a transboundary landscape.

Keywords: *Kailash Sacred Landscape, Indigenous Rights, Legislative Framework*

Résumé

Le paysage sacré du Kailash évoque une affiliation religieuse profondément enracinée pour les Hindous en Inde et au Népal, et pour les Bouddhistes en Inde, au Népal et dans la région autonome du Tibet ou la région autonome du Xinjiang. Une myriade de conventions internationales, de chartes et de recommandations émanant de l'Organisation des Nations unies pour l'éducation, la science et la culture, du Conseil international des monuments et des sites, ou de l'Union internationale pour la conservation de la nature, en rapport avec les paysages culturels et les sites sacrés, ont été documentées et appliquées, mais les problématiques relatives à la participation inclusive des parties prenantes sont abstraites. En Inde, en Chine et au Népal, depuis la ratification de la Convention du patrimoine mondial (1972), il existe des lois nationales qui reconnaissent les

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notions de patrimoine culturel, de reliques, de monuments et de sites, mais elles ne reconnaissent pas celle de paysages culturels, principalement parce que l'interprétation du patrimoine est souvent fondée sur la conservation des monuments et le patrimoine bâti. Dans le domaine du patrimoine naturel, les lois sur l'environnement ou la biodiversité fonctionnent en compartiments étanches et ne sont pas coordonnées avec leur homologue culturel, laissant ainsi la place pour une interprétation de l'adaptation juridique en accord avec l'adaptation culturelle et l'adaptation écologique.

La singularité des paysages sacrés transfrontaliers du Kailash est étudiée en conséquence, pour cartographier l'évolution des standards internationaux concernant la participation inclusive des communautés autochtones dans la conservation transfrontalière. Par la suite, les lois nationales de la Chine, du Népal et de l'Inde sont réévaluées afin de comprendre les sujets interconnectés de la tutelle des cultures autochtones couplée à la menace d'assimilation culturelle, des moyens de subsistance des communautés traditionnelles, et de leurs systèmes de valeurs intangibles pour la protection et la gestion de divers écosystèmes informels dans un paysage transfrontalier.

Mots-clés : *Paysage sacré du Kailash, droit des peuples autochtones, cadre juridique.*

Introduction

This paper focuses on the re-examination of legislation of India, China and Nepal pertaining to the conservation of the Transboundary Sacred Landscape of Kailash. Key to the central theme, the paper introduces the notion of legal adaptation as an axiomatic recourse to re-evaluate issues of inclusive participation, economic, technological and legal revitalisation in the cross-stakeholder interface of the Integrated Transboundary Approach. The notions of cultural landscape, sacred sites and transboundary conservation are explored, through international charters and conventions as a theoretical pivot, to offer a neutral yet cogent understanding of the development of the interconnected themes of custodianship of indigenous cultures coupled with the threat of cultural assimilation, traditional community livelihood, their intangible value systems for protection and management of diverse informal ecosystems in a transboundary landscape. Analogous to the theoretical pivot, a historical mapping of international charters and conventions is undertaken, to account for a holistic purview of the evolution of nature–culture linkages and their role-defining significance in the production of consensus amongst the recognised and under-recognised national and international stakeholders, particularly the World Heritage nomination of transboundary landscape, against which the domestic regulatory efficacy paradigm of the governance framework of India, China and Nepal is tested.

Part 1. Interpretation of Cultural Landscape and Sacred Sites

As the Venice Charter initiated monument-based conservation in isolated silos, the 19th-century convergence of the Stockholm Conference and the *World Heritage Convention* in 1972 spearheaded the nature–culture journey, which is still at a nascent stage, considering the challenges of implementation and re-calibration of inclusive community participation in diverse ecosystems, especially in a transboundary conservation landscape. The definitions of cultural landscapes and sacred sites have always linked community participation with traditional custodianship, because both are essentially symbiotic, the existence of one is essential for the sustenance of the other.

To quote the World Heritage Committee, cultural landscapes are the “combined works of nature and man [...]they are illustrative of the evolution of the human society and settlement over time, under the influence of the physical constraints and opportunities presented by their natural environment and successive social, economic and cultural forces, both external and internal.”¹

Community participation also remains a key consideration in the interpretation of Sacred Sites. They are defined as a form of landscape where traditional communities assign a special status; invoked through perception of residing deities and spirits, or spiritual sites for contemplation, meditation and spiritual enlightenment.² They can be traced to traditional knowledge of the communities in protecting and conserving the diverse ecosystems, mostly in mountains, rivers, lakes, forests (groves) caves and even islands. They endorse concepts of traditional custodianship and customary land tenure as a means of protecting vast ecological reserves.³

The diverse traditional knowledge systems and the associated intangible values in a transboundary conservation area justify the dominant role of legal adaptation as a mutually cooperative process, where policies of diverse jurisdictions, different legal and institutional structures and their distinct management and governance regimes come together, to overcome their differences in order to achieve conservation goals across one or more international

¹ Nora J. Mitchell and others (eds), *World Heritage Cultural Landscapes: A Handbook for Conservation and Management* (UNESCO World Heritage Centre 2009).

² Thomas Schaaf and Cathy Lee, *Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes: International Symposium Tokyo (Japan), 30 May - 2 June 2005* (UNESCO 2006).

³ *Ibid.*

boundaries.⁴ The major sectors are ecology and conservation, livelihoods and development and management and planning.⁵ The definitions have come a long way; though it is merely illustrative of the democratization of the process, it does entail legitimization of community stakeholdership, subject to the indoctrination of the state governance frameworks in the landscape conservation domain.

The historical connection, in this context, provides a solid substratum to develop an argument that legal adaptation, alongside cultural adaptation and ecological adaptation must coexist in the indoctrination process to sustain the regulatory efficacy paradigm. To map the evolutionary inter-dependence of community and nature, citing the 19th century union between the natural sciences and the biological sciences is relevant. It integrated society and environment, subject to continuous evolution; the morphological interpretation resulting from the interplay between cultural values, customs and land use practices.⁶ While interpreting the notions of landscape, the inherent cultural construct relates to the perpetual interplay between the key tangible and intangible values found in it.⁷ Pre-1980, the evolution of cultural landscapes remained as cultural products, and we have seen more often than not the term cultural property associated with it, as well as monument-based conservation factors at the time. But post-1980, the trend meanders towards the definition and interpretation of cultural processes associated with the landscape; an ideological representation of systems and structures of signification and domination.⁸ Modern approaches to cultural landscape preservation connects disciplines such as planning, cultural heritage preservation, rural development, nature conservation and forestry⁹, traditional skills and development of knowledge-bases etc., not to mention historical elements infused with

⁴ International Union for Conservation of Nature, “Transboundary Conservation” <<https://www.iucn.org/commissions/world-commission-protected-areas/our-work/transboundary-conservation>> accessed on 10 April 2022

⁵ Janita Gurung and others, “Evolution of a Transboundary Landscape Approach in the Hindu Kush Himalaya: Key Learnings from the Kangchenjunga Landscape” (2019) 17 *Global Ecology and Conservation* e00599, 9. <<https://doi.org/10.1016/j.gecco.2019.e00599>>.

⁶ Ken Taylor and Jane Lennon, *Managing Cultural Landscapes* (Routledge 2012) 2. <<https://doi.org/10.4324/9780203128190>> See also Julie Riesenweber, ‘Landscape Preservation and Cultural Geography’, in R. Longstreth and S.C. Boyle (eds.) *Cultural Landscapes: Balancing Nature and heritage in preservation practice*. (2008 University of Minnesota Press).

⁷ Maja Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach* (Craig Groves and Adrian Phillips (eds.) International Union for Conservation of Nature 2015). <<https://portals.iucn.org/library/node/45173>> accessed 9 April 2022. <<https://doi.org/10.2305/iucn.ch.2015.pag.23.en>>.

⁸ Mauro Agnoletti, *The Conservation of Cultural Landscapes* (CABI 2006). <<https://doi.org/10.1079/9781845930745.a>>.

⁹ Mauro Agnoletti, “Introduction: Framing the Issue – a Trans- Disciplinary Reflection on Cultural Landscapes” 10. <<https://doi.org/10.1079/9781845930745.0000>>. Christopher Rodgers, “Environmental Impact Assessment: Mapping the Interface between Agriculture, Development and the Natural Environment” (2011) 13 *Envtl L Rev* 85 <<https://doi.org/10.1350/enlr.2011.13.2.119>>.

archaeological and ethno-anthropological perspectives.¹⁰ The question, therefore lurks, whether this inter-connectedness of disciplines is adequately adapted by legislation, in order to achieve the desired outcomes.

The principles of democratization of stakeholdership and adaptation of inclusivity are also found in the Six Principles¹¹ advocating the management framework of the cultural landscapes. They have been actively guiding the stakeholders such as government agencies, other non-governmental and international organisations engaged in advisory capacities, and individuals as activists or custodians, engaged in the management of cultural landscapes. The First Principle and the Second Principle are co-extensive. They state that People associated with the cultural landscape are the primary stakeholders for stewardship. Inclusivity through dialogue and agreement should be maintained at all levels of stakeholder interactions in order to foster the principles of fair and transparent governance. The Third Principle indicates that the value of the cultural landscape is based on the interaction between people and their environment and the consequential relationship between the two interfaces. The Fourth, Fifth and Sixth principles are read together in order to form a coherent analogy: the principles focus on balancing the evolving nature of the landscapes and guiding towards sustaining a value retention framework in consonance with the principles of sustainable development, in the context of a larger all-encompassing, ever- evolving landscape.

Part 2. Cultural Landscapes – International Legal Framework

As mentioned earlier, the historical overview of the legal framework relating to cultural landscapes not only introduces the essential notions of values and authenticity of attributes, it also maps the process of adaptation of various correlative and necessary principles on an international scale. The authenticity paradigm links the cultural process of the landscape to the world heritage nomination process, whereby unique testimonies to almost extinct cultural traditions can represent tangible associations of living traditions. They can thrive, and conserve the biological diversity of landscapes for the world to witness in their wholesomeness. But this is only possible if adaptation-induced legal frameworks are integrated into institutional indoctrination. At this juncture, this correlation is deemed necessary for the purposes of the paper, as it will build upon re-evaluations of domestic legislations against contemporary international standards.

¹⁰ Alan Bond and others, "Dealing with the Cultural Heritage Aspect of Environmental Impact Assessment in Europe" (2004) 22 Impact Assessment and Project Appraisal 37. <<https://doi.org/10.3152/147154604781766085>>.

¹¹ Mechtild Rössler, 'World Heritage Cultural Landscapes: A UNESCO Flagship Programme 1992 – 2006' (2006). 31 Landscape Research 333. <<https://doi.org/10.1080/01426390601004210>>.

Contextually, the notion of cultural landscapes and their attributes of religious, artistic and cultural associations of their natural elements was incorporated in the 16th session of the World Heritage Committee in Santa Fe¹² by an amendment in the 1992 Operational Guidelines for the Implementation of the World Heritage Convention, though originally posited in the Operational Guidelines of the *World Heritage Convention* (1977).¹³ Later, the International Council on Monuments and Sites (ICOMOS) Burra Charter 1979 introduced the term “cultural significance” in relation to archaeological sites, spiritual and religious places and merged associative intangible cultural aspects of heritage drawn from memories of the communities associated with that place, a precursor to the *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).¹⁴ To accommodate and legitimize the Japanese conservation practices of periodic dismantling, repair and re-assembly of wooden temples, a transcending stride towards authenticity can be seen in the Nara Document on Authenticity (1994).¹⁵ Quoting Stovel, “...credibility of related information sources may differ from culture to culture, even within the same culture. It is thus not possible to base judgements of values and authenticity within fixed criteria. On the contrary, the respect due to all cultures requires that heritage properties must be considered and judged within the cultural contexts to which they belong.”¹⁶ The Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage also voices a similar coherent framework.¹⁷

Not only ICOMOS, but the International Union for Conservation of Nature (IUCN) has been making positive strides since 1994, when it incorporated landscapes and seascapes as “areas of land, with coast and sea as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity.”¹⁸ Also, in the same year, the World Heritage Committee’s Global Strategy endorsed an inclusive approach by including thematic studies of

¹² ‘World Heritage Papers 7; Cultural Landscapes: The Challenges of Conservation 2002’ 193.

¹³ Sophia Labadi, World Heritage, authenticity and post-authenticity: International and national perspectives, *Heritage and Globalisation* (Routledge 2010) 89, <<https://doi.org/10.4324/9780203850855>>.

¹⁴ “Charters and Conventions: The Internationalisation of Heritage, 1945–89” in Miles Glendinning, *The Conservation Movement: A History of Architectural Preservation* (Routledge 2013) <<https://www.taylorfrancis.com/books/9781136167027/chapters/10.4324/9780203080399-21>> accessed 9 April 2022.

¹⁵ “The Nara Document On Authenticity” 4. See also, Ken Taylor, “Cultural heritage management: a possible role for charters and principles in Asia”, (2004) *International Journal of Heritage Studies*, 10:5, 417-433, DOI: <10.1080/1352725042000299045>.

¹⁶ “Charters and Conventions: The Internationalisation of Heritage, 1945–89” (n 15).

¹⁷ Mechthild Rössler, “Applying Authenticity to Cultural Landscapes” (2008) 39 *APT Bulletin: The Journal of Preservation Technology* 47.

¹⁸ Schaaf and Lee (n 2).

traditional cultures and environment of Asia and Africa because they lack adequate representation. Additionally, the Seville Strategy for Biosphere Reserves 1995, under the aegis of the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Man and the Biosphere Programme recommends the use of biosphere reserves as models of land management along with the principles of sustainable development; to include areas where traditional lifestyles and indigenous uses of biodiversity are practices including sacred sites.¹⁹ The Task Force of the World Commission on Protected Areas of IUCN,²⁰ also delved into diverse taxonomies of Transboundary Conservation Areas to define the significance of Cultural and Spiritual Values of Sacred Natural Sites. The Tokyo Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the conservation of Biological and Cultural Diversity, 2005²¹ under the aegis of UNESCO, United Nations University, IUCN, UN Convention on Biodiversity, United Nations Permanent Forum on Indigenous Issues, and Food and Agriculture Organization of the United Nations emphasizes the significance of the spiritual well-being of the indigenous peoples and speaks of collaboration between the officially recognised stakeholders (governments, protected area managers, non-governmental organisations) and the unofficial custodians (indigenous peoples and the local communities through the right based inclusive, consensual and participatory approach).²² The inclusivity in stakeholder relationship is also reiterated in the UNESCO/IUCN Working Guidelines for the conservation and management of the sacred natural sites, which infuses the spiritual well-being with the mutually reinforcing and interdependent biological and cultural diversity of the sacred sites or landscapes.²³

In addition to the above, the Working Guidelines also explore coextensive issues of conflict and mistrust in the stakeholder interface, usually between governmental agencies and local communities. They weave together myriad sectors relating to recognition and valorization of the sites, cultivating a balance between modern scientific knowledge and traditional knowledge, traditional belief systems and values woven across the human –nature relationships through intercultural, peaceful and inclusive dialogue, thus fostering the cultivation of a Symbiocene approach rather than an Anthropocene one.²⁴

¹⁹ *Ibid.*

²⁰ Denis Byrne, "The WCPA's Natural Sacred Sites Taskforce" in Denis Byrne, Sally Brockwell and Sue O'Connor (eds), *Transcending the Culture–Nature Divide in Cultural Heritage*, vol 36 (ANU Press 2013) <<http://www.jstor.org/stable/j.ctt5hg2n.15>> accessed 13 May 2022. <<https://doi.org/10.22459/ta36.12.2013>>.

²¹ Rössler (n 12, 17).

²² Schaaf and Lee (n 2).

²³ Rössler (n 12, 17).

²⁴ Karubaki Datta, "The Challenges of Conservation and Development in the Sacred Landscape of Demojong in West Sikkim" (2020) 45, *The Tibet Journal*.

The Akwe` Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments on Sacred Sites, Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities were adopted from the recommendations of the Ad Hoc Working Group on Article 8(j)²⁵ of the Conference of the Parties of the Convention of Biological Diversity, 2000.²⁶ It is path –breaking, in the sense it proposes an accountability clause, where the cultural, environmental and social concerns of indigenous and local communities should be included in the impact assessment process, “especially of women, who bear a disproportionately large share of negative development impacts.”²⁷ More specifically, the guidelines²⁸ emphasize the ownership question of the traditional knowledge, innovations and practices of indigenous communities. The 2005 International Conference in Xi’an China stressed the significance of the cultural and social dimensions of the landscapes which are imbued with “complexity of ownership, legal structures, economic and social pressures that impinge on the physical and cultural settings of immovable heritage assets.”²⁹

The Hoi An Protocols for Best Conservation Practice in Asia, published by UNESCO in 2009, includes guidelines for safeguarding, preservation and management for cultural landscapes, archaeological sites, underwater cultural heritage sites, historic urban sites and heritage groups and monuments, buildings, and structures. It calls for identification and documentation of tangible and intangible elements of a landscape and incorporating inclusive participatory approach while safeguarding them.³⁰

To conclude, the analysis of the labyrinth of charters, conventions and recommendations does successfully capture the fluidity and the ever-encompassing nature of the definition of the cultural landscapes inspired by the likes of Carl Sauer, Fred Kniffen, and Wilbur Zilenski, David Lowenthal, Pierce Lewis, Marwyn Samuels, Donald Meinig, Tuan, Dennis Cosgrove, Duncan and

²⁵ Parties undertake to respect, preserve and maintain the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.

²⁶ Inkeri Markkula, Minna T. Turunen and Sini Kantola, "Traditional and Local Knowledge in Land Use Planning" (2019) 24 Ecology and Society <<https://www.jstor.org/stable/26796911>> accessed 13 May 2022. <<https://doi.org/10.5751/es-10735-240120>>.

²⁷ Schaaf and Lee (n 2).

²⁸ Jenny Springer, "Addressing the Social Impacts of Conservation" (2009) 7 Conservation and Society 26. <<https://doi.org/10.4103/0972-4923.54794>>.

²⁹ *Xi'an Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas*, 15th General Assembly of the International Council on Monuments and Sites, 21 October 2005 <<https://www.icomos.org/charters/xian-declaration.pdf>> accessed on 12 April 2022.

³⁰ Patrick T. Daly and Tim Winter (eds), *Routledge Handbook of Heritage in Asia* (Routledge 2012). <<https://doi.org/10.4324/9780203156001>>.

historians such as W.G Hoskins. The previous examples of legal adaptation coinciding with cultural and ecological adaptation take a backseat as they reflect more directly the attributes of a geographer, historian, anthropologist, ethnographer or an archeologist or a landscape architect.³¹ Strictly speaking, the inclusivity and rights-based adaptive paradigm of essential stakeholders like the traditional and the indigenous communities, the local populace and forest dwellers are elusive in the documents. Although the international principles mention the rights, privileges and liabilities of custodians involved in the protection of the sites, the implementation mechanisms backed by state laws lacks feasibility of implementation between cross-stakeholders in a trans-boundary context.

Nevertheless, the international standards have evolved from mere aesthetic appeals to culturally significant ones, the tangible contents supplemented with their essentially intangible counterparts and both considered worthy of protection. Traditional settlements were recognised as stakeholders and included in collaborative efforts and impact assessment processes. However, one needs to test the veracity of the doctrinal standards against the practicalities of the landscape, so that the regulatory efficacy is sustained.

With the same vein, this paper analyses the doctrinaire norms against the Transboundary Sacred Site of Kailash, to assess the aforementioned paradigms. Before doing so, the paper briefly describes the contours of the landscape in order to capture certain tangible as well as intangible particularities, which will further the argument for an inclusive cross-stakeholder perspective in transboundary conservation.

Part 3. Kailash Sacred Landscape

The Kailash Sacred Landscape (KSL), situated in the Hindu-Kush Himalayas, is a transboundary mountainous area, with a diverse, vulnerable topography that ranges across an extensive region that includes the remote southwestern expanses of the Tibet Autonomous Regions (TAR) of China and contiguous areas of Nepal and India.³² It covers at least four major geological and physiographic zones, from the densely inhabited lesser Himalayan Zone in the

³¹ Adrian Phillips, "The Nature of Cultural Landscapes — a Nature Conservation Perspective" (1998) 23 Landscape Research 21. <<https://doi.org/10.1080/01426399808706523>>.

³² K.P. Oli and R. Zomer, "Kailash sacred landscape conservation initiative: feasibility assessment report" (2011), International Centre for Integrated Mountain Development (ICIMOD). <<https://doi.org/10.53055/icimod.545>>. See also Wu Ning and others, "High-altitude rangelands and their interfaces in the Hindu Kush Himalayas", (2013) International Centre for Integrated Mountain Development (ICIMOD) <<https://doi.org/10.53055/icimod.579>>.

South, to the Greater Himalayan Zone, to the Trans-Himalayan Zone and the Tibetan Plateau³³ (which is the least inhabited). In the TAR region of China lies the sacred site of Mt. Kailash, along with Manasarovar Lake. These sites evoke deep-rooted religious affiliations and veneration for five religions and their associated cultural communities – namely Hindus, Buddhists, Jains, Sikhs and Bons. The landscape is enriched with both tangible and intangible associative values of these areas; namely the rich bio-physical, socio-cultural milieu blended with transboundary historical linkages.

The demography in KSL - TAR China is approximately 0.63/sq. km and the population is sparse, with employment including livestock husbandry, transhumance and seasonal herding. By contrast, in the Indian region the land is densely populated, with occupation being livestock farming and agricultural farming.³⁴ The Nepal region is also comparatively densely populated³⁵ and as the area remains a food-deficient area, families mostly migrate to the nearby towns. Though the primary source of livelihood is farming and livestock,³⁶ the amount of arable land is quite low. It was historically documented that pilgrims and traders travelled by foot from Almora, Tanakpur and Bagheshwar northwards or north-eastwards leading to Tibet, enhancing the cultural significance of ancient trade routes and an intercultural milieu among the traditional communities of India, Nepal and Tibet, supported by the six mountain passes leading from the Indian landscape to Tibet and at least two officially recognised passes from Nepal to Tibet. Despite these passes, the commuting infrastructure remains severely neglected in the three respective jurisdictions³⁷ due to the rugged terrain and the remoteness of the landscape. There are six important Buddhist monasteries around the Mt. Kailash zone and eight gompas around Lake Manasarovar. These include sacred sites for five religious communities and several significant and renowned monasteries such as the Halji and Yalbung monasteries, which offer Buddhist studies as cultural and linguistic knowledge-bases in the local areas. These sites are also major contributing managers

³³ Ajaz Hussain, Gajendra Singh and Gopal S. Rawat, “Landscape Vulnerability Assessment Using Remote Sensing And GIS Tools In The Indian Part Of Kailash Sacred Landscape”, (2018) International Archives of the Photogrammetry, Remote Sensing & Spatial Information Sciences.<<https://doi.org/10.5194/isprs-archives-xlii-5-409-2018>>.

³⁴ Rössler (n 12, 17).

³⁵ Ripu Mardhan Kunwar, “Ethnobotany in the Kailash sacred landscape, Nepal: Implications for Conservation through Interactions of Plants, People, Culture and Geography”, (2018) Doctoral dissertation, Florida Atlantic University.

³⁶ R.K. Joshi and others, “Challenges and opportunities under COVID-19 on rural populace in Kailash Sacred Landscape (KSL)-India”, (2022) 7 Environmental Challenges, 100497. <<https://doi.org/10.1016/j.envc.2022.100497>>.

³⁷ Robert Zomer and others, “Environmental stratification of Kailash Sacred Landscape and projected climate change impacts on ecosystems and productivity”, (2013) International Centre for Integrated Mountain Development <<https://doi.org/10.53055/icimod.578>>.

in the domain of biodiversity conservation, along with the Narayan Swami Ashram, the sacred Adi Kailash and its analogous Parvati Tal.³⁸

The cultural significance of the transboundary historic pilgrimage and trade routes was actioned by the Governments of India, China and Nepal via a transboundary nomination and through the stakeholders, namely, The Kailash Sacred Landscape Conservation and Development Initiative (KSLCDI), and International Centre for Integrated Mountain Development (ICIMOD).³⁹ The resulting and significant ‘Sacred Pact’, was proposed in 2009 and signed in 2011, under the aegis of the Chinese Academy of Sciences, People’s Republic of China; Ministry of Environment and Forest and Climate Change, India; and Ministry of Forest and Soil Conservation, Nepal.⁴⁰ Other institutional stakeholders in their executive capacity joined in the pact, namely the Institute of Geographic Sciences and Natural Resources Research, China; GB Pant Institute of Himalayan Environment and Development, India; the Wildlife Institute of India, Dehradun; and the Research Centre for Applied Science and Technology, Tribhuvan University, Nepal to develop and update country specific implementation plans in consultation with the diverse stakeholders of the region.⁴¹ Apart from the national collaborations, United Nations Environment Programme, Deutsche Gesellschaft Fur Internationale Zusammenarbeit (GIZ) and the Department of International Development – UK Aid, United Kingdom⁴² were also stakeholders in a high-level scoping session, conducted by ICIMOD, UNESCO and various community leaders of the Kailash Landscape in 2015, where the Chinese Partners expressed their interest in filing a nomination, but did not confirm whether they were interested in filling for a transboundary nomination. This is the first instance of the disruption of adaptation mechanism by a party. Later in 2019, the landscape and route was nominated by India and was accepted in the Tentative List of the World Heritage as a Mixed Site.⁴³ Except for China’s lack of decisiveness and India’s overtly forthcoming nature, the aforementioned paragraph suggests inclusiveness in the adaptation paradigm, but a meticulous

³⁸ Gopal S. Rawat and others, “Strategies for the Management of High-altitude rangelands and their Interfaces in the Kailash Sacred Landscape”, in Wu Ning and others (n 32) 25-36.

³⁹ Naina Singh, “The Kailash Sacred Landscape Conservation Initiative: Assessment and Potential of Cooperation in the Himalayas”, (2018) 23 Occasional Paper.

⁴⁰ ICIMOD, “China, India, and Nepal Keen on Creating a Trans-boundary UNESCO World Heritage Site in the Kailash Sacred Landscape” (28 January 2016) <<https://www.icimod.org/china-india-and-nepal-keen-on-creating-a-trans-boundary-unesco-world-heritage-site-in-the-kailash-sacred-landscape/>> accessed on 2 April 2022.

⁴¹ Lok Man S. Palni and Ranbeer S. Rawal, “Kailash Sacred Landscape Conservation and Development Initiative: A Transboundary Project” in Lok Man S. Palni, Rebon Banerjee Dhar and O.P. Tandon (eds.), *The State of Ecology of the Tibetan Plateau*, (2019) Academic Foundation in association with the Foundation for Non-violent Alternatives (FNVA).

⁴² Abhimanyu Pandey, Rajan Kotru and Nawraj Pradhan, “Kailash Sacred Landscape: Bridging cultural heritage, conservation development through a transboundary landscape approach”, *Asian Sacred Natural Sites*, (2016 Routledge).

⁴³ The Site was nominated under Criteria (iii), (vi) and (x) of the Outstanding Universal Value. <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1576506>>.

study of each individual jurisdiction is required to understand whether the inclusivity and community participation has trickled down into the domestic regulatory tiers of the governance framework.

Part 4. Stakeholders – India, Nepal and China

a. Nepal

Nepal, one of the youngest democracies in the world, adopted its Constitution in 2015, with the values of “socialism based on democratic norms” enshrined through the federal democratic republic system of governance.⁴⁴ Primarily a three-tier governance structure, the polity vests in the Federation, the State and the Local Level. The Local Level is further categorized into village institutions, municipalities and district assemblies. To complement the values of an egalitarian society, the fundamental rights of the indigenous communities (Madhesi and Tharu) are recognised along with their access to social and affirmative justice, apprising their role in the creation of an enriched inventory of intangible cultural heritage. The minority communities are also inducted in the local governance system through compulsory inclusion in the municipal assembly. The inclusive and participatory models of governance⁴⁵ are fostered through a harmonious blend of cultural diversity, state policy relating to social and cultural transformation which includes protection, promotion and development of ancient, archaeological and cultural heritage, policies relating to protection, promotion and use of natural resources, and sustainable development of biological diversity across varied ecological landscapes. Additionally, the right to preserve and protect public property is a Fundamental Duty of every citizen.⁴⁶

Though, we find in the existing literature about the establishment of certain construction committees namely Guthi Sansthan and Guthi Jirnodhar tatha Nirman Samiti⁴⁷ in the 1950s under the patronage of the Public Works Department and the Department of Archaeology for repairs and restoration of ancient structures, the *Ancient Monuments and Preservation Act, 1956* remains the primary legislation in the domain of heritage conservation, with an objective to preserve ancient monuments and archaeological, historical or artistic objects.⁴⁸ Later, it was applied along with the

⁴⁴ *The Constitution of Nepal, 2015*, Second Amendment 18 June 2020, <<https://lawcommission.gov.np/en/wp-content/uploads/2021/01/Constitution-of-Nepal.pdf>> accessed on 27 September 2022.

⁴⁵ John H. Stubbs and others, ‘Architectural Conservation in Asia: National Experiences and Practice’, (2016 Routledge) <<https://doi.org/10.4324/9781315683447>>.

⁴⁶ (n 44).

⁴⁷ Neel Kamal Chapagain, ‘Heritage Conservation in Nepal: Policies, Stakeholders and Challenges’ (2008).

⁴⁸ *Ibid.*

Town and Country Planning Act. Nepal ratified the UNESCO World Heritage Convention in 1978 and subsequently nominated seven monument sites in the Kathmandu Valley, which promptly received the World Heritage Inscription in 1979, only to demote two of the seven monument sites in 1993 to the List of World Heritage in Danger.⁴⁹

The 1970s witnessed a rise in international collaborations with actors such as the United Nations Technical Assistance Programme for the Royal Palace, Hanuman Dhoka Project and development of the master plan for the conservation of the Kathmandu Valley, financially assisted by UNDP and technically assisted by UNESCO.⁵⁰ Despite the training received by the members of the Department of Archaeology from UNESCO, the question of synchronicity between the generic heritage preservation policy, specific legislation pertaining to heritage trust, local governance policy and the planning policy remained obscure.⁵¹

In the bio-diversity domain, community resource management through legislation that guided common property resource management was promulgated by the erstwhile monarchs in Nepal. Regulated public grazing and afforestation along the water sources was sanctioned. The tussle between the custodianship of the forest resources led to the enactment of the *National Parks and Wildlife Conservation Act, 1973*, amended in 1995. It is largely based on the provisions of the *Private Forest Nationalisation Act 1956* and the *Forest Act 1961*.⁵² It models inclusive and participatory governance of the indigenous communities, primarily forest dwellers in conservation and management strategies and incorporates the provision of Buffer Zones.⁵³ *The Pasture Land Nationalisation Act, 1964* was enacted to regulate horticultural, medicinal and animal husbandry activities in the pasture lands as a means of assistance to the forest dwellers and communities.⁵⁴ Existing studies have shown that the mountain tribes in the Nepalese Village Development Committees have adapted the common property resource regime, where rights of access or use are shared equally and exclusively by a group.⁵⁵ They formed informal groups possessing user's rights on hereditary or kinship terms, controlling and regulating sustainable resource management

⁴⁹ UNESCO, "Nepal", <<https://whc.unesco.org/en/statesparties/np>> accessed on 2 April 2022.

⁵⁰ Chapagain (n 47).

⁵¹ *Ibid.*

⁵² Krishna Prasad Oli, "Legal Instruments for Sustainable Environmental Management in Nepal" (1996) 2 *Environment and History* 231. <<https://doi.org/10.3197/096734096779522400>>.

⁵³ Kamal Aryal and others, "Conservation and Management Practices of Traditional Crop Genetic Diversity by the Farmers: A Case from Kailash Sacred Landscape, Nepal" (2018) 18 *Journal of Agriculture and Environment* 15. <<https://doi.org/10.3126/aej.v18i0.19886>>.

⁵⁴ Oli (n 52).

⁵⁵ *Ibid.*

through informal surveillance systems.⁵⁶ These traditional sustainable strategies are not backed with hard or soft law instruments, which makes these conservation efforts futile.

To conclude, the cultural policy is essentially Kathmandu-centric or Kathmandu-focused. The major international collaborations and funding are for conservation within the valley, leaving the peripheral areas unregulated. In addition, the self-regulated community resources are managed by the entitled echelons from the monarchy, thus entailing marginalization and inevitable migration from the peripheral areas. Additionally there is no legal framework endorsing representation of the traditional communities in the conservation process of the sacred landscape.

b. China

China, a unitary one-party socialist republic, has an impressive historical record in harbouring one of the ancient cultures of the world.⁵⁷ It ratified the World Heritage Convention in 1985. Since then it has the highest number of inscriptions of World Heritage Sites: fourteen natural sites, thirty eight cultural heritage sites and four mixed sites.⁵⁸ Their cultural policy amends and refines the erstwhile beliefs, customs and the traditional value system by carefully curating the communist doctrines within, mildly balancing the vast economic development coupled with modern infrastructure.⁵⁹ The administration is essentially two-tiered; the Central level cultural relics administrative department coordinates with the State Administration of Cultural Heritage, Ministry of Housing and Urban-Rural Development, Ministry of Environmental Protection whereas the Local Level cultural relics administrative department coordinates with the local governments, cultural relics protection department, urban planning department and the environment protection department.⁶⁰

The 1982 Law for the Protection of Cultural Heritage (Cultural Relics and Sites) was enacted as a reactionary measure to the destruction caused by the Cultural Revolution. It defines the ambit of cultural relics and includes historic buildings, sites and archaeological remains from significant

⁵⁶ *Ibid.*

⁵⁷ *Constitution of the People's Republic of China, 1982*, amended 11 March 2018, <<http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>> accessed on 6 April 2022

⁵⁸ UNESCO, "China", <<https://whc.unesco.org/en/statesparties/cn>> accessed on 2 April 2022.

⁵⁹ John H. Stubbs and others, (n 45).

⁶⁰ Chen Shen and Hong Chen, "Cultural Heritage Management in China" 13. <<https://doi.org/10.5744/florida/9780813034607.003.0006>>.

historical events that carry a political narrative.⁶¹ It is backed by State Council's Regulations on cultural relics, namely the Regulation for the Implementation of the Cultural Protection Law 2003 and the Historical Cities, Famous Towns and Famous Villages Protection Regulation of 2008.⁶² The Ministry of Culture and the Ministry of Development, along with the State Councils and the State Administration of Cultural Heritage have also enacted Interim Provisions on Administrative Penalty Procedures Relating to Cultural Relics 2009; Interim Measures for the Recognition of Cultural Relics, 20097; Archaeological Excavation Management Measures 1998; and Administrative Measures for the Protection of World Cultural Heritages 2006. Additionally, there are Preparation Requirements for the Protection of Historical and Cultural Sites, 1994; Measures for the Administration of City Purple Lines, 2003; and Rules for the Protection of Historical and Cultural Cities, 2005.⁶³

In 2003, ICOMOS China along with the State Administration for Cultural Heritage ratified the Conservation and Management Principles of Cultural Heritage Sites in China, a joint collaborative effort undertaken by the Getty Conservation Institute, the Australian Heritage Commission and ICOMOS International.⁶⁴ Loosely based on the Burra Charter, it enunciates general conservation principles, standardizes processes and interventions for 760,000 documented historic sites, out of which 4,296 sites qualified as National Priority Protected Sites.⁶⁵

Tibet had been a semi-autonomous region of China, established around the 7th century CE, and was annexed to the People's Republic of China in 1950.⁶⁶ Though it had rich architectural traditions and a distinct spiritual identity which was fostered through the Tibetan settlements built around Buddhist temples or monasteries enriched with mural paintings and woodcarvings,⁶⁷ most of these traditional buildings, scriptures and other forms of intangible cultural heritage were destroyed during the Cultural Revolution in 1966 due to forceful restoration centrist policies of the Beijing Communist Government.⁶⁸ Immigration of Han populations into Tibet has also made

⁶¹ Lisa Bixenstine Safford, "Cultural Heritage Preservation in Modern China: Problems, Perspectives, and Potentials" (2014) 21 *ASIANetwork Exchange: A Journal for Asian Studies in the Liberal Arts* 3. <<https://doi.org/10.16995/ane.69>>

⁶² Shen and Chen (n 60).

⁶³ *Ibid.*

⁶⁴ Safford (n 61).

⁶⁵ *Ibid.*

⁶⁶ Victor C. Falkenheim and others, "Tibet", *Encyclopedia Britannica* (11 April 2022) <<https://www.britannica.com/place/Tibet>> accessed on 21 April 2022.

⁶⁷ Palni and others (n 41).

⁶⁸ BBC, "Tibet Profile", (26 April 2019) <<https://www.bbc.com/news/world-asia-pacific-16689779>> accessed on 19 April 2022.

the ethnic and indigenous communities of Tibet vulnerable. Thereafter the Chinese Communist government funded the restoration of many razed temples, monasteries and sites through an approach of “forced assimilation” of cultures. However, the real intention was to tighten the control of cultural policies of Tibet and its indigenous knowledge and traditions of architectural restoration. The Tibet Heritage Fund, led by German conservationist Andre Alexander restored and conserved individual buildings through international sponsorships in 1996 with the German Government and the Prince of Wales, which was the start of an international collaboration until the resistance from Chinese Authorities to stop the program. This led to other collaborations in the nature of outreach programmes offered by Kham Aid Foundation, Shalu Association and the World Monument fund. Other than educational outreach and awareness campaigns, the collaborators aided in creating an inventory and documentation of rich natural and cultural, built and living architectural heritage.

To conclude, the legislative framework of China boasts a forced assimilation of cultures and a strong centrist policy of natural and cultural resources functioning in watertight compartments, catering to the widespread urbanisation and modernization of the State. Additionally, the notion of inclusive participatory approach is not recognised and the traditional settlers do not garner adequate representation in the conservation process and policy of the sacred landscape of Kailash.

c. India

Though India ratified the World Heritage Convention in 1977,⁶⁹ the present *Ancient Monuments and Archaeological Sites and Remains Act*, 1958, amended in 2011, is established under the aegis of the Archeological Survey of India, the apex regulatory agency for heritage management.⁷⁰ It is interesting to note that from 1958 to the present, the framework of heritage management is still built on protection of selected monuments of national importance, through limited preservation actions.⁷¹ The Act deals with the definition of monuments and sites, creation of an Authority known as the National Monuments Authority which looks into the prohibited zones and the regulated zones of the monument management framework, and declarations of national importance.⁷² The provisions of the Act are in consonance with the Constitution of India, which, similar to the Constitution of Nepal, prescribes preservation of cultural heritage as the Directive

⁶⁹ UNESCO, “India”, <<https://whc.unesco.org/en/statesparties/in>> accessed on 2 April 2022

⁷⁰ Manish Chalana and Ashima Krishna (eds.), *Heritage Conservation in Postcolonial India: Approaches and Challenges* (Routledge 2021). <<https://doi.org/10.4324/9781003109426-1>>.

⁷¹ Kapila D. Silva, ‘Prospects for Asian Heritage Management’ (2013 Routledge) 12. <<https://doi.org/10.4324/9780203066591>>.

⁷² John H. Stubbs and others, (n 45).

Principles of State Policy and also as Fundamental Duties.⁷³ As the Constitution is a quasi-federal structure, the monuments that are declared of national importance are regulated by the National Monuments Authority, whereas the monuments that are declared of State importance are protected under the departments of Archaeology, Town and Country Planning Acts of the respective States through administrative and regulatory bodies like the Urban Arts Commission, Heritage Commission, Municipal Corporation etc.⁷⁴ In a similar context, The National Cultural Heritage conservation Policy has instituted an Apex Coordination Committee, which would work in close coordination with six subcommittees, namely the National Manuscript Mission, National Archives of India, National Library, Archaeological Survey of India, National Museum Institute and National Research Laboratory.⁷⁵

The Indian National Trust for Art and Cultural Heritage (INTACH) is a non-profit organisation, setup in 1984 that voluntarily takes up conservation projects, awareness and outreach programmes, and has enacted a Charter for the Conservation of Unprotected Architectural Heritage and sites in India, 2004.⁷⁶ The Charter meticulously imbibes *jirnoddharna*,⁷⁷ with other traditional philosophies of conservation practice, and carefully weaves it into the International charters and calls for protection of unidentified, unclassified and unprotected sites.

In relation to Biodiversity and Environment, there are well-coordinated National Biodiversity Authority and State Biodiversity Boards that coordinate with the District Development Authorities and the Panchayats in order to conserve Flora and Fauna. In the State of Uttarakhand, the State Biodiversity board, the Van Panchayats under the Van Panchayat Act, 1931 act in consonance with the *Wildlife Protection Act*, 1972 and the *Forest Conservation Act*, 1980.⁷⁸

⁷³ *The Constitution of India*, 1950, amended 1 December 2007, <<https://www.refworld.org/docid/3ae6b5e20.html>> accessed on 27 September 2022

⁷⁴ F.R. Allchin, "Monument Conservation And Policy In India" (1978) *Journal of the Royal Society of Arts* 21. See also Chalana and Krishna (n 70).

⁷⁵ India, "National Mission on Cultural Mapping and Roadmap Mission Document", Ministry of Culture <<https://www.indiaculture.nic.in/sites/default/files/CulturalMapping/MissionDocument.pdf>> accessed on 20 April 2022.

⁷⁶ Kelly D Alley, "Heritage Conservation and Urban Development in India" (1992) 14 *Practicing Anthropology* 23. <<https://doi.org/10.17730/praa.14.2.q1164581786g5303>>.

⁷⁷ Binumol Tom, "The Hindu Philosophy of Conservation" in K. D Silva and N.K.Chapagain (eds.) *Asian Heritage Management: Contexts, Concerns and Prospects* (2013 Routledge) 14.

⁷⁸ Uttarakhand Biodiversity Board, "Study on Science-Policy Interface focusing on Access & Benefit Sharing (ABS) and Trans-boundary issues", (2017) Kailash Sacred Landscape Conservation and Development Initiative. (Dehradun: Uttarakhand Biodiversity Board).

Furthermore, the National Mission on Sustaining the Himalayan Ecosystem is read along with the National Environment Policy 2006 under the aegis of the *Environment Protection Act* 1986.⁷⁹

To conclude, India's federal polity, coupled with a decentralised legislative framework creates several focal points, but seems to lack coordinated dialogue between the government agencies and their panchayat counterparts. Thus the devolution of power becomes ineffective. Furthermore, an element of mistrust lingers in the communities where they are not able to fathom the role of law in advocating for their protection. The confusion between custodian and ownership remains, as they strongly feel that the compensation as a part of the rehabilitation bargain is not worthwhile.

Conclusion

An analysis of the cross-stakeholder relationship reveals that apart from scoping sessions, there is no visible interaction between the states. Though the pilgrimage routes continue to exist, there is no cross-border dialogue amongst the management and governance regimes regarding conservation and livelihood management of the traditional dwellers, thus refuting any iota of adaptive mechanisms to either subvert systems of signification and dominance or augment traditional skill and develop traditional knowledge associated with the conservation of the cultural landscape of Kailash. The refusal of China to spearhead the transboundary nomination merely illustrates the point. Also, common to all jurisdictions, natural and cultural heritage are viewed in water-tight compartments, where the heritage legislation does not identify or recognise the voice of the living indigenous cultures or the regions they oversee. Despite the biodiversity acts recognizing inclusive participation, the settlements of the cultural landscapes and sacred sites are not within view of the existing legislative scheme, therefore compromising the integrity and continuity of the living cultural resources within them.⁸⁰ Additionally, the lack of incentives to the forest dwellers for their traditional knowledge has led to unregulated resource management and migration of certain settlements.⁸¹ The axiom of inclusivity and democratization of fairness

⁷⁹ Shalini Bhutani and Ashish Kothari, "The Biodiversity Rights of Developing Nations: A Perspective from India" (2002) 32 Golden Gate UL Rev 587. See also Christopher Rodgers, "Environmental Impact Assessment: Mapping the Interface between Agriculture, Development and the Natural Environment" (2011) 13 Env'tl L Rev 85 <<https://doi.org/10.1350/enlr.2011.13.2.119>>.

⁸⁰ Corinna Wallrapp, Markus Keck and Heiko Faust, "Governing the Yarshagumba 'Gold Rush': A Comparative Study of Governance Systems in the Kailash Landscape in India and Nepal" (2019) 13 International Journal of the Commons 455.<<https://doi.org/10.18352/ijc.884>>.

⁸¹ Richard Longstreth, "Introduction: The challenges of cultural landscape for preservation", (2008) 1 Cultural landscapes: Balancing nature and heritage in preservation practice.

induced participatory process, endorsed by the 1995 Seville Strategy and the Akwe' Kon Voluntary Guidelines, fostered by legal adaptation,⁸² fails miserably.

The axiomatic notion of legal adaptation in the Asian context needs to be re-visited. The marginalized indigenous communities functioning in the jurisdictions of China, Nepal and India in the transboundary landscape are prone to subjugation and excluded from the notion of inclusive participation. The erstwhile colonial mindset may play a role, but current international standards cannot adequately alter the regulatory frameworks and their efficacy quotient. The Forest Acts of India as well as Nepal have dominant historical narratives of the colonial past. While some of the clauses were re-written as later amendments to the main text to incorporate the provisions of inclusive participation, these formal expression of sovereignty and its powers do not authorize the indigenous communities or broadly speaking, the diaspora, from seeking their entitlements as rightful owners of the landscapes. The semantics of the word 'owner' transitioning into 'custodians' in the Nationalisation Acts of India, Nepal and China proves the point. Also, the domain of conservation remains, essentially, monument-centric. The notion of cultural landscapes, along with its components, has not found a place in the heritage legislation of the three jurisdictions, despite the robust international developments in the domain, thereby leaving the primary stakeholders unrecognized and undervalued.

One may therefore ask questions regarding loopholes in the community participation paradigm in the transboundary landscape scholarship, more so the existing realities regarding migration of communities and loss of intangible cultural heritage. This inquiry opens up a host of plausible research contexts from the point of digital visibility through dialogues, incentivisation to promote traditional conservation practices and other intangible cultural heritage associated with the sacred routes of the landscape. The international conventions could be a viable lead to explore domestic frameworks for such forms of adaptation. Critical to transboundary sacred sites and cultural landscapes, these adaptations would undoubtedly promote social cohesion and economic development across borders.

Lastly, the element of cooperation inherent in legal adaptation is also crucial to sustain cross-border governance regimes in a transboundary conservation landscape. The domestic legal

⁸² Charles de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent, revised by J. V. Prichard. Based on edition published in 1914 by G. Bell & Sons, Ltd., London. <<https://www.marxists.org/reference/subject/philosophy/works/fr/montesqu.htm>> accessed on 25 April 2022

frameworks have yet to sustain a value retention framework which balances the conservation philosophy with the recognition and enforcement the rights of the traditional communities.