



THE DICHOTOMY ON CODIFICATION OF CUSTOMARY LAWS IN INDIA – AN ANALYSIS

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Abstract

In many indigenous communities, Customary law is hugely empowering as it is a form of not just a social organisation of justice which maintains and sustains traditions that dates back millennia but a way of life and sense of identity to those bound by it. The dominant narrative in socio-political terms as driven by progressive changes in Indian society has been one tending towards social inclusion of tribal populations. The manner in which this endeavour of social inclusion has panned out through codification of customary laws is the subject of discussion in this paper. In attempting to discern the position, the author examines the question on codification of tribal customs adopting cross jurisdictional study. Considering the tribal population in India, it is a common knowledge that the majority of tribes are concentrated in Central and North-East India as demonstrated by the Fifth and Sixth Schedules of the Constitution. This paper seeks to analyse the debate over the codification of customary laws- to seek whether this is the only method of providing recognition to the customary laws in the mainstream formal legal system. The article begins with an introduction to the topic touching upon the aspects of legal pluralism. Second Part is a brief discussion on Customs- its definition and dynamics. Part III of the paper contains cross jurisdictional study on customs and their codification. While part IV attempts to answer if a case for codification is ruled to recognise the customary laws, lastly the paper concludes with observations of the author.

I. INTRODUCTION

Ethnic diversity is the defining characteristic of Indian democracy. Legal developments which discount the plurality of interests involved are unlikely to be well received and may in turn invite strong oppositions. Therefore, it is essential that uniformity is not mistaken for unitary. One needs to take a liberal approach towards understanding the concept of codification through the lens of pluralism taking into considerations the history of the land and the various community practices that have developed over time ensuring at every stage that the idea of the heterogeneous fabric of the society is not disrupted. If these are not considered, the law might appear oppressive to the communities.

Customary laws are treated as rules, which all members are obliged to follow owing to their general acceptance. Over time they evolve as an intrinsic part of one's life, views and

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an identity especially of many indigenous communities¹. While Blacks's Law Dictionary describes "laws to consist of customs which are accepted as legal necessities or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated as if they were laws"². The Indian Constitution permits certain communities the right to deal with disputes through personal and customary laws whereby the customary legal forums operate within the sanction of the state itself. Hence in this context of the tribes in India, customary laws being given both state and social sanctions has played an immensely important role in determining lives and rights of the tribesmen.

The policy of non-interference was adopted by the colonial rulers in the administration of the affairs of the hill tribes thereby permitting them to manage the affairs based on their customary laws³. To the rulers it was one of the fundamental task to "civilize and humanize" the hill tribes with could most significantly be achieved through the introduction of modern education⁴ that was imparted by the missionaries whose movements in the region were restricted to evangelical works and social services ranging from imparting education to offering medical aid and assistance⁵. Numerous activities which focused on literacy, medical assistance and introduction of scripts through education marked the entry of the Christian missionary works in the region^{6,7,8,9}. Restrictions on the accessibility of the region was considered to be one of the most significant channel to protect the tribesmen from infiltration against outside communities, which continues to this day.

¹U. Gosart, "Traditional Knowledge & Indigenous Peoples" *World Intellectual Property Organisation* 143(WIPO, 2009), available at :https://www.wipo.int/edocs/pubdocs/en/tk/1014/wipo_pub_1014.pdf (last visited on March 31, 2021)

² Henry Campbell Black, Bryan A Garner (eds), Blacks's Law Dictionary 2007 (St. Paul, MN: West Group, 2007)

³UdayonMisra, North-East India: Quest for Identity: a Collection of Essays on Socio-political Topics (Omsons Publications, New Delhi,1988)

⁴ H. Srikanth, "British Colonialism and the Hill Tribes of Composite Assam", 79-116 *Man and Society: A Journal of North East Studies* 3 (2006)

⁵ V. Venkata Rao, "Politics of Tensions in North-east India: Antecedents" in VerinderGrover, *Pressure Groups and Politics of Influence* 193-218 (Deep and Deep Publications, New Delhi, 1997)

⁶R Buongpui, *Women and Legal Pluralism: A study among Hmars of Manipur* 104 (2016) (Unpublished Ph.D Thesis, IIT Guwahati)

⁷Lal Dena, *Christian Missions and Colonialism: A Study of Missionary Movement in North East India with particular reference to Manipur and Lushai Hills, 1894-1947* (Vendrame Institute Publications, Shillong, 1988)

⁸ Rowena Robinson, "Christianity in the Context of Indian Society and Culture", in Veena Das (ed.) *The Oxford India Companion to Sociology and Social Anthropology*, 1 883-907 (New Delhi: Oxford University Press, 2003)

⁹ John Thomas, *Missionaries, Church and the Formation of Naga Political Identity 1918-1997* (2010) (unpublished Ph.d. Thesis, Jawaharlal Nehru University. Centre for Historical Studies School of Social Sciences)

Framers of the Indian Constitution acknowledged that there were certain issues pertaining to the Northeast region that needed due consideration¹⁰. The necessity to establish a separate political and administrative structure to suit the requirements of the region was implemented, directing the efforts of the Government towards a plethora of endeavours to address the needs of the tribal communities as part of the nation-building project¹¹. The Indian Constitution grants protection of the culture, tradition and customary laws of the region¹² through various provisions and laws to the tribal communities¹³. While the amusing fact to place on record is that, except for the states of Nagaland and Mizoram; there is no codification of customary laws in the other Eastern States. Nonetheless the intrinsic values of the unwritten laws continue to play decisive and pivotal role to the tribal identity. Researches conducted by various authors reflect that the modern tribesmen prefer to redress their grievances through their customary laws in almost every part of the Northeast states¹⁴.

II. DEFINITION, MEANING AND ROLE OF CUSTOMARY LAW

To the sociologist, the function of law is to sustain the social order by upholding the basic values and norms of the society¹⁵. Mathew Deflem¹⁶ writes that laws are an institutionalised system of norms intended to establish social interactions for societal integration. Henry Maine, opined that law developed organically just as language. The legal pluralist would certainly disagree to the common perception that laws came into existence via the institution of the state, making the primary function of the state to legislate laws. To them, not all laws originate from the state^{17,18}. The universe of such non state laws is huge and one can easily place the customary laws that are indigenous, native and living or the local-laws way.¹⁹

¹⁰ Manjushree Pathak, *Crimes, Customs & Justice in Tribal India: A Teleological Study of Adis*(Mittal Publication, New Delhi, 1991)

¹¹ Melvil Victor Pereira, *Customary Law and State Formation in Northeast India: A Comparative Study of the Angami and the Garo of Meghalaya*, (unpublished thesis submitted for the degree of doctor of Philosophy in Centre for Political Studies. School of Social Sciences, Jawaharlal Nehru University Delhi, 2009)

¹² The Constitution of India, article 13 29, 30, the Vth ,VIth Schedule.

¹³ Ibid.

¹⁴ Supra note at 6, 5,70 and 117.

¹⁵ Indra Deva (ed.), *Sociology of Law 02* (Oxford University Press, New Delhi, 2005)

¹⁶ Mathieu Deflem, *Sociology of law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, 2008)

¹⁷ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Arno Press, New York, 1975)

¹⁸ Leon Shaskolsky Sheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism* (Routledge Publication, New York, 2009)

¹⁹ M.S Vani, "Customary Law and Modern Governance of Natural Resources in India: Conflicts, Prospects for Accord and Strategies" in Gitenjendra Pradhan (ed.) *Legal Pluralism and Unofficial Law in Social, Economic and*

Customs and Customary laws distinguished

Customary laws enjoy legal sanctions through the general acceptance by the members of the society and any failure of compliance to these will attract sanction²⁰. Generally speaking, customs are norms or rules of social conduct failure of adherence may or may not attract sanction. Customary laws do not constitute a ‘single body of law’ but is adaptive with inherent flexibility to the ever evolving body of norms for efficiency in governances of the tribal communities.²¹ Such laws serves the dual purpose of regulating social relationship and engages social control as the breach of customary laws often culminates into a situation with serious consequences²². Leon Sheleff²³ notes that customary laws are not simply relics of the past but provides guidance and solutions for situations that maybe more satisfying than those offered by the State legal system. The validity of customary laws is the free will of the social acceptance of the people who chose to adhere to it²⁴. The genesis of customary laws are the values, morals and traditions of the local indigenous ethnic people²⁵ and from the societal practices that the community concerned feels obligated to follow²⁶ thus enabling the younger generation to developed an holistic understanding of their culture²⁷.

Dynamics of Customary law

Customary laws that can be detected historically and presently accepted as authoritative are deemed to be the outcome of social conditions blended with political motivations²⁸. Customary laws are endowed with the outstanding feature of being unwritten based on oral traditions²⁹³⁰. The traditions are conveyed through the modes of folktales,

Political Development 409-446 (The International Centre for the Study of Nature Environment and Culture, Kathmandu, 2002)

²⁰ T.S. Gangte, *Tribal, Land, History and Culture and other Essays* (Ruby Press & Co., New Delhi, 2013)

²¹ *Supra* note 19.

²² P.K. Bhowmick, *Customary Law of Austric-Speaking Tribes* (Kalpaz Publications, Delhi, 2002).

²³ Leon ShaskolskySheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism* (Routledge Publication, New York, 2009)

²⁴ Ahren, “Indigenous people’s Culture, Customs and Traditions and Customary Law- The Saami people’s Perspective” *Arizona Journal of International and Comparative Law* 63-112 (2004)

²⁵ Ben KirombaTwinomugisha, “African Customary Law and Women’s Human Rights in Uganda” in JeanmarieFenrich (eds.) *The Future of African Customary Law* (446-466) (Cambridge University Press, 2011)

²⁶ T. Bennett, *Customary law in South Africa* (Lansdowne, Juta (2004)

²⁷ *Supra* note at 25.

²⁸ MunaNdulo, “African Customary Law, Customs, and Women’s Rights”, *18(1)Indiana Journal of Global Legal Studies* 87-119 (2011).

²⁹ *Supra* note at 25.

³⁰ Vera N, Ngassa, “Exploring Women’s Rights within the Cameroonian Legal System: Where do Customary Practices of Bride-Price Fit in?” in FonjongLotsmart (ed.) *Issues in Women’s Land Rights in Cameroon* (Langaa research & Publishing Common Initiative Group, Cameroon, 2012).

songs, stories and epics, myths and tales and legends of the past³¹. Customary law may be referred to as a system of immemorial rules that originate and evolve with the development of human desires the focus being the common knowledge³². Another distinguishing feature is the easy accessibility of the customary laws as opposed to the stringent rule of law in the formal system of Legal order. The informal atmosphere with regard to the time and space for operating the procedures of dispute resolutions makes it relatable and less intimidating.³³.

With the enactment of the Indian Constitution in 1949, Article 13(1) unambiguously states the invalidity of all previous and future laws that were and are inconsistent with the Constitution.³⁴ The Article 13 of the Constitution defines "law" to include "all custom or usage having in the territory of India the force of law." The Courts of India have thus recognized custom as law only if the custom fulfils the following tests,

- (1) "ancient or immemorial" in origin,³⁵
- (2) "reasonable [³⁶] in nature & continuous ³⁷ in use," &
- (3) "certain"³⁸

The interpretation of the Courts in elucidating the terms "ancient or immemorial" is to emphasis that for any customs to be binding it "must derive its force from the fact that by long usage it has obtained the force of law." A custom may also "derives its validity from being reasonable at inception & present exercise." Lastly, a "certain" custom is one that is "certain in its extent & mode of operation" & invariable.³⁹

Section 3(a) of Hindu Code defines 'Custom' as:

³¹Melvil Victor Pereira, Customary Law and State Formation in Northeast India: A Comparative Study of the Angami and the Garo of Meghalaya (2009) (Unpublished Ph.D Thesis, Centre for Political Studies. School of Social Sciences, Jawaharlal Nehru University Delhi,

³²J.C. Bekker, "Seymour's Customary Law in Southern Africa, Cape Town" in Jutta & Belenky, Mary Field, et. al. (eds.) in Women's Ways of Knowing: The Development of Self, Voice and Mind (Basic Books, New York, 1989)

³³E. Harper, Customary Justice, 27 (International Development Law Organization, Rome, 2011)

³⁴Available at <http://lawmin.nic.in/coi/coiason29july08.pdf> (last visited on March 31, 2021)

³⁵Gokulv..Parvin Kumari, 1952 AIR 231.

³⁶In Produce Brokers co. v. Olympia oil & coke co. [1915] UKHL 787, the Divisional court of the King's Bench held that customs shall be adopted when they are fair and proper, that any reasonable, honest and fair minded men would willingly adopt.

³⁷In case of Muhammad Hussainforki v. Syed MianSaheb(1942) 1 MLJ 564, it was held that unless there is continuity there is no custom. A custom may be abrogatory if it abrogates another custom, such other custom ceases to exist

³⁸In Wilson v Willes, 1 US (1 Dall.) 351 (1788) it was held that for a custom to be recognised it must not be vague but certain and definite.

³⁹B.J. Krishnan, "Customary Law", (Aug. 2000), available at <http://www.india-seminar.com/2000/492/492%20b.%20j.%20krishnan.htm>. (last visited on March 31, 2021)

3. Definition⁴⁰ - In this Act, unless the context otherwise requires. -

(a) the expressions, 'custom' & 'usage' signify any rule which, having been continuously & uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family⁴¹

“...therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right.”⁴²

Following the World War-I & the establishment of the League of Nations, the need for codification of international law was on high demand. In 1930, the League of Nation conducted the Hague Conference for the purpose of codification of general rules but hardly achieved any progress. Post the World War-II, the International Law Commission was established under the umbrella of the United Nations for the effective study & formulation of international jurisprudence cum laws.⁴³

III. CROSS JURISDICTIONAL STUDY OF CUSTOMARY LAWS - AN OVERVIEW

Africa

The Constitutions of African nations have to a high degree recognised traditional and customary institutions alongside the wide acceptance of the customary laws in the courts. The law provides wide range of obligations ranging from protection and promotion of culture/traditions,⁴⁴ to a more generic right on freedom to tradition and culture⁴⁵ or a more specified right with regard to language.⁴⁶ Often, these rights or duties are strictly manned to be accordant with the constitution and fundamental human rights.⁴⁷ The Constitution of Chad is the most restrictive, allowing recognition of customary marriages and inheritances only

⁴⁰Bhimashya&Orsv. Smt. Janabi @ Janawwa,Appeal (civil) 5689 of 2006 (Arising out of S.L.P (C) No. 26558 of 2005

⁴¹Available at <https://indiankanoon.org/docfragment/285351/?formInput=custom%20define>(last visited on march 31, 2021)

⁴²In Re, Smt. Amina v.Unknown, AIR 1992 Bom 214.

⁴³Available at [https://en.wikipedia.org/wiki/Codification_\(law\)](https://en.wikipedia.org/wiki/Codification_(law))(last visited on 31 March 2021)

⁴⁴ The Constitution of the Republic of Benin 1990, art. 10; Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 91(1); Constitution of Kenya 2010, art. 11; Constitution of Mozambique 1990, art. 115(1); Transitional Federal Charter for the Somali Republic 2004, arts. 1:1(3), 24(6); Constitution of the Republic of Ugands 1995, art. XXIV .

⁴⁵Id

⁴⁶ Constitution of the Republic of Benin 1990, art. 11; Constitution of Equatorial Guinea 1991 item 4; Constitution of Kenya 2010, art. 7.

⁴⁷ Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 91(1); Constitution of the Republic of The Gambia 1997, s 32; Constitution of the Republic of Ghana 1992, art. 26(2).

upon the agreement of both the parties.⁴⁸ The Namibian constitution provides for marriages under customary law⁴⁹ while Ethiopia recognises customary marriages and permits the application of customary laws in the adjudication of disputes relating to personal or family matters.⁵⁰ The preamble to the Swazi constitution upholds the necessity to fuse customary institutions with the agents of modern democratic society, alongside the traditional pillars of the monarchy⁵¹ which functions according to Swazi law & custom.⁵² The administration establishes a Council of Chiefs, to advise the King on issues pertaining to customs specially on such Bills that may alter and affect the customary authorities, cultural activities, customary courts or Swazi laws and/or custom.⁵³ Somalia's charter requires the participation of traditional leaders on the appointment of parliamentarians.⁵⁴ The state of Angola dictates that the local government organisations shall include traditional authorities.⁵⁵

In the African continent, the constitutions contain provisions on customary laws that ought to be observed in the judicial courts. Some jurisdictions are enlarged to accommodate the establishments, preservations and/or permission for establishing specific customary law courts⁵⁶ while few others dictate the contours on the courts's jurisdiction in view of customary laws. One must note that numerous constitutions do contain stringent prohibition on customs that are or appears to be contrary to all or few basic rights like those on human rights, women's rights, principles of natural justice or any such other norms of customs that are deemed to be undesirable.⁵⁷ Sudan provides for an interesting association of the custom and the state laws, pronouncing that the source of nationally enacted legislation shall be customs.⁵⁸

⁴⁸ Constitution of the Republic of Chad 1996, art. 162.

⁴⁹ The Constitution of the Republic of Namibia 1990, art. 12(1)(f).

⁵⁰ Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 34(4),(5).

⁵¹ The Constitution of the Kingdom of Swazil, 2005, s. 227(2). The Constitution of Lesotho 1993, ss. 45, 46 & Constitution of the Republic of South Africa 1996, s. 143(1) maybe referred for provisions relating to the application of customary laws in relation to traditional monarchy.

⁵² The Constitution of the Kingdom of Swazil, 2005 s 227.

⁵³ Supra note 52 at ss. 115, 251

⁵⁴ Transitional Federal Charter for the Somali Republic 2004, arts. 30, 71(5).

⁵⁵ Constitution of the Republic of Angola 2010, art. 213.

⁵⁶ Constitution of the Federal Democratic Republic of Ethiopia, 1995, art. 78(5); Constitution of the Republic of Malawi, 1994, s. 110(3); Constitution of the Federal Republic of Nigeria, 1999, ss. 265, 280; The Constitution of Sierra Leone, 1991, s. 120(4); Constitution of the Republic of South Africa, 1996, schedule 6, s. 16.

⁵⁷ Constitution of the Republic of Angola, 2010, art. 7; Constitution of the Democratic Republic of the Congo, 2005, art. 207; Constitution of the Federal Democratic Republic of Ethiopia, 1995, art. 35(4); Constitution of the Republic of Ghana, 1992, art. 26(2); Constitution on Kenya, 2010, s. 2; Constitution of the Republic of Liberia, 1986, art. 2; Constitution of the Republic of Malawi, 1994, ss. 24(2), 200; The Constitution of the Republic of Namibia, 1990, art. 66(1); The Constitution of the Republic of Rawanda, 2003, art. 201; The Interim National Constitution of the Republic of Sudan, 2005, art. 32(3); The Constitution of the Kingdom of Swazil, 2005, s. 252(2); Constitution of the Republic of Uganda, 1995, art. 2(2).

⁵⁸ The Interim National Constitution of the Republic of Sudan, 2005, arts. 5(2),(3)

Canada & Australia

Contemporary Canadian constitution broadly recognises aboriginal rights. All existing aboriginal rights pertaining to treaties including any claims and freedoms are protected.⁵⁹ Interestingly it also ensures that customary rights are not affected by any provision pertaining to official languages.⁶⁰

While the Indigenous Australian customary law lacks uniformity across the continent and one witnesses wide variations in language groups, clans, or regions.⁶¹ The words "law" & "lore" are used to differentiate the Indigenous and post-colonial legal systems. The word "law" is used in reference to the system of laws as was set up by the British during their rule, and the word "lore" in contradistinction to "law" refers to the Indigenous customary system that is inherent in the lives of the tribes since time immemorial. Imparted through childhood, lore spells out the rules and norms on interaction within the community.⁶² In 1986 a report by the Australian Government noted the absence of any codified version of the indigenous customary lore, while it did acknowledged that the existing knowledge on Indigenous Australian traditions was adequate for codification.⁶³ In 1992, post-colonial law asserted that the claims through the Indigenous lore was a valid in the Mabo decision⁶⁴, which discarded the legal fiction of terra nullius. The court found that the crown held title over all land in Australia, the High Court held that customary legal rights to land would be recognised if only those legal rights had not been displaced but maintained continuously. The Australian Law Reform Commission⁶⁵ and the Law Reform Commission of Western Australia⁶⁶ have propagated the advantages in recognising customary law entailing the Aboriginal Australians. In the Northern Territory, the statutes and courts make rather obvious references to various customary lore in identifying relationships based on social expectations.⁶⁷ These have

⁵⁹ Constitution of Canada, 1982, ss. 25, 35

⁶⁰ Supra note 59 at s. 22

⁶¹ Australian Law Reform Commission Report 31, "The Proof of Aboriginal Customary Laws" (12 June 1986)

⁶² Working with Indigenous Australians First Nations People, "The Law & the Lore" available at http://www.workingwithindigenoustralian.info/content/Culture_4_The_Law_and_the_Lore.html (Last accessed on March 31 2021).

⁶³ Supra note 61

⁶⁴ (1992) 175 CLR 1

⁶⁵ Supra note 61

⁶⁶ Law Reform Commission of Western Australia, "Aboriginal Customary Laws (Project 94) - Discussion Paper Overview" (2005) Available at <https://www.wa.gov.au/sites/default/files/2021-04/LRC-Project-094-Discussion-Paper.pdf> (last accessed on March 31 2021).

⁶⁷ Community Welfare Act 1983 (NT) s 69; Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT) s 4

sometimes been rather controversial,⁶⁸ by and large in cases where customary lore appears to infringe human rights.⁶⁹

IV. A CASE FOR CODIFICATION?

Customary International Humanitarian Law refers to un-codified rules and regulations of Public International Law. International Humanitarian Laws such as Geneva Conventions are ratified by almost all the Nation States but not all treaties are ratified, ushering the importance of customary practices as the guiding principles in the absence of any proper, codified norms in treaties and conventions. The International Committee of the Red Cross (ICRC) reported the existence of 161 customary rules applicable in national and international armed conflicts. Technological advancements have reduced warfare and created globalisation of trade. Customary International Law plays the pivotal role in establishing diplomatic relations between these 'global villages'. Codification of trade norms thus appears to be the pressing needs in the global engagements. But, this does not imply that Customary Laws have lost their significance.

The Constituent part of Indian jurisprudence is customs upheld in many judgments by the courts. Customs are lucid in their expressions, enabling established local usage to develop into law which maybe often used interchangeably though customs are originally confined to local usages existing immemorially.⁷⁰

When the court uphold the validity of a customary right in India it organically becomes customary law based on the principle of common law jurisprudence. While customary laws at the community sphere evolved out of the local traditional usages and practices, that reflect the cultural ethos and haute of livelihood of the inhabitants of the society. Custodial association is much more than community conservation of natural resources. The concept of 'custodial association' still exists wherein the natural resources are owned by the community themselves. This relationship of man-nature custodial association exemplify the 'best

⁶⁸ Walker v. New South Wales [1994] HCA 64, (1994) 182 CLR 45 (16 December 1994), High Court (Australia); Coe v Commonwealth [1993] HCA 42, High Court (Australia).

⁶⁹ Elizabeth Byrne, "High Court rejects customary law defence in sexual abuse case" The World Today (ABC Radio). 19 May 2006. Available at <https://www.abc.net.au/worldtoday/content/2006/s1642802.htm> (Last accessed on March 31 2021).

⁷⁰ Bulbul Kumari, "Distinction between Substantive and procedural law", available at https://www.academia.edu/39468664/UNIT_I_Distinction_between_substantial_law_and_procedural_law (Last visited on March 31, 2021)

&highest' model in community conservation.⁷¹ Correspondingly Article 3(1) of Convention 169 (1989) of the International Labour Organisation (ILO)⁷² states that

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

In Australia the Mabo case⁷³ it was pronounced that the community title was superior to crown title over the common natural. Similarly the Indian Constitutional 73rd & 74th Amendments were significant efforts with regard to community conservation also, paving the road for local governance largely based on customary laws.

Customs in the North Eastern States

Certain special provisions are contained in the Fifth and Sixth Schedule in the Constitution of India that permits and legitimises the existence of governance via alternate mechanisms within specific scheduled and tribal areas. These provisions are applicable to those states where the customary laws have been upheld equivocally in the north-east Indian states of Assam, Tripura, Mizoram and Meghalaya alongside notified scheduled areas in ten other Indian states namely Chattisgarh, Madhya Pradesh, Jharkhand, Gujarat, Himachal Pradesh, Rajasthan, Telangana, Andhra Pradesh, Odisha and Maharashtra.

The colonial government had brought the tribes of Assam under its regime while recognising their customary laws through the Scheduled District Act of 1874. The tribal customs were further protected by the Assam General Clauses Act 1915 by limiting the application of the Provincial Laws in the Hill areas. Similar provisions were contained in the Montague-Chelmsford Reforms 1919. The Indian Statutory (Simon) Commission, 1930 recommended the protection of tribal customary rights which was accepted by the Government of India Act in 1935 thereby dividing the hill areas into Excluded & Partially Excluded zones while stipulating that Act of the Central or Provincial Legislature will apply to the areas only if the Governor decided in furtherance of peace and good

⁷¹Ibid

⁷² International Labour Organisation, C 196- Indigenous and Tribal Peoples Convention, 1989 (NO.169) (5 Sep 1991). Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (Last visited on March 31, 2021)

⁷³(1992) 175 CLR 1

governance. These provisions are the current day Sixth Schedule that includes the Naga, Khasi, & Garo Hills. Currently it applies to states of Meghalaya and the North Cachar Hills & Karbi Anglong districts in Assam. Recognition to the customary laws of Nagaland and Mizoram have also been provided through the Amendments to the Constitution to Art. 371A and 371G respectively.⁷⁴ Peculiar to the Sixth Schedule is recognition of community ownership with regard to land and forests and those without individual title belongs to the State. However, only recognition of rights fails to provide adequate protection interns of their livelihoods as the administration of the areas remain individual oriented where the office of the (village) chief is hereditary. There have been multiple instances where the chief had issues pattas⁷⁵ in the North Cachar Hills of Assam where non-tribals of the region are not permitted to own lands.⁷⁶ Instances was these have led to other states like Arunachal Pradesh, Manipur and Tripura to demand for the recognition of their customary laws under the Sixth Schedule as they were never apart of Assam⁷⁷.

V. CONCLUSION

One may notice a contradiction between the formal and informal legal systems. Tribal communities need no formal recognition of their customs by the formal system which is an external regulatory mechanism as adherence to the customs enables them maintain a balance between their communities and nature⁷⁸. The customs are social control mechanism hence followed with respect and fear as violation of such are taken seriously by the community leaders.⁷⁹ This is precisely because customary laws and practices are a response to their daily life with the space for flexibility to adopt to the changing needs of the tribesmen. If a society fails to progress and stagnates unable to deal with changes, the resultant factor is the rigid interpretations that emerges especially if the customs continue while the social base had disappeared. Justification for such custom are then sought by attributing it to its ancestors.

⁷⁴JeutiBarooah, "Property and Women's Inheritance Rights in the Tribal Areas of the North East" in Walter Fernandes and Sanjay Barbora (eds.), *Changing Women's Status in India: Focus on the Northeast* 99-113 (North Eastern Social Research Centre, Guwahati, 2002)

⁷⁵Id

⁷⁶Supra note 74 at 65-66

⁷⁷Supra note 74

⁷⁸RoshmiGoswami, "Shifting Sands: Negotiations, Compromises and Rights in Situations of Armed Conflict", in Preeti Gill (ed.) *The Peripheral Centre: Voices from India's Northeast* 88-99 (Zubaan, New Delhi, 2010)

⁷⁹Lucy T.V., "Women's movement in Manipur: Some Observations", in M.N. Karna (ed.) *Social Movements in North-East India* (Indus Publishing Company, Delhi, 1998)

Customary practices may also change when formal codification is made which is the case in the state of Nagaland and Mizoram.

However the debate on codification of tribal customary laws has been long drawn. A growing opinion appears to support the idea of documentation of customary laws and then recognition by the State. This will lead to double benefit of- recognition and second, flexibility as codification reduces the mobility and flexibility of the customary laws. The issue of codification is not one that can find easy summation of thoughts as to most of the Hills Tribes in the Eastern states, their customary laws is an identity and not just governing set of norms. Any threat to their customs are looked upon as a threat to their existence and culture. The idea of documentation is well supported as this will ensure that the customs and traditional laws will not die off with generations. But codification being the final step of being given a legal form within the formal legal system one is left with the fear of distorting the essence of the customary. Yet one must appreciate that without recognition, any exercise of documentation is a futile exercise. Hence, recognition is the integral process to accept the identity of not just the Tribes but of any socio political existence.

Experiences in the past have reflected that codification of tribal laws can result in the stagnation of customary laws and go against the concept of legal pluralism. For instance, there are substantial differences in the customary law of the Naga living in Manipur, Nagaland and Assam. The essence of customary laws may vanish permanently if codification is imposed bringing several different practices into a single code thereby striking off identity through diversity. Flexibility is essential for the customary laws to evolve preserve tribal identities. This requires recognition, not stagnation through codification. However, considering that despite agitation on the point over the past three decades, state like Manipur continues to be outside the Sixth Schedule depriving the constitutional protections deserved by the tribes, making it vulnerable to the onslaught of mainstream influences which can adversely impact the cultural identity.

Through this paper, an effort has been made to study the feasibility of codifying customs as it could bring several benefits including but not limited to making them more accessible to the general population and availing legal remedies in case of infringement of their tribal traditions. However, one can not overlook that any endeavour for codification of customs may open a Pandora's box with the possibility of non-tribals hijacking tribal narratives by replacing them with their own interpretations of tribal cultures as in the case

when savanna individuals began authoring pieces about dalit life. Further, unlike the mainstream populations, several aspects of the tribal ways of life are intangible, codification may not be the best option and even if done may perhaps not be capable of capturing the true essence of the customary elements. Modernisation and globalisation has enabled constant interactions between the tribals and non-tribals. Yet, it is important to remember that there exists the serious need to support tribal communities in preserving their traditions and culture. Under the guise of social inclusion, it must not be at the cost of loss of identity of tribes.