

Between Conscience and Coercion: Internalisation of Customary Law among India's tribes

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Citation: Avitoli G Zhimo et al, (2023). Between Conscience and Coercion: Internalisation of Customary Law among India's tribes, *Educational Administration: Theory and Practice*, 29(4) 5624-5628
Doi: 10.53555/kuey.v29i4.10589

ARTICLE INFO

ABSTRACT

The process through which norms are absorbed into the moral fabric of a community, thereby transforming them into customary law, is labelled as internalisation. Once internalised, such laws command adherence not through coercive state apparatuses, but through internal mechanisms such as conscience, shame, or fear, depending on cultural context. However, without formal recognition or implicit consent of the authority, customs remain normative practices rather than enforceable law. Customary law, thus, arises from long-standing social practices embedded in the community's ethical and moral values, and carries an informal yet potent sanction of the people. In tribal societies, these customary laws are pertinent in regulating social relations, including inheritance, succession, marriage, divorce, and homicide, to name a few. Such laws derive legitimacy from societal acceptance since time immemorial. They are often enforced through traditional leadership, such as the chief, headman, or elders. However, in contemporary times, the broader constitutional framework of the Indian state plays a crucial role in safeguarding the tribals, especially under the Fifth and Sixth Schedules. These dual legal structures intertwine complexly, often producing frictions between traditional governance and state intervention. This paper examines the intricate internal mechanisms and contemporary challenges of customary law while arguing for it as a form of legal order that contributes to the pluralistic legal landscape in India.

Keywords: internalisation, customary law, state, panchayat, village council

Introduction

Customary law is a law internalised by a social group that is considered binding. The process by which a law becomes customary is labelled as internalisation (Pospisil, 1971). If such a law is broken, the culprit has a bad conscience because he has misbehaved. Conformity to such law is not usually affected by external pressure. It is produced by an internal mechanism, which can be conscience in some cultures and fear or shame in others. Customary law comprises a large body of rules and regulations followed by members of the society, sustained by their moral and ethical values. It has the implicit sanction of the people. It may be enforceable by the collective coercive force of the people (Bhandari, 1995). Customary laws evolve out of the customs regulating people's social life. These customs and usages become part of the moral and ethical values of the community, and gradually they attain a kind of sacredness around them due to their antiquity. These values provide the code of conduct in such societies. The customary laws of any given society emanate from its customs, traditions, and usages. A body of observances, norms, and accepted religious and moral standards regulates the relations between the members of society. The codes of conduct, practised as such, ultimately became the unwritten laws. In tribal societies, customary law is crucial in regulating social relations, including inheritance, succession, marriage, divorce, and conflict resolution.

Law in a tribal society can be discerned more from the functions that it performs:

- The functions of interpersonal relations and the maintenance of overall social order.
- The imposition of sanctions is an essential dimension of any legal mechanism.

These may be dispensed at both the informal and formal levels. In most complex societies, these are codified, and there are complex institutions for administering justice. In simple societies, each area of life they occur

may have ways and means of imposing sanctions. Some may be believed to be automatically imposed, like in the case of supernatural sanctions. The present paper examines a few significant laws that often impact the tribals and investigates the working of internal mechanisms and contemporary challenges of customary law.

Conceptual Framework

Ian Hamnett (1977) identified two approaches to law in traditional societies postulated by Malinowski (1926) and Gluckman (1955). Malinowski was concerned with a special aspect of social control. He showed how 'control' need not be exercised by or mediated through specialised institutions of enforcement but may arise out of the felt reciprocities and interdependencies of concrete interaction in face-to-face groups. Malinowski challenges the idea that so-called 'primitive societies' lack law and social order. Based on his fieldwork among the Trobriand Islanders in Papua New Guinea, he argues that these societies have systems of law and regulation. However, they may look very different from modern legal systems. The Trobriand Islanders maintain order not through formal institutions, but through social norms, reciprocity, and customary obligations. Law is embedded in social life; it is not separated as a distinct system. Customs are not just traditions; they guide behaviour and are enforced by community expectations, kinship obligations, and the threat of social exclusion. While there may not be formal punishment, sanctions like loss of reputation, revenge, or denial of economic cooperation prevent unsociable acts. Malinowski argues that even without courts, primitive societies are not lawless. His work questioned the colonialist stereotypes, which paved the way for the modern anthropology of law. For Malinowski, law exists in all societies; it is not just about rules and penalties but also about the social fabric that binds people together.

Max Gluckman (1955) stated that the Lozi have rules accepted by all members of the society that define proper and reasonable ways in which persons are obliged to behave towards one another and things. Law in Lozi society is a specific and irreducible social fact; law influences the behaviour of both Lozi judges and the public. He explores the legal and judicial systems of the Barotse people, who lived in erstwhile Northern Rhodesia. Through a detailed ethnographic study, he highlighted how Barotse law is structured, logical, and rooted in principles of fairness, much like the Western legal system and contrary to the then-common colonial assumption that African societies lacked true legal institutions. Gluckman argued that Barotse judicial processes are consistent and reasoned. Disputes are resolved using precedent, argument, and evidence, not arbitrary power or superstition. Barotse courts use formal hearings, cross-examinations, and legal reasoning. They emphasise public consensus and moral values in rendering verdicts. Gluckman shows that Barotse law is flexible and adapts to social change, blending tradition with modern needs. The work refutes colonial stereotypes that African societies were lawless or irrational.

The theories on the anthropology or sociology of law are many and varied. Podgorecki and Whelan (1981) have compiled various sociological approaches to study law. Consensus theory propagates that law resides essentially in the minds and practices of people in a society, rather than in the compulsion imposed by statutes and commands of the sovereign. Substantive theories mainly indicate how to explain the functioning of legal phenomena. Reflexive theories are concerned with how to study and understand the legal phenomenon. However, they may be unable to explain the operations of legal processes and the functioning of legal institutions. According to the functionalist perspective, behaviour, social structure, or law should be studied regarding its manifest functions (intended consequences of social actions) and its latent functions (unintended consequences). In functionalism, law is therefore seen not only as constructing social standards but also as being derived from its social context. In the structuralist approach, politics is seen as formal relations that express the real power relations between individuals and groups. However, common elements and differentiation in the arrangement are essential to this approach. There are two stages: discovery of the 'internal structural relations of each organisation considered as a system, and the interpretation of the organisation studied as a totality, 'as if it were the product of a combination.

Structuralism is the least explored theoretical approach in legal studies based on empirical research. However, structuralism is a powerful explanatory tool that facilitates understanding the legal relationships between various social groups. As a method, structuralism proceeds at an abstract level to understand the facts of the social world, thus interpreting the information of the entire system. The possible line of enquiries based on a structuralist approach could be, viz., the very structure of the legal norm, the normative scheme of a legal system, and the study based on the factual operation of the law in social life (Podgorecki & Whelan, 1981).

The most prominent approach used by some anthropologists is the Dynamic approach. It attempts to seize the dynamics of the structure and the system of relations that form it. This approach considers society's incompatibilities, contradictions, tensions, and movements. Some prominent anthropologists who used this approach were Edmund Leach, who forced us to consider the contradictory, the conflicting, the approximative and the external relational. Max Gluckman (1956) recognises internal dynamics as constitutive of any society, but he reduces their power to change things. The tribes in India are diverse and different from one another in terms of customs. Each tribe will have its contradictions and conflicts. Let us explore a few customs to understand the internal dynamics that Gluckman argued about.

Findings

The findings of the present paper are based on empirical fieldwork conducted in the tribal state of Nagaland, India, between 2007 and 2011, and a review of secondary sources of relevant literature. To gain access to settlement orders of village and customary courts, a special permission was sought, for which I was granted access to twenty years' archives in the district customary law court of Zunheboto, Nagaland. Apart from the settlement orders, standard research methods like in-depth interviews, case studies, life histories, and genealogies were utilised to collect primary data. For comparative purposes, secondary sources like classical monographs on the tribes were reviewed.

The local authoritarian and the administrative body

Most of the tribes in India fall under scheduled areas. These areas are safeguarded through constitutional provision under the Fifth and Sixth Schedules. Each tribe has its customary law, but the state's interference and influence cannot be overlooked. Each tribe is divided into clans, lineages, etc. In a tribal village, there is a chance of two or more clans living together under one authority. Most of the time, this authority can be in the form of a village headman. The village headman is generally the oldest, wisest, or most clever among the elders. Owing to the state's interference, the tribal villages have a village council or village-panch or *Panchayat* (the council of five). Among the Hill Kharia, the village headman is called *Dehuri* or *Dihuri*. However, Dihuri is not the sole authority in the group. He consults the influential heads of the families or practically all adult males (Roy: 1926). Among the Bhils, the village panchayat is an inevitable part of their social organisation. For all important matters, the village elders meet and confer among themselves. Once a unanimous decision is made, everybody is obliged to obey. (Naik: 1956). The Birhors move around in a band searching for food or live together as a comparatively settled local group or *tanda*. Each *tanda* has a headman who is supernaturally elected. This headman is called the *Naya*. He is primarily the priest of the group (Roy: 1925).

In Arunachal Pradesh, the traditional tribal institutions have managed village affairs for centuries. These institutions vary in character and influence from tribe to tribe. The tribal council settles all the affairs of a village and decides problems of land and the admission of new settlers, and some of them arrange to give relief in case of disaster and help those who are poor, sick or bereaved. Among the Wanchos of Arunachal Pradesh, the village chief exercises executive and judicial powers with his council of elders. The power of the chief, although theoretically absolute, is, in practice, limited, as he always must appoint elders to assist him. However, in recent times, the chief's authority has tended to decline. Even then, the village authority is still a living force and controls every aspect of village life.

The administrative body of the Ao-Naga tribe of Nagaland is called '*putu Menden*'. It is an institution of elders for the village state and its governance. Thus, in an Ao village, the decision of the *Putu-Menden* is final in all matters of the village government. The leader is elected and never hereditary. Even after the introduction of statehood in Nagaland, *Putu-Menden* runs the village governance and acts as an agent of the government regarding development and civil laws. In contrast to the Ao, another Naga tribe called the Sumi never elects their chief. The chieftainship is a hereditary position, which is enjoyed till his death. Only men are eligible to become village chiefs. The village council exists in all Sumi villages, and its chairman and members are elected for five years. However, the chief, an ex officio member, is more powerful than the elected members. (Zhimo, 2019)

Among the Dimasa of Assam, the administrative system is a three-tier system. The village council is at the bottom, the Mouzadar is in the middle, and the Autonomous District council lies at the top. The village administration is headed by the traditional village headman (*dilek*) and other village elders. The village council can settle and finalise disputes and quarrels, try cases of theft, incest, elopements, etc., and deliver binding judgments on the concerned parties. The village headman is a powerful man in the 'Dimasa political Hierarchy'. According to tradition, the oldest and wisest member of the village becomes the village headman.

The administrative authority of the community among the Mizo is the village council. It tries and settles both criminal and civil cases. The village council members are also the village council Court members, elected by the villagers. The village court cannot decide cases arising out of murder, rape, and other unnatural offences. Such cases are reported to the village council's deputy commissioner. The village court has the authority to confiscate property, the monetary value of which is equivalent to the number of fines in case a person refuses to pay. The village court can impose fines, as it deems appropriate, on any person who brings disrespect to the court. The village court cannot decide the litigation of persons from different villages. Such cases are decided by the subordinate district Council Court, which has jurisdiction over them.

Inheritance and Succession:

The Panchayat is also the custodian of the customary law of succession and inheritance among the Hill Kharia. Among the Hill Kharia, all sons get equal shares of their deceased father's property. Daughters are not given any share but are maintained and looked after by the brothers until their marriage. It is also the responsibility of the sons to look after their late father's widow till her death. A sonless Kharia may opt for adoption. The adopted boy is usually a brother's son or a sister's son, for only such a near relative is entitled to inherit the entire property of the adoptive father on his death. (Roy: 1937)

Among the tribes of Ao, Dimasa, and Mizo, the father is the sole owner of the family property and his self-acquired family property. The father uses the property according to the desires and wishes of his family members. Inheritance is always in the male line –sons, brothers, brother's sons, etc. Among the Dimasa, the eldest son receives the largest share, and the others receive equal proportion; however, the youngest son gets to inherit in the case of the Mizo. The Mizo cannot claim absolute right over the father's property while the latter is still alive or until he distributes the property. If a man has no sons, his property is inherited by the nearest male relative and not by his daughters after his death. A daughter inherits the maternal property, which includes jewellery, clothes and the handloom of her mother, but not real estate. Among the Wancho, the father uses the property at his discretion but also considers the wishes of his family members.

The matrilineal Khasi tribe of Meghalaya considers the youngest daughter to be the one who holds the religion. She inherits the largest share of the family property because she must perform family ceremonies and propitiate the family ancestors. On their mother's death, the other sisters can inherit a share of their mother's property, but the youngest one gets the lion's share. No man can possess landed property unless it is self-acquired. If a man dies and leaves behind his acquired property, his mother, if alive, will inherit his property. The deceased man's property can only be inherited by his wife if she does not remarry. All properties acquired by a man before marriage belong to his mother. After marriage, his wife will inherit his self-acquired property, and the youngest daughter will receive the most significant share upon her death. Without daughters, the acquired property would be equally divided among the sons. (Gurdon: 1914) The Sumi tribe of Nagaland are patrilineal, patriarchal and patrilocal. The sons inherit the father's property. The daughters cannot inherit immovable properties but are entitled to receive their mother's jewellery. From the domestic space to the public domain, all critical decisions are made by men.

Divorce and marital cases

Divorce is not uncommon among the tribes of India. It may occur for a variety of reasons: sexual promiscuity of either partner, sterility of the wife, incompatibility of temperament, confirmed laziness of the wife, neglect of household duties, and refusal of the wife to live in her husband's house. Besides the previously mentioned reasons, a Kharia man may divorce his wife if she tends to steal or is proven to be a witch by the village paanch. The village panchayat formally dissolves the marriage if the allegation against either spouse is proved. If divorce is granted on the ground of the wife's adultery, the wife's people are required to return the bride-price (Roy:1937). In the case of the Khasi, the husband and wife decide to divorce each other if they cannot live together amicably. Until the divorce ceremony has been performed, neither husband nor wife can marry again. However, after the divorce ceremony, either can remarry but not within the family of the divorced spouse (Gurdon: 1914). If a Kachari couple decides to obtain a divorce, they may appear before the village elders and state their case. They conclude their statement by tearing a pan-leaf into two pieces, a symbolic act indicating the severance of their married life forever (Endle: 1911). Should the husband divorce his wife for causes that seem inadequate to village elders, he forfeits all claims to reimbursement of his marriage expenses. Even if his divorce is approved, he must pay a certain fine for his freedom, which is divided between the village panchayat and the divorced woman. On the other hand, if a woman is divorced for her unfaithfulness to marriage obligations, the husband is entitled to recover his marriage expenses from the wife's family. Among the Lotha tribe, it is rare for a man to drive his wife out (Mills: 1922). If he does so, he cannot recover his marriage price. Should a wife decide to leave her husband, the aggrieved husband recovers the marriage price from her family or whoever marries his runaway wife. A divorced Ao woman can claim a share of the household store of grain, but a Lotha woman can only claim the thread and chickens she brought at her marriage or equivalent. After a divorce, a Lotha woman must return the ornaments her husband gave.

Homicide

Murder may be distinguished into two types: Accidental murder and Intentional murder. Among the Sumi tribe, when a person is murdered unintentionally or accidentally, the murderer seeks forgiveness. The deceased's family can either forgive him or ask for compensation. In accidental murder, the culprit is banished from the village for a specific period. The period of exile may vary from village to village. Sometimes the case may be resolved through understanding and forgiveness, where the penalty of the culprit is lightened. Intentional murder is considered more heinous and therefore involves strict punishment. In addition to exile from the village, there is a tendency within the aggrieved family to avenge the crime. It may be noted that in all homicides, intentional or accidental, the culprit must give away a plot of land to the

aggrieved family as a fine before other punishment is imposed on him. When adjudication of murder cases becomes contentious and the Village Council or Panchayat cannot pass judgment prudently, the case may be referred to the police authority. Whenever accidental murder happens among the Sumi of Nagaland, the punishment may not amount to the same degree as intentional murder. However, per customary law, the accused must compensate the victim's family in cash or kind, depending on the case and the village concerned. On the other hand, when a murder is committed intentionally, the deceased's family seizes the murderer's house and lands, and he is chased out of the village. Even if the deceased's family wants to forgive the murderer, the villagers will forbid the murderer from staying in the village.

Interface with the State:

Customary rules existed before the emergence of the state. Despite the emergence of the modern state, many customary rules continued to be followed and recognised, while others ceased to exist. Those who continued came to acquire a further sanction since, before the origin of the state, they were enforced by public opinion alone. Later, they came to be implemented by the state agency through its political authority with the advent of the newer political organisation and institution. They were, nevertheless, unwritten but were known opinions of the community regarding right and wrong. For example, the tribes in the states of Nagaland and Mizoram enjoy special constitutional provisions in the form of Article 371A and 371G, respectively. As per the provision, they can follow their customary law and procedure. No Act of Parliament is applicable without the consent of two-thirds of the legislative assembly. Despite having customary courts at the village and district level, the state also has its judiciary taking care of disputes, primarily criminal offences.

In many cases, customary law courts cannot solve offences not of intra-village origin, for instance, in an intertribal dispute, whose customary law will be applicable. Any case related to government employment cannot be given a verdict as per customary law. New offences like cybercrime are rising, and the tribals are not spared either. Not only did they become victims, but cases of them being offenders are being reported. In the contemporary era, with the advancement in communication and information technology, the customary laws passed through oral tradition seem to lose their lustre against the formal law that keeps updating itself.

Conclusion

In tribal communities, customary laws function as regulatory mechanisms and expressions of collective identity and continuity, and they are rooted in a community's shared values and experiences. The internalisation of law highlights the intricate relationship between traditional norms, morality, and legality. However, the interface between state law and customary law often results in tensions, incompatibilities and contradictions, particularly in the context of administration in tribal areas. With the expansion of administration and inclusion of safeguarding India's tribes in the constitution, one cannot overlook the growing reach of the modern legal state that is inevitably shaping tribal customary practices. There is a need for a nuanced legal pluralism that acknowledges the integrity of customary systems while ensuring compatibility with human rights and constitutional frameworks. Recognising customary law not merely as a cultural relic but as a dynamic, adaptive legal system is essential to preserving tribal autonomy and social justice.

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