

THE CUSTOMARY LAWS OF THE MUNDA & THE ORAON (2002)
By Jai Prakash Gupta. Jharkhand Tribal Welfare Research Institute,
Ranchi. Pp. 270. Price Rs.300/-

THE MEANING and significance of tribal custom and tradition in the modern world needs to be studied in the light of the 73rd amendment and the formulation of the Panchayat Raj Act (Extension to Tribal Areas) 1996. Gupta discusses one aspect namely customary law.

The book must be read in three parts – the first part deals with definitions of customary law, and related ideas such as customs, conventions, the difference between custom and usage, and between practice and habit, relation between custom and practice. There is some reference to anthropological thinking but a large part of the discussion is within the legal framework.

The phrase customary law is not self-explanatory. There is a contradiction in terms because custom and law derive legitimacy from contrasting social systems namely, of the cultural and social tradition and the legal rational tradition.

It is not always the case that law and custom are in agreement. The Constitution of India under article 13(3) specifically recognizes customs or usage having, in the territory of India, the force of law as a non-legislative source in so far as they are consistent with the provisions of part three of the Constitution of India or are in derogation of the same.

Chapters one and two describe selected aspects of Munda and Oraon social and cultural institutions. There is little description of their present day condition on account of which it is difficult to understand how the legal regime works. The regime is described in chapters three, four and five.

A field view is necessary to know the limits and possibilities of customary law. For instance, it cannot be taken for granted that law always has a better sense of justice. Equally, it is unjust to say that all customs are unjust. There are several instances where custom, convention and usage have a better sense of well-being and collective good. Under the constitutional provisions of article 13(3) there is no possibility for upholding such customs, convention and practices. For instance, the customary practices of tribal people not to eat any fruit before it is ripe and has been offered to the gods cannot become the basis for allowing the tribal people to continue to live in the forest and look after it as well.



Such denial suffocates custom, not allowing it to respond to the changing historical conditions. The assumption of article 16(3) is that custom is static and unresponsive. That is not so. Customs also grow, acquire new meaning and also become redundant in a particular historical era and become meaningful in another. To know and document such possibilities, field research is necessary.

Gupta describes the 'Effect of Statutory Provisions regarding Panchayat' with reference to the Bihar Panchayat Act 1947. "In spite of the statutory power granted to the Panchayat by the above said Act after independence of India, it has not made significant place into the tribal political system. This has happened because of two reasons. First the tribal traditional Panch still holds command significantly in the society. The above said Act ignored all socio-political situation in the tribal areas which resulted non-tribal and many neo-habitant elected as Mukhia and Surpanch. The tribal people in the tribal region reacted vehemently and they opposed it in their own way continuously. Secondly the structure of the Statutory Panchayat was quite different from that of the tribal Panch and Parha. The latter two institutions are organized on the basis of kinship..." (p 79-80).

With regards to inheritance and succession, *Gupta* points out "among the Mundas and the Oraons like other similar tribal the conception of property is very rigid and they believe that all landed property including the natural resources are the property of the community not of an individual and it is only meant for the livelihood of all members of the community..." (p 87).

There are several questions here. There is a more important aspect of the rights to resources that has a bearing on rights to landed property and, therefore, on the question of inheritance and succession.

The mother earth has an important place in tribal thinking. All that comes from nature is under the jurisdiction of mother earth. Tribal people are only caretakers. They have rights to use only that which is the product of their labor and is not a product of the work of nature, which thus belongs to mother earth. As caretakers they have an obligation to look after, to care for, to think that dissipation and destruction is a collective responsibility. Thus the individual and the community cannot own or possess and do not have the right to dispose

How would such a regime of custom be viewed in the light of the provisions of the article 16(3)?

As the reviewer sees it, the expression 'community property' is not appropriate because it does not grasp the whole relation of the people to the land namely of caretakers. Some thing becomes property only on account of the labour invested in it. Further, there are two categories of work the work of nature, which is continuous reproduction and this



defines the limits, and possibilities of the work of man.

From the history of development we know that the state in the name of public interest can violate this right to property. It does not have the frame of reference to recognize the link between the function of the caretaker and the mode of livelihood that follows from it. There is little discussion of tribal usage of land for hunting, food gathering and shifting cultivation.

The Chotanagpur Tenancy Act, 1908 “recognized for the first time the rights of the bhuinhar or the khuntkattidars over their traditional lands” (p 120). This and other such legislation prevent the outsider from coming in but they do not seem to create conditions for tribal people to continue to use the forest in their own way.

The question is: does the regime of customary law create conditions for tribal people to live with respect to their own terms of reference? Does it not use custom; make it look like law and in the process create conditions for tribal people to become clones of non-tribal Hindus and Christians?

The history of tribal movement suggests that the people were not in favour of living under alien rule. This comes through *Gupta's* discussion of movements of 1789, 1811, 1817 and 1820. This was not how they understood them. All of them contributed to British Government taking steps for a closer administration and more effective control. The process of making-up a legal regime was central to the colonial rule. Is not customary law a result of this process? That is to say, what the British meant by closer administration was to not violate the norm but have a closer look at it and construct an administrative set-up using it for their political purpose.

All this was a consequence of Warren Hastings cultural policy that promoted the study of customs, traditions, practices in order to be familiar with the lives of the people and then on this basis formulate laws and design legal regimes. For instance, the definition of the village as a social unit frames the way to look at customs and traditions. It is derived from the notion of land as property.

A village in the Chotanagpur Tenancy Act is defined(p 125) as below:

Village means-

(a) In a local area in which a survey has been made and a record of rights prepared under any enactment for the time being in force the area included within the same exterior boundary in the village map finally adopted in making such survey and record, a subsequently modified by the decision (if any) of a Court of competent jurisdiction, and



(b) Where a survey has not been made and a record of right has not been prepared under any such enactment, such area as the Deputy Commissioner may, with the sanction of the Commissioner by general or special order, declare to constitute a village.

In this definition the physical aspect of the village is given prominence. This is a way of saying that one part of social life linked to economic activities is taken over by the state and alienated the rest of social life.

Gupta has rendered great service to students, researchers, legal community and general readers by writing this book. This book makes an authentic portrayal of customary laws of the Mundas and the Oraons and would continue to be a value in times to come.

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