Law, Culture, and Community at the Borders of the state.

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Abstract

This thesis explores the conditions under which the immediate and local narratives of communities might produce a culture of resistance. Focussing primarily on research with the Chakma people of Chittagong Hill Tracts(CHT), it recounts the complex role of legal pluralism in sustaining communities as political units in the postcolonial state, exploring how law's framing narratives produce different iterations of communitarian legal practice ostensibly within the same postcolonial legal form. This exploration uses a conceptual frame of '*critical communitarianism*', which draws specific attention to the parallels between political identity and legal culture, and community and legal mobilisation within a legally plural setting. Using legal culture and mobilisation as analytical tools, this thesis unpacks the relationship between law, power and resistance in a context where community and state are inherently unstable. In the post-conflict CHT, it appears that the processes of colonisation and de-colonisation have caused the boundaries and ideations of community to be highly mutable and contested, yet these very instabilities appear to diffuse power more equally across the community, and subvert the colonial legacy of feudal hierarchies. To further illustrate this hypothesis, the brief contrast drawn between the CHT and an Indian Chakma community demonstrates how a rigid system of constitutional recognition under the Sixth Schedule of the Indian Constitution has an ossifying effect on communitarian law; recognition reinforces an elderly and conservative customary elite and ultimately pushes communitarian legal practice to the margins of community. The thesis concludes that conditions of crisis appear to diffuse power across communities, causing dynamic and resistant interpretations of law and culture to emerge from within non-state communities.

Acknowledgements

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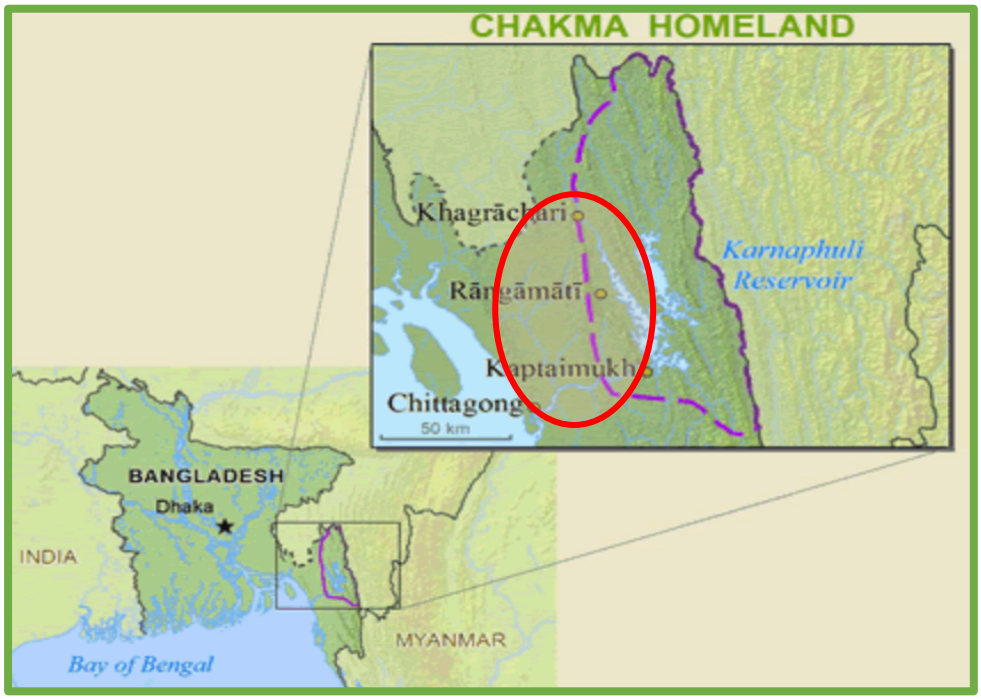
In the Hill Tracts, there are too many people to mention by name. Naba Bikram Kishore Tripura, the CHT Secretary, organised permission to research given through the offices, and Professor Nasir Uddin organised my affiliation to University of Chittagong and supported my research visa. Both are busy men and I am indebted to them for their kindness in making time for me. It was a pleasure to return to Khagrachari if only for a short time, and I am extremely grateful for the efforts of the Mong Raja, Saching Prue Chowdhury and my dear friend Umaching Chowdhury to square my presence there with the military. In Rangamati, my project was made possible by wingmen Salit Chakma and Jidit Chakma, who were great research assistants and remain great friends. Every moment of time spent in their company was a great joy.

In my final year of study, Denny's confidence and pride in me rendered quitting inconceivable when completing seemed quite impossible. That he still cared so much while facing his final battle is testament to the extraordinary courage, compassion and generosity of my big brother, a truly great man in all the ways that really matter. This thesis is dedicated to Denis Alexander O'Brien, 17th July 1952 to 10 July 2018.

Figure One: Maps of the Chakma in India and Bangladesh

The Chakma in Bangladesh



The Chakma in India and Bangladesh

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Chapter One. The Chakma nation and the Pahari

1. An Overview

1.1. Thesis Objectives

Legal form in a postcolonial context plays a complex but central role in producing and sustaining 'community' as a political entity in the postcolonial South Asian state. This thesis suggests postcolonial legal form in certain circumstances not only sustains community as a political form but also creates the conditions under which the interior world of the postcolonial community is transformed. Its central premise is that state violence provokes a community resistance that simultaneously and paradoxically disperses power amongst community members, whilst state recognition ossifies communities and empowers a narrow elite. Focussing on the Chakma nation, this proposition is explored through the prism of legal culture in the complex, uncertain and violent post-conflict region of the Chittagong Hill Tracts (CHT), an area of exceptional geographical and human diversity in the illiberal state of Bangladesh.[1] The premise is underscored by contrast with the relatively stable Tripura Chakma community formally recognised in 1976 as a Scheduled Tribe under the ostensibly protective provisions of Sixth Schedule of the Indian Constitution.

The notion of community as an organising and value-imbued unit remains problematic in progressive theories of law and rights, and perhaps more so in South Asia due to the valorisation of certain communities and their cultures through the colonial '*politics of difference*'.[2] Theoretically, this thesis seeks an understanding of the sources of resistance where the development of class

[1] The definition of Bangladesh as an illiberal state is discussed further in this chapter in Section 1.3

[2] Partha Chatterjee, '500 Years of Love and Hate' (1998) 33 Economic and Political Weekly 1330. Discussed in chapter two, section 2.4 and 2.5.

consciousness was precluded by the deliberate exclusion of communities from developing markets and equal citizenship in the colonial era. These communities, the tribes of British imagination, were produced by racialised legal hierarchies and are now sustained by the '*classical legal pluralism*',[3] that across South Asia forms one common legacy of colonial rule. Though these plural structures preserve elements of precolonial and colonial legal culture in current incarnations of customary law, this thesis will demonstrate that each iteration of customary law is truly communitarian in being formed from the narratives that immediately surround it, and in particular, are influenced by the nature of the postcolonial state. The sheer diversity of the hill areas and their troubled postcolonial history provides a febrile environment for comparative study; each section of this project probes the conditions under which resistance might arise within such communities and the ways in which that resistance is expressed through law.

The conceptual frame hones the nebulous concept of legal culture[4] by reference to its more critically engaged offspring, '*critical communitarianism*', a move that deploys the method of the legal culture paradigm to locate non-state communities as the '*cultural foci of mobilization for, or resistance to, state law in the political context of state-society relations*'.[5] Using the disaggregated tools of the legal culture school, critical communitarianism explicates the legal cultures of non-state communities by reference to their position vis-à-vis the state and to power struggles within the boundaries of community in an environment of legal

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[3] Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law and Society Review 869.

[4] David Nelken 29 Austl. J. Leg. Phil. 1 (2004) '*Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes.'(Pg. 2)* As Nelken acknowledges, the opacity of the legal culture concept has invited strong criticism. Discussed in chapter two, section 4.1.

[5] Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (University of Michigan Press 2010).Pg. 1

pluralism.[6] In the following chapters, analyses will cover the historical formation of the Chakma/ community, and legal mobilisation and consciousness amongst elite leaders and ground level practitioners. Recurring questions emerge as to whether customary law is now mobilised by communities for or against the state? To what extent does the state continue to determine the boundaries of community in postcolonial South Asia? And lastly, what are the effects of this mobilisation on the distribution of power within communities and the production of legal consciousness?

Field research is framed by a genealogy connecting the racialised jurisprudence that produced tribes as organising units in colonial India, with the contemporary dissonance between state and communities now self-defined by cultural alterity and territorial attachment. Primary data will demonstrate how customary law, despite its imbrication with the racialised tropes of 'backward', 'primitive' and 'tribe', has been strategically mobilised by community elites to augment community solidarity and in support of claims to territorial and political autonomy. It will suggest the diversity encapsulated by the colonial demarcation of the hill peoples has survived to destabilise the contemporary iteration of community, whilst the echoes of feudalism in erstwhile customary structures further fragments legal consciousness. Tension between an outward-facing desire to repel the state and an internal diversity and dissension within the borders of community is identified as a critical factor in the formation of Chakma/Pahari legal culture. Paradoxically, at ground level, this thesis will demonstrate these tensions and instabilities disperse power more equally across the community, democratising dispute resolution practices and subverting the fixed quasi-feudal customary hierarchies introduced to the hill communities by colonial rule. Conditions of crisis create a contingency and mutability in the political form of the postcolonial hill community that produces a dynamic and resistant legal culture. As a contrast, a brief sojourn to the Indian State of Tripura demonstrates how an

[6] Ibid.

established and rigid recognition process under the Sixth Schedule of the Indian Constitution marginalises the Chakma from sources of political solidarity and power, and at the same time produces an insular, conservative and ossified customary legal culture. The ultimate paradox is suggested as the empowerment of an oppressed minority community through sustained violence, and the oppression of an ostensibly empowered community through liberal recognition.

1.2. A Brief History of the Chakma

Though the mountain communities of South Asia broadly share migratory origins, a reliance on swidden or jum agriculture, hunting and foraging as modes of production, and oral forms of social organisation, cultures and laws, these commonalities obscure a vast diversity of language, religion, social organisation and cultural symbols amongst the many nations of the mountains.[7] Scott argued that the hill peoples were defined not just by their alterity to settled societies but their active avoidance of incorporation into settled states.[8] This thesis will suggest, in contrast, that hill and plain life-worlds were closely connected through trade, politics, and through intermittent conflict until the colonisation and pacification of the territories in the 19th century replaced a previously symbiotic relationship with an absolute bifurcation.[9] The contemporary differentiation of plainland and hill communities in South Asia is thus better explained by reference

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[7] James C Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale Univ. Press 2009). Scott argues in addition that that the hill-based groups occupying the vast ranges of Western Thailand, North East India and South East Bangladesh originate in outsiders expelled or migrating from the strictures of city-state and share an inherent mobility.

[8] Ibid. Pg. 178

[9] Ibid. Although Scott advances a theorisation of the hill communities as refugees from the state, and their cultures designed to avoid settlement, he acknowledges that their variety related to their relationality to the state.

to colonial history and its consequences than by any supposedly inherent difference.

The Chakma are a case in point. They remain the largest and most dominant of the precolonial hill communities which together still form the majority population of the CHT region and the largest territorial concentration of indigenous people in Bangladesh.[10] Though now objectively and subjectively defined as indigenous or Pahari (hill people), the precolonial Chakma occupied a '*zone of transition*' between the plains and the hills, with most clan groups residing in settled villages, some practising plough cultivation and some using temporary hill camps for the purposes of jum farming only.[11] In politics, the Chakma chiefs were tributaries to the Moghul rulers with whom they appeared to have a close and respectful relationship.[12] When the Moghuls granted the Diwani of Bengal to the British East India Company (BEIC), their domain over the Chakma was established only after a protracted struggle that ultimately confined Chakma settlements to the Chittagong Hills, apparently tribalising a community that had previously incorporated many state-like attributes.[13] From their defeat in 1790 to the eventual annexation of the territory as a full colony in 1860, the Chakma were tributaries to the BEIC and resisted persistent attempts to exert direct control over the region's economy. Even after claiming sovereignty, the British desire to transform the hill

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[10] The eleven communities of the Hill Tracts are the Bawm, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mro, Pangkhua, Taunchangya, and Tripura. Devasish Roy, Philip Gain and Society for Environment and Human Development (Dhaka, Bangladesh) (eds.), *The Chittagong Hill Tracts: Life and Nature at Risk* (Society for Environment and Human Development 2000).

[11] David E Sopher, 'The Swidden/Wet Rice Transition Zone in the Chittagong Hills' (1964) 54 Annals of the American Association of Geographers 107.

[12] The Chakma chiefs adopted the suffix Khan in the 16th century as a mark of respect to the Moghuls. S B Qanungo, *Chakma Resistance to British Domination* (Shanti Press Chittagong 1998). Pg. 24

[13] Ibid.

societies to something more closely resembling a feudal peasantry evolved into a regionally specific form of indirect rule that threw exclusionary legal and territorial borders around hill territories and peoples, and prohibited external interference in community affairs excepting the default powers vested in colonial authorities.[14] This system of government was formalised in the Chittagong Hill Tracts Regulations 1900, which concretised indirect rule through three territorially bounded administrative Circles led by tribal chiefs, excluded any foreign or non-indigene from settling in the Hill Tracts and afforded limited legal recognition to the common property frontier that provided livelihoods to most hill communities.[15] Although a technique of domination, the CHT Regulations 1900 have survived two further iterations of statehood in the Republics of Pakistan and Bangladesh, to found the highly contentious constitutional basis for the Chakma's contemporary claims of legal and cultural difference.

1.3. Pakistan and Bangladesh

From the colonial era to the current period, the geographical location of the CHT has been a critical factor in the fate of its peoples. For the British, even before partition, the Chittagong Hills were problematic in being similar in nature to the mountain areas of Assam but closer to the administrative centre of Bengal in Chittagong. The tension generated between bureaucratic rationality and pragmatism was strong enough to cause a mutability in administrative boundaries

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[14] Tamina M Chowdhury, 'Raids, Annexation and Plough: Transformation through Territorialisation in Nineteenth-Century Chittagong Hill Tracts' (2016) 53 The Indian Economic & Social History Review 183.The process of territorialisation and the creation of leadership hierarchies within the hill communities is discussed in more detail in chapter three. The default clause was the common 'repugnancy clause' that reserved ultimate power to British administration in the event that any aspect of community law was repugnant to the state. See chapter 3.2 Section 3.2

[15] The legislative framework and history are explored in detail in chapter three, Section 3.

of the CHT in the decades before Partition. To 1895, parts of the CHT region were redrawn into the government of Assam from Bengal, until the first partition of Bengal foundered in 1911. When the Simon Commission was formed in 1929 to consider the future government of the north Eastern Hill Tracts, its thinking was still to combine the administration of the '*Backward Tracts*' of Assam with the Arakans, Chittagong and Pakkokko Hill Tracts.[16] By 1947, however, the logics of development, that is the proximity of the CHT to Chittagong and the city's need for water resources, appeared instrumental in Radcliffe's decision to despatch the territory and hill communities to a majority Muslim and overwhelmingly Bengali state.[17]

The first Republic of Pakistan was a curious experiment of a nation-state, east and west were divided by over 1000 miles of territory, by language and culture, and even by differences in the practice of Islam. From 1947, the problems presented by its extraordinary form, the immediate material problems of food shortages, and the failure to agree a Constitution distracted attention from the border communities, indeed, the colonial District Commissioner was retained to provide oversight to tribal government for some years.[18] The legislative framework of the CHT was not seriously challenged until, in 1957, the Pakistani military assumed

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[16] Subir Bhaumik, *Troubled Periphery: The Crisis of India's North East.* (SAGE Publications India Pvt, Ltd SAGE Publications, Limited [Distributor] 2015) Pg. 9 <http://knowledge.sagepub.com/view/troubled-periphery/SAGE.xml> accessed 2 January 2016.

[17] Nehru was most insistent that '*On religious and cultural grounds, the Chittagong Hill Tracts should form part of India. Sir Cyril Radcliffe had had no business to touch them*'. British Library Archive. Minutes of a meeting held at Government House, New Delhi, 16 August 1947, to receive the awards of the Boundary Commissions which demarcated the boundaries between India and Pakistan in Bengal and the Punjab.

http://www.bl.uk/reshelp/findhelpregion/asia/india/indianindependence/indiapakistan/partition9/

[18] Pierre Bessaignet, *Tribesmen of the Chittagong Hill Tracts* (Asiatic Society of Pakistan 1958).

power in a coup they justified by reference to the failure of democratic government to develop the economic base and steer land reform in East Bengal.[19] The new government introduced the Basic Democracies Order in 1959 which legitimised martial law on development grounds and confined democratic control to minor decision making at a local level.[20] Through this legislation autonomy conferred on the hill peoples by the CHT Regulations was tangentially undermined by the centrifugal sensibilities of military rule. In 1960, the Chakma first experienced forced displacement on a large scale when the zenith of this development policy, the damming of the Karnaphuli River by the Kaptai Dam, flooded nearly 80% of cultivable lands in the Rangamati valley. As many as 250,000 Chakma were displaced and dispersed across the Hill Tracts and to India.[21] The prohibition on settlement in the Hill Tracts was explicitly voided in 1964, ostensibly to auger further development of the hill regions and retrospectively legitimise the Kaptai displacement.[22]

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[19] Anti-Slavery Society Report Number 2, *The Chittagong Hill Tracts, Militarization, Oppression and Hill Tribes* (Indigenous Peoples and Development Series 1984).

[20] Willem van Schendel, *A History of Bangladesh* (Cambridge University Press 2009). Pg. 119

[21] The Kaptai project was conceived in the early 1950's and only reached fruition under the military government. It has been argued, however, that the decisions taken under military rule, that is the level at which the lake was created was politically motivated by distaste for the cultural and religious minorities of the CHT, and a desire to dismantle colonial protections. Chakma refugees were resettled to Arunachal Pradesh, and though accepted as Indian citizens controversially remain excluded from AP state politics and benefits. Deepak K Singh, *Stateless in South Asia: The Chakmas between Bangladesh and India* (Sage ; New India Foundation 2010). Harikishore Chakma and Centre for Sustainable Development (Dhaka, Bangladesh) (eds), *Bara Parang: The Tale of the Developmental Refugees of the Chittagong Hill Tracts* (1st ed, Centre for Sustainable Development 1995).

[22] Anti-Slavery Report Number 2, (n 19)

The constitutional reforms introduced by the military leadership effectively legitimised martial rule across Pakistan by reference to the poverty and low capacity of the citizenry and their consequent inability to participate in democratic processes. Despite this, the martial government did little to tackle the material poverty of its eastern wing, continuing to govern Bengal from afar and for the benefit of the Western Urdu-speaking elite. In East Pakistan, opposition to the junta grew during the 1960s, with increasingly strident calls from the Awami League-led opposition coalition for greater autonomy within Pakistan and a return to democracy.[23] Elections were called in 1970, and the refusal of General Ayub Khan to honour the result and cede power to the newly elected Awami League government instigated the war of independence, and the creation of the Peoples Republic of Bangladesh.[24]

In the forty years since independence, Bangladesh has moved through many incarnations to its position, now, as a functional but politically troubled democracy.[25] The first government of the Republic (GOB) expressed the nationalist fervour that had displaced West Pakistani hegemony in an idealistic constitutional form of centralised but democratic socialism.[26] Idealism notwithstanding, Sheikh Mujib, the putative Father of the Nation, had already limited the original constitutional checks and balances on prime ministerial power

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[23] Schendel (n 20).

[24] Srinath Raghavan, *1971: A Global History of the Creation of Bangladesh* (Permanent Black 2013). Although outside the scope of this thesis, Raghavan makes a convincing case for the war of independence being a proxy war between India and Pakistan, with the outcome largely influenced by geo-political considerations. India's subsequent hostility to martial rule in Bangladesh drove their financing of the Chakma-led insurgency.

[25] Ali Riaz, *Inconvenient Truths about Bangladeshi Politics* (Prothoma Prokashan 2012).

[26] Abdul Fazl Huq, '*Constitution-Making in Bangladesh*' (1973) 46 Pacific Affairs 59.

before his assassination by the army in 1975.[27] From 1975 to 1992 Bangladesh remained under martial law with the justification for the suspension of democracy again found in the need for rapid and centralised economic development.[28] When democracy was eventually restored in 1992, the travails of government continued, with political instability deeply embedded as power shifted between two bitterly entrenched political dynasties, the ostensibly liberal and secular Awami League(AL) headed by the daughter of murdered Prime Minister Sheikh Mujib, and the Islamist conservative Bangladesh National Party(BNP) led by the wife of murdered President General Ziaur Rahman.[29]

After winning the 2011 election, the Awami League(AL) consolidated their hold on power through a sustained attack on the opposition that was met with a BNP boycott of two subsequent elections and the installation of the AL as a government without opposition.[30] Though ostensibly the liberal opponents of military rule, the AL appeared to enter an insidious alliance with the Army.[31] In

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[27] Sheikh Mujib had in fact augured an era of one-party government prior to his assassination through constitutional amendment in 1974. One reason for the continued dysfunction in the Bangladesh polity is frequently attributed to his early failure to reconcile the victorious Awami League with the vanquished supporters of a more Islamic iteration of state. Many of these supporters were either in the Army or associated with it, and the military-bureaucratic complex remained (and remains) a powerful element of the state after independence.

[28] Abanti Adhikari, *Bangladesh since 1952 Language Movement* (Maulana Abul Kalam Azad Institute of Asian Studies; Shipra Publications 2011).

[29] Riaz (n 25).

[30] Ibid. Even before the BNP boycotts, Riaz identified the failure of the two main parties to oppose effectively within a parliamentary democracy as the fault line in Bangladeshi democracy. In opposition both the AL and BNP attack the legitimacy of government rather than engaging in scrutiny and oversight. In power, both the AL and BNP have resorted to direct attacks on and oppression of political opponents, with the BNP suspected of an attempt on AL leader Sheikh Hasina's life in 2005.

[31] See Ramachandra Guha on the positioning of the Bangladesh military and the Awami League, in *Too Quiet for Comfort*, Telegraph of India,

relation to this thesis, the salient point of this commentary is that the development focussed and majoritarian trajectory initiated by its former Pakistani military rulers was broadly sustained by the Bangladeshi state, regardless of whether the new nation was ruled as a democracy or a dictatorship. Further, though now a functioning democracy, Bangladesh remains illiberal in the sense that the liberal constitutional protections afforded to individuals and the more limited and mainly indirect constitutional protections[32] afforded minority communities are regularly abrogated, falling prey to the political whims of whoever holds power at the time.[33]

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published 3 December 2015 http://www.telegraphindia.com/1151203/jsp/opinion/story_56299.jsp#.VmKEEON968r

[32] The Constitution of the Peoples' Republic of Bangladesh contains numerous rules of law provisions, upholds the independence of the judiciary and defends freedom of religion and culture. It also provides for special treatment for backward groups, and is discussed in more detail in chapter three. http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367

[33] Zakaria (n 1). Zakaria defines illiberal democracy as plebiscite rule without the checks and balances associated with constitutional liberalism, that is the protections afforded to individuals against tyranny from state, church or society. Bangladesh is included as falling between liberal and illiberal democracies, in that its structures include some of the protections associated with constitutional liberalism, namely an independent judiciary and a constitution that enshrines individual rights, even if those protections are difficult to invoke. During fieldwork human rights activists such as Iftekar Zahman, the Director of Transparency International and a member of the CHT Commission explained how, in the current polity, his personal freedoms had been curtailed by government surveillance and the apparently strategic failure of the security services to curb attacks on secularists and liberal activists. The recent arrest of internationally renowned photographer Shahidul Alam after documenting student protests is another example of the increasingly illiberal nature of AL government. https://www.bbc.co.uk/news/world-asia-45173303

1.4. Minorities and Rebellion in Bangladesh

The increasing uniformity of the population of Bangladesh is perhaps the starkest illustration of how political upheaval and a majoritarian ethno-nationalism has homogenised and polarised the nation, placing all minorities in varying states of jeopardy.[34] At Partition, the population of East Pakistan was still diverse, with the proportion of Bengali Hindus and Buddhists at 30% of the total, and the small borderland communities at around 2%, of which the largest group were concentrated in the CHT.[35] In the 2011 census, 90% of the population of Bangladesh were Bengali Muslims with the reasons for this extraordinary demographic transformation suggested as outward migration of Hindus under growing persecution of minorities.[36] Populations shifts have followed each upheaval, the 1965 Pakistan/India war and the war of independence creating spikes in migrations of Bengali Hindu and plainland Adivasi to India.[37]

Nation building in the aftermath of the war of independence did little to address the apparently hostile environment for non-Bengali, non- Muslim denizens, and it

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[34] Amena Mohsin, *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh* (University Press 1997). Mohsin analyses the location of Pahari minority communities in relation to the state in Bangladesh, concluding that their position is precarious due to the type of exclusionary nationalism produced by the revolution

[35] Ahmed Kamal, East Bengal at Independence, Pg.333 in Sirajul Islam, Harun-or-Rashid and Asiatic Society of Bangladesh (eds), *History of Bangladesh, 1704-1971* (Asiatic Society of Bangladesh : Distributing agent, Academic Publishers 1992).

[36] Housing and Population Census 2011, Bangladesh Bureau of Statistics; http://203.112.218.69/binbgd/RpWebEngine.exe/Portal?BASE=HPC2011_short&lang=

[37] Nahid Kamal, '*The Population Trajectories of Bangladesh and West Bengal During the Twentieth Century: A Comparative Study*' (PhD, London School of Economics 2009). Pg. 129. Religious persecution remains an entrenched problem. See Report for US Department of Justice, 'Bangladesh: Treatment of Religious Minorities' (Global Legal Research Center, Law Library of Congress 2016) 2016–013914.

was in this dangerous context that the hill-based minorities experienced further marginalisation as the state approach to diversity unfolded in its valedictory Constitution.[38] The 1972 Constitution of the Republic of Bangladesh encapsulated the ideals and aspirations of the victorious Awami League, but contained only sparse recognition of minority cultures in the enablement of progressive measures for backward races. At the same time, Bengali ethnicity and language were determined as symbolic of national citizenship, cementing the distancing of the hill peoples and other borderland communities from the mainstream of the Bangladeshi polity. Protests from Manabendra(M N) Larma, Chakma activist and sitting MP for Rangamati, were met with insouciance from Prime Minister Sheikh Mujib, who famously told him to '*go home and become Bengali*.[39] Whilst these political skirmishes infected national discourse, the CHT the hill communities were targeted by still armed parties of Bengali freedom fighters who frequently ascended the hills to raid villages for food, a matter which excited the defensive formation of armed Chakma cadres. Under the leadership of the M N Larma the hill people's political movement, the Jana Samhati Samiti

[38] Aftab Ahmed, '*Ethnicity and Insurgency in the Chittagong Hill Tracts Region: A Study of the Crisis of Political Integration in Bangladesh*' (1993) 31 The Journal of Commonwealth & Comparative Politics, 32. Ahmed suggests the majority of the Paharis were indifferent to the struggle for independence, seeing it as a competition between Bengali elites, but notes that the Awami League did nothing to persuade their leadership to join this struggle. Two of the Circle chiefs, Raja Aung Shwe Prue Choudhury and Chakma Raja Tridiv Roy aligned with the Pakistani leadership, the latter being exiled to Pakistan at the end of the conflict. After the war, Tridiv Roy fled to Pakistan, taking up an ambassadorial position and remaining in exile until his death in 2012. The ambivalence of the Chakma leadership toward independence is suggested a reason for the victorious Awami League's diminution of indigenous minority groups.

[39]Snehar Kumar Chakma gives a personal account of Mujib's speech in Rangamati in 1972, at which this statement was apparently made. Chakma, Chakma SK, *My Life and Struggle for Peace* (Mrs Anamita Chakma 2014)

(JSS),[40] organised these defensive formations into an insurgent army, the Santi Bahini.[41] In 1975, in response to this accumulation of material and political provocations, the former hill tribes or 'Pahari', under Chakma leadership armed themselves against the state.[42]

That year, the first offensive raid by Santi Bahini took place shortly after the return to martial law to Bangladesh. By then, the Santi Bahini were well trained and well-resourced due to support from the Indian government, and in the early phases of the conflict inflicted casualties and real damage on military facilities in the CHT.[43] Their activities invited a military response of disproportionate brutality, mainly visited on the wider Pahari population. Throughout the late 1970s and 1980s, mass killings, rape and disappearances by the army caused further massive population shifts of mainly Chakma indigenous residents to refugee camps in India.[44] Land settlement was explicitly deployed by the state to neutralise and undermine the Pahari during the conflict; the 'transmigration policy' introduced by General Ziaur Rahman in 1979 settled half a million landless Bengalis on previously protected CHT territory, their presence creating a need

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[40] United Peoples Party. Post 1997, the JSS were renamed the PCJSS or Parbatta Chattagram Jana Samhati Samiti.

[41] Shapan Adnan, *Migration, Land Alienation, and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh* (1st ed, Research & Advisory Services 2004).

[42] Ibid. For a further historical account of the insurgency see S Mahmud Ali, *The Fearful state: Power, People, and Internal War in South Asia* (Zed Books 1993)

[43] Ibid.

[44] For an account of human rights abuses see Amnesty International (ed.), *Bangladesh: Unlawful Killings and Torture in the Chittagong Hill Tracts* (Amnesty International 1986). And the report by the Anti-Slavery Society (n 19). Though focussed on Chakma development refugees, Singh also touches on the later waves of forced migrations to Tripura state and the longstanding Refugee Camps only dismantled in 2002. Deepak K Singh, *Stateless in South Asia: The Chakmas between Bangladesh and India* (n 21).

for protection from Santi Bahini that further legitimised the militarisation of the region.[45] By 1991, transmigration had reduced the proportion of indigenous residents in the CHT to 51% of the population, from 98% at Partition.[46] At the time of field research, and in the absence of up-to-date census data, most Pahari commentators and the PCJSS leadership believed the policy to transform the region through settlement had effectively created a Bengali majority in the Pahari homeland of the CHT.[47]

Peace was finally established by the UN brokered Chittagong Hill Tracts Peace Accord 1997 (CHTPA), but its failure either to reconcile state and community after the abuses of the war, or to address directly the consequences of land settlement left the CHT region still wracked by division and low level conflict.[48] Criticised as too little, too late, the CHTPA offered no timetable for demilitarisation of the region, and left the army a powerful and highly visible

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[45] The impact of the insurgency on CHT is covered in detail in Shapan Adnan, *Migration, Land Alienation, and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh* (n 41).For details of human rights abuses and displacement. Amnesty International (ed.), *Bangladesh: Unlawful Killings and Torture in the Chittagong Hill Tracts* (Amnesty International 1986).

[46] The settlement policy was known as the Transmigration Programme and was formally initiated by General Ziaur Rahman in 1979. Population shifts in the CHT were tracked until 1991, since when no census has been conducted. At that time, the indigenous population was recorded as 501,144 against a non-indigenous population of 473,301, e.g. Bengali settlers formed 49% of the population, from only 2% in 1872. Rajkumari Chandra Kalindi Roy, '*Economic Solutions to Political Problems*', Minorities Peoples and Self Determination (2005). Pg. 130

[47] The PCJSS website flags the difficulty in assessing the impact of settlement. https://www.pcjss.org/population-in-cht/. However, in conversation with chief Press Officer Mangal Kumar Chakma and chief operating officer Shakti Tripura, the figure of 60% Bengali majority was guessed at and attributed to continued settlement and faster population growth among the Bengali population.

[48] Kumar Panday Panday and Jamil Ishtiaq, '*An Unimplemented Accord and Continued Violence*' (2009) 49 Asian Survey 1059.

aspect of life in the Hill Tracts to the present day.[49] It created an irresolvable conundrum in auguring democratic institutions but simultaneously rendering them ineffective as autonomous bodies by an absolute failure to address the demographic consequences of transmigration.[50] These palpable weaknesses ensured that even at the time of signing, the terms of peace were opposed by the main regional opposition to the JSS, the United Peoples Democratic Front(UPDF), who argued against disarmament without a concomitant commitment from government to demilitarise and resettle the now numerous Bengali residents. Their continued opposition to the JSS is now the source of frequent internecine violence, compounded by splits in both main parties and a seemingly relentless fragmentation of the armed cadres that still populate the hills.[51]

This unstable post-conflict environment provides the material context for the core study of the genesis and practice of customary law in the Chakma community in the CHT, and the benchmark against which customary law from the apparently more fortunate Tripura Chakma community is contrasted. Though the laws and cultural symbols of the Chakma nation suggest a superficial homogeneity between Bangladeshi and Indian iterations of customary law, this thesis will argue their residual similarity barely conceals an ocean of complexity swollen by more than a century of history, highly divergent state approaches to managing diversity and equally divergent alignments between the respective Chakma communities and global campaigns for human rights and recognition as indigenous people.

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[49] The CHT is still governed under a state of Emergency and the Army now have entrenched commercial interests in tourism, construction and plantations. Reportedly, they are still instrumental in determining government policy toward the CHT.

[50] Over twenty years later, elections have still not been held to the new democratic bodies. Considered in chapter three, section 4.4

[51] A Reform JSS has been formed by former Members protesting the highly centralised leadership of the Party, whilst a recent split in the UPDF has been attributed to up to 20 deaths in 2018 alone.

Exploring both legal mobilisation and consciousness amongst the Chakma elite, and at a village level, it will show how conditions of revolt against an oppressive and illiberal state has empowered the Chakma, expanding the concept of community to a broad if unstable solidarity with similarly marginalised Adivasi communities in the Hill Tracts and beyond. In the apparently peaceful conditions of Tripura state, however, recognition through the appeasement of a liberal state recreates the pacifying effects of colonial domination. Below, a short detour through two appeal cases provides an indication of the emergent differences now embedded in legal culture in the two selected communities.

1.5. Two Forms of Justice

This short story of two separate appeals made to the highest level of the communitarian legal hierarchy offers a brief illustration of the radically different outcomes possible in the culture, consciousness and mobilisation of communitarian law in the Chakma communities. The cases, though not entirely analogous, were considered of great importance to the respective communities, both related to issues of communitarian jurisdiction and, more pertinently, were revealing of the highly divergent social dynamics and relations of power in the customary legal institutions operating in the two localities.

First to Bangladesh and an appeal taken to the Mong Raja, the highest-ranking official of the customary system in the Khagrachari Circle District of the Chittagong Hill Tracts.[52] The Botoli School dispute related to the disposal of a small parcel of land owned by a wealthy Chakma businessman and adjoining a

[52] The Botoli School hearing was held on 6 November 2015, in the office of the Mong Raja in Khagrachari. Village parties to the dispute were interviewed between 7 November 2015 and 9 November 2015, and the landowner interviewed in his Dhaka apartment on 3 December 2015. Note that the customary system in Bangladesh is territorialised into administrative circles and the Khagrachari the appellate judge in this case was a Marma chief. The Circle System is analysed in chapter three.

Pahari school in a mainly Pahari/Marma village. An agreement had been reached between the landowner, and an intermediary – a Tripura (Pahari) businessman - to sell a larger piece of land including this segment to a Bengali businessman, thus alienating a substantial portion of the village footprint from Pahari ownership. The local headmen, in line with his customary powers, had refused to approve the sale of land as the landowner had previously promised to donate the land to the school. His utilisation of customary powers in favour of the school led the landowner to bypass the headman and appeal directly to the Raja to issue the report on title and facilitate the sale. In effect the Raja was being asked to act against a headman who had used his administrative role to prevent the alienation of land from the Golabari village community to one of the wealthy new settlers to the region.

Of particular interest was the visibly strained and contradictory juxtaposition of the 'customary' domain, that is the traditional and historically transmitted concept of non-state law, with a highly politicised and critical conception of community law emanating from the villager parties to the dispute. Though the dispute related to a highly specific deployment of customary institutions and procedures to prevent land alienation, the representatives of Botoli School disregarded the processual issue and presented the Raja with a passionate appeal for Pahari political solidarity based on wider notions of social and economic justice. The headman, himself a customary official, asserted his legal power to stop the sale of land on an explicitly political claim, namely that the community's need for a larger school took precedence over a sale that alienated land to Bengali settlers.

A hearing was convened at the Raja's Office for all parties to put their case, including members of the school committee, Teachers, the headman and the landowner. The Raja, though asserting his neutrality at the outset, reverted to a mainly procedural justification for supporting the sale in the face of opposition from the community, an appeal to custom which, according to later conversations with the villagers, masked an inclination toward supporting the community elite. The headman was joined by male and female members of the village community

who argued passionately on behalf of Botoli School, and their need for a larger playground. The hearing itself was fractious and even though the Raja chaired proceedings, fierce arguments between parties and with the Raja occurred throughout. The case for the school was based entirely around the justice of the situation; a promise had been made, and the consequences of it not being honoured was the Bengali acquisition of Pahari lands in an exclusively Pahari village.

The Raja's decision to refer the dispute back to the community antagonised both the landowner and the customary officials, the former hoping for a speedy resolution and the latter acutely aware of their relative weakness in a private negotiation without the authority of the Raja. Yet, whilst unwilling to honour the donation in its entirety, the landowner afterwards explained he had been persuaded to defer the sale agreement and allow the village to purchase the plot necessary for school expansion. The management committee were bitterly critical, in private, of the Raja's refusal to deploy his customary authority, attributing his reticence to a lack of experience and awareness of the politics of land. Still, it appeared from subsequent discussions with participants that despite the limitations of the customary system being at the fore in the Botoli case, the customary route to justice was still considered of primary importance to their community. The mobilisation of customary institutions had ultimately caused a wealthy, powerful and cosmopolitan individual to consider their moral obligations to the Pahari community, through the promotion of an explicitly political conception of community justice.

Contrast the position in Tripura state, India, where the appellate system of the Chakma customary system was invoked to hear a case in which allegations of partiality and corruption were made against a lower level of the customary hierarchy.[53] Chakma law, according to officials in Tripura, allowed parties to a

[53] Hearing observed on 24th June, 2016, Santipur Village, Tripura

dispute to prove their innocence by taking a traditional oath before the Panchayat. In this case, a woman and man of Santipur village had been accused of adultery at their village Panchayat by the husband of the woman concerned. The male party to the alleged adultery had agreed with the Panchayat Chair to pay a reduced fine in return for an admission of guilt, but the sub-text of the case was allegedly a dispute between the alleged male adulterer and the female party's husband. She protested to the Panchayat on the grounds that her reputation was destroyed by this action, and argued that she should be allowed to take an oath of innocence. The villagers supported the female party and presented evidence of corruption on the part of the Adam (village) Panchayat to support their request that the Panchayat Chairman and Members be removed from their posts.

The Appeal was convened by the President of the Chakma system and addressed to the Suleane (Regional) Panchayat, which is the third strata of legal hierarchy.[54] Twenty-one male customary officials attended the hearing, but with a smaller group of seven being appointed as the decision-making panel. The hearing process was formal and stylised, and included the symbolic resignation of the Panchayat headman. After hearing arguments, the inner circle of headmen left the room to consider their verdict, and returned after a short while to adjudicate in favour of the aggrieved female party and villagers and to order the suspension of village Panchayat members. But on announcement of their verdict, President Nironjon intervened to overturn the judgment. Though he agreed that Chakma law and the facts of the case supported the Panchayat decision, he asked the committee to remember that the role of the court was to maintain peace and unity within the community. To this end, facts were less important than maintaining cooperation and collaboration in the community, and making sure that people respected the customary system. The Panel then reconsidered their verdict, and returned to the hearing to concur with the President of the Panchayat. All

[54] Nironjon Chakma, President of the Suleane Panchayat, interviewed on 23rd and 24th June.

involved expressed their approval of the judgement and reinstatement of the suspended Panchayat members.[55]

Both cases were heard within Chakma customary systems ostensibly similar in their structures, hierarchies and their utilisation of community solidarity to ground decision making. Yet in Bangladesh, two different Pahari communities, Marma and Chakma, utilised a communitarian system that cut across ethnic divides to address an issue of wider political significance. A rowdy, contested, inclusive, relatively democratic process suggested an expansive accommodation of community perspectives within the erstwhile customary system and a partial rejection of the strict hierarchy associated with the hereditary authority of the Raja.[56] In India, however, an exclusively Chakma process appeared highly stylised, gendered, hierarchical, and oppressive in its rejection of the entreaties of the villagers to act against officials of the system. The selected President overruled the decision of the villagers and met with approval for doing so. These differences in communitarian legal process appeared reflective of a sharp divergence in the narratives and subjectivities attaching to the customary legal systems across communities of the same nation, now geographically separated by state borders.

A number of lines of enquiry are raised by the apparently divergent trajectories of the customary legal institutions of the Chakma in Bangladesh and India. This thesis will present qualitative data gathered from Chakma people involved in the mobilisation of customary law, and will attempt to identify the effects of state/minority interactions on the distribution of power within a community.

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[55] Interviews after the case suggested that the woman would suffer reputational damage, but according to the elders the pursuit of community harmony was of greater import than her personal reputation

[56] It should also be noted that this case took place in the Khagrachari District, and respondents asserted that under the leadership of the Chakma chief, in the Rangamati District, they would have expected the chief to support the community, perceiving the Chakma chief to be a stronger and more politically astute operator.

Theoretically it seeks understanding of the contemporary location of the communities previously excluded from equal citizenship and capitalist markets, using the guiding conceptual frame of '*critical communitarianism*' to link state context and local practice to its analysis of communitarian legal culture. It argues that under certain circumstances, customary/communitarian law is potentially a force not only for eliciting resistance to the state, but also for generating emic change and dispersing power within the boundaries of community. Yet paradoxically this potential appears less obviously manifest where community autonomy is ostensibly strongest, calling into question the efficacy of liberal modes of recognition in empowering the weakest community members. Finally, noting that state violence appears to have a democratising effect on communitarian legal practices, it asks whether the lessons learnt from the transmission and creation of communitarian legality in the context of an illiberal state offers wider intelligence on the relationship between community, law and liberation.

1.6. Terminology

The language of community in both Bangladesh and India is complicated by the highly politicised nature of discourse over minority rights, radically different political and constitutional frameworks in Bangladesh and India, and a resulting divergence in Chakma self-definitions in the Republics of Bangladesh and India respectively. Neither Bangladesh nor India are signatories to the United Nations Declaration of the Rights of Indigenous People (UNDRIP);[57] formal recognition of the hill communities in both states accrues through the Constitution only. Nevertheless, across Bangladesh, the mainly borderland minorities that comprise only 2% of the population tend to self-identify as Adivasi, a definition used across South Asia to refer to the pre-Aryan inhabitants of the Indian sub-continent.[58]

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[57] United Nations Declaration on the Rights of Indigenous People 2007. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[58] Andre Beteille, '*The Concept of Tribe with Special Reference to India.*' (1986) XXVII Archive of European Sociology, 297.

The assumption of an Adivasi identity is underlined by political identification as indigenous people, and the longstanding alignment of representative political organisations with the global indigenous people's movement.[59] Adivasi is rarely used in government circles and remains a matter of controversy,[60] and constitutional recognition is limited to special quota provisions and a default affirmation of the jurisdiction of pre-existing custom and law.[61] Definitions of 'tribe' and 'backward' pepper state and majoritarian communications, whilst being deeply resented and rejected as pejorative by the Adivasi communities. Given this context, concepts of indigeneity in this thesis are utilised and discussed in relation to political identity, but not in relation to state recognition. Further, given its pejorative connotation in Bangladesh, 'tribe' is not used unless explicitly related to a government communication, or in relation to the positing of 'tribe' to reference the colonial political form imposed on the hill communities. For all these reasons, the term Adivasi / indigenous will be used to identify the larger group of minority communities in Bangladesh.

There is a further territorial element to Adivasi identification however, which distinguishes the hill communities of the Chittagong Hill Tracts from the wider

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[59] Mesbah Kamal, *'Parliamentary Caucus on Indigenous Peoples: A Genesis of Parliamentary Advocacy in Bangladesh'* (Research and Development Collective 2014). Note that the indigenous definition was utilised by the Supreme Court recently, see chapter three, Section 4.5

[60] Terminology is regularly debated in the press, as in this article posted by the Parliamentary Caucus. https://www.dhakatribune.com/uncategorized/2014/08/10/js-body-no-constitutional-bar-to-using-term-adivasi-2

[61] The current definition of indigenous people under UNDRIP reflects more closely experiences of settler colonialism and does not fully capture the peripatetic nature of Asian mountain communities. Both Bangladesh and India use the uniqueness of the hill communities to justify their reluctance to sign the Declaration. See Benedict Kingsbury, 'The Applicability of the International Legal Concept of Indigenous People in Asia.', *The East Asian Challenge for Human Rights* (Oxford University Press 1999).Joanne H Bauer and Daniel Bell. Eds.

minority communities of Bangladesh. Two further categorisations relate specifically to the Bangladeshi hill areas; 'Pahari',[62] meaning of the hills, and 'Jumma',[63] meaning a swidden farmer, are terms used interchangeably by the hill people to self- describe and distinguish indigenous CHT hill dwellers from both minority Adivasi communities elsewhere in Bangladesh and Bengali settlers in the CHT. The Bangladesh focussed chapters of this thesis uses the term Pahari to describe communitarian legal institutions, which serve all hill communities, and the term Chakma when necessary to distinguish Chakma law, history or political positioning from this generality. It is perhaps useful to note even at this early stage that due to the hybrid nature of the erstwhile customary system in Bangladesh, the hierarchical structure and laws in relation to land, tax and dispute resolution were consolidated in the CHT regulations 1900 and are defined as Pahari because they are common to all eleven indigenous groups. The rule-set in relation to personal and clan business remains solely Chakma.[64]

In India, the anthropological genealogy of 'tribal' has been usurped by the specific constitutional meaning created in the Sixth Schedule of the Constitution, which frames the benefits and protections carried over from the colonial era into the framework of the newly independent Republic of India.[65] The Tripura Chakma

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[62]Devasish Roy, 'Challenges Towards the Implementation of the Chittagong Hill Tracts Accord of 1997', *The Politics of Peace* (Institute of Culture and Development Research 2012). The primary chronicler of customary law in the Hill Tracts expresses a preference for the less politicised term of 'Pahari', though it the term Pahari was from a generic name for hill dwellers coined by Bengali plainspeople.

[63] Willem Van Schendel, '*The Invention of the "Jummas"; State Formation and Ethnicity in South Eastern Bangladesh*' 26 Modern Asian Studies 95.

[64] This describes the broad composition of the system as set out in chapter three; the material realities of its practice are discussed in more depth in chapters four and five.

[65] Beteille, (n 58). Beteille discusses the complexities of tribal definitions given its colonial connotations, anthropological specificity and its current legal traction within the Indian constitution.

achieved recognition as a Scheduled Tribe in 1976 and define themselves as a tribal community. Explicitly cognisant of their relatively recent migration to Tripura, they do not identify either as Adivasi or as indigenous people, and have no political connection to Indian Adivasi groups or to the global movement for indigenous people. The discussion of the Kanchanpur Chakma contained in chapter six reflects their self-definition and uses only the terms 'Chakma' and 'tribe'.

A final semantic point relates to the use of 'customary' and 'communitarian'. The Chakma of Bangladesh and India describe their laws and legal system as 'customary', and 'customary' is the constitutional term used to describe community generated law in both Republics. This thesis recognises customary as a descriptor but also seeks to reveal its colonial roots and understand the term as both a strategic deployment and potentially at least, a limiting concept. It uses 'communitarian' as a more appropriate descriptor of community generated law in Bangladesh as its practice is at only partly drawn from concepts of custom and partly from alternative ideological foundations. The meanings of 'communitarian' and 'critical communitarianism' are further discussed in chapter two. Chapter six retains the customary descriptor in India to reflect the terminology of the Sixth Schedule of the Constitution as it relates to recognition of law.

2. Hypothesis and Methodology

2.1. Hypothesis

The primary object of this thesis is to explicate the communitarian legal culture of the Chakma people of the CHT region of Bangladesh, with a focus on the productive effects of two centuries of state domination on Chakma law and society. The Chakma were the most numerous and dominant of the eleven CHT hill nations (Pahari) determined as 'extremely backward' under British rule and governed in accordance with legal protections reserved for peoples deemed too primitive to benefit from participation in markets or equal citizenship. Decolonisation elicited state violence toward the Chakma-led Pahari, and

produced a community of interest and shared ideology capable of a powerful *progressive* resistance to capitalism. The hypothesis advanced is that resistance to the state and the internal dynamism of the contemporary Pahari/Chakma community are productive of a participative and highly adaptive communitarian legal culture, with both conditions reflected in and reinforced by the mobilisation and practice of communitarian law. Ergo, this thesis argues that there is a strong connection between the strategic mobilisation of law to reinforce the boundaries of the wider Pahari community against the state, and the co-terminous competition and contestation that accompanies each legal mobilisation at a local level. This hypothesis asserts that the internal plurality of the erstwhile customary arena drives the legal mobilisation of customary institutions as a practice of identity and simultaneously produces a legal consciousness that challenges the internal hierarchies of the Pahari/Chakma customary system and disperses power within the boundaries of community. This hypothesis is tested by contrasting the customary legal culture of the CHT Chakma with a migrant Chakma community in Tripura state, India, where customary law is consensually mobilised '*for the state*' as part of the constitutional recognition processes defined under the Sixth Schedule of the Constitution of Republic of India.

2.2. Research Questions

At the core of the thesis was a qualitative research project that collected primary accounts of legal mobilisation and consciousness to gain insight into the co-constitutive relationship between communitarian law and political form by reference to the sub-concepts of legal culture, consciousness and mobilisation. Research questions were constructed to elicit information on social context and legal practice in the CHT region, and in Tripura state, India. The following research questions were used to structure this project.

- How is law mobilised by the Chakma to negotiate the boundaries between community and the state?
- What defines legal culture and consciousness within the Chakma communitarian legal system?

• How is communitarian law mobilised in different village settings, by whom and to what ends?
• Are there differences arising in the culture, consciousness and mobilisation produced by the different circumstances and contexts of customary legal practice in Bangladesh and India?

2.3. Methodology

A qualitative methodology was employed to collect subject perceptions of the communitarian legal system in the Chittagong Hill Tracts, Bangladesh. Fieldwork amongst the Chakma and Taunchangya community was conducted in the Rangamati area, and amongst the Marma community in Khagrachari, though work at this site was halted due to interference by the intelligence services. In India, field research was based amongst the Chakma community in the Kanchanpur valley of Northern Tripura.

In the three months permitted in the Rangamati area, 54 individual interviews were conducted with the Chakma chief, headmen, karbari, political and civil society activists and lawyers. A workshop was held with the leader and selected members of the Rangamati Hill District Council, and a further workshop with advocates from the Rangamati Bar. In situ workshops and meetings were held in six villages identified as possible model studies, which were attended by villagers, women, karbari and headmen, and followed up where possible by further individual interviews. A further visit to the village of female karbari Rini Chakma was arranged to talk specifically to women about the impact of the Chakma Circle female karbari project. Safety considerations prevented any travel to the UPDF controlled Sebakkon area, but the UPDF were kind enough to arrange for a group of villagers to travel to Chittagong to discuss their approach to village justice. Restrictions on travel, however, meant that no village could be visited more than three times. The low number of customary cases combined with this restriction meant that cases could not be observed in the time available, but at village workshops participants in customary justice were interviewed about their experience. In Khagrachari, research had to be curtailed after ten days due to

heavy surveillance by intelligence officers. However, three in-depth case studies were possible, and a number of preparatory interviews undertaken.

Thirty interviews were conducted in Dhaka with lawyers, political and civil society actors and development professionals. The CHT Secretary, Naba Bikram Kishore Tripura,[66] agreed to be interviewed for the purposes of the project but asked that some of his comments remained off the record. One informal meeting was held with a local Rangamati Army Major, but requests for a formal discussion were refused. A further two months of fieldwork was conducted amongst the Chakma community of the Kanchanpur Valley in Tripura, during which a total of eighteen in-depth interviews were conducted with customary officials, five workshops in village sites were held, and five case studies conducted of customary cases in progress at the time of field work. It was possible to observe the conduct of cases in Tripura and speak to participants.

This study also utilised primary and secondary research materials to create a multi-layered study of the history, development and practice of communitarian law in the Hill Tracts. Historical data was drawn not only from established academic texts, but from original research conducted in the Bengal Archive and National Library of Bengal in Kolkata. Where possible, Chakma accounts of their history and society were used to illuminate chapters concerning Chakma law, history and origins. Supreme Court judgements were used to illustrate the particularly Bangladeshi controversies over the constitutional status accorded to customary law.

2.4. Interview and Workshop Structure

Qualitative interviews with customary officials and village workshops were open ended and structured around four main subject areas, power and leadership,

[66] The Secretary is the most senior bureaucrat in the CHT Ministry, the government Department created to coordinate implementation of the CHTPA and drive development of the region.

development, law, and justice. Where possible, interviews were conducted in English and contemporaneous notes were taken. Simultaneous translations of all other interviews and workshops in the Rangamati area were provided by two Chakma research assistants. Translations are believed to be largely accurate but it is likely that some of the nuances and complexities of the situations reported were lost through the process of transcription. Although this thesis is not directly concerned with gender, the marginalised position of women in customary Chakma law brought gender considerations to the fore. Women only workshops were held in two of the villages under analysis in Bangladesh and in Kanchanpur in Tripura. Attitudes to gender parity were revealing of different approaches to change amongst the Chakma/Pahari leadership, and formed part of enquiries at all stages of research.

2.5. Constraints

Fieldwork was conducted between September 2015 and September 2016 at a time of a deteriorating security situation in Bangladesh as a result of a number of attacks on civil rights activists and foreigners by militant Islamist groups. The Chittagong Hill Tracts remained under full Army control, and foreigners were required to gain permission to enter the area for any reason. For the purposes of research, permission was needed by the Minister of the Interior, and although it was granted for six months research duration in the Khagrachari and Rangamati Circle Areas, severe restrictions were imposed on the conduct of research. In the Khagrachari area, the presence of heavy security and army intelligence rendered interviews extremely difficult due to harassment of subjects. As a result, the research programme in Khagrachari ended after ten days after discussions with SOAS management. In Rangamati, research was conducted without direct interference, but permission was withdrawn after three months. This limited the range of the research and led to a comparative study being drawn up with reference to the Chakma of Tripura.

The conditions surrounding research in Bangladesh and India were subtly different and militated against a direct comparison of the material context of

customary legal practice. In Bangladesh, the severe restrictions on movement coupled with the low number of cases rendered the planned participant observation unfeasible, so evidence of legal practice and outcome was drawn from secondary accounts. A very wide-ranging research sample was collected from political, customary and cultural leaders, many of whom took on more than one activist role, for example many customary officials were actively engaged in politics. In India, though travel to the villages was much easier, a strict division between the customary system and the political arena in Tripura was maintained by customary officials and community members. This division was itself relevant to the conclusions drawn and is discussed in chapter six, but in practical terms hindered field research into the wider political positioning of the Chakma within the arena of tribal politics in Tripura. Where necessary or illuminating, these methodological limitations are referred to in the text of this thesis.

3. Thesis Outline

This thesis focusses predominantly on research into the construction of legal form and the practice of communitarian law in the Chittagong Hill Tracts of Bangladesh. The next two substantive chapters contextualise the study, first through an exposition of theories of community and the core concept of critical communitarianism, and secondly through a historical narrative of the birth, decline and resurgence of customary law in the Hill Tracts. Research chapters four, five and six shed light on the conditions under which legal culture can become the loci of resistance against the state, through the deployment of the analytical sub-concepts of legal mobilisation and legal consciousness.

Chapter Two – The Location of Community. This chapter establishes a theoretical frame for the thesis and identifies the key concepts deployed in the analysis of communitarian law. A brief discussion of the location of community in universal theory contextualises the politics of difference. A contrast is drawn with the explicitly racialised *colonial* politics of difference that produced tribal communities defined an exteriority that now manifests as a potential source of resistance. With this theoretical potentiality established, the discussion moves to

review the literature on legal pluralism and legal culture, identifying critical communitarianism as an appropriate guiding frame for a study that places community as the foci of culture, consciousness and mobilisation.

Chapter Three – Invention and Return. This chapter begins by providing a historical overview of the location of tribal communities in colonial iconography and their inception in the comparative jurisprudence of indirect rule. It then moves to the specific case of the Chakma, recounting the evolution of their law from its precolonial ontology through its gradual but uneven incorporation into a British technology of rule. This culminated in the formative legislative institution of the Chittagong Hill Tracts Regulations 1900 (CHT Manual). In the last part of the chapter, the contemporary relevance of the CHT Manual is discussed in terms of the default recognition of minority difference contained in the Constitution of the Republic of Bangladesh. It links the transference from military to political and legal resistance after the 1997 Peace Accord, to the current environment of conflict and fragmentation within the Pahari community.

Chapter Four – The Cultural Curators. This chapter uses the analytical tools of legal culture and legal consciousness to deconstruct approaches to communitarian law in the CHT, as expressed by Chakma customary officials, political and development actors, lawyers, and participants and users. It suggests that the relatively recent alignment of customary law with the political identity of the Pahari/Jumma has created a much wider and more contested iteration of communitarian law, and consequently generated radical and disruptive changes in the way Chakma law is conceived, interpreted and applied. This exploration of culture and consciousness teases out the inextricable connectedness of state violence, community identity and the practice of law, ergo, the ways in which legal culture is produced by the power relations that surround it.

Chapter Five – CHT Village Practice. Shifting to village practice, this chapter focuses on the mobilisation of law at a village level, and approaches to legal consciousness generated amongst local participants. This chapter proposes that at a local level, legal mobilisation is influenced by different and highly localised

'constellations of power' that reflect, amongst other things, the relative power of political and legal actors, geographical location and modes of production, and proximity to alternative sources of dispute resolution. The customary domain is portrayed as porous and expanded by internal plurality, whilst still playing a vital role as the foci of resistance to state domination. It suggests the erstwhile customary system is becoming broadly communitarian, admitting many influences and becoming increasingly democratic, mutable and participative.

Chapter Six – A Culture of Perfection - The final substantive chapter offers a contrast to the CHT drawn from qualitative research into the practice of Chakma customary law in the Kanchanpur Valley of Tripura state, India. It shows the hierarchies of the customary system in Tripura to have been recently reconstructed by elder members of the Chakma community as a means of further demarcating the Chakma from other tribal communities in the context of Tripura state politics. The customary system demonstrates an essentialised iteration of Chakma identity and a highly conservative understanding of customary law. Customary institutions appear closed, static and rigidly hierarchical. Again, the links between identity, culture and consciousness are discussed through the prism of critical communitarianism.

Chapter Seven – Conclusion – The thesis concludes by presenting the reasons for the divergence between the legal cultures of the two Chakma communities under scrutiny using the conceptual frame of critical communitarianism. The thesis posits that, paradoxically, conflict causes a community to evolve into the foci of resistance, and produces an internal plurality that disperses power, causes rapid and radical changes in communitarian law, and provokes a wider resistance to capital. It argues in support of engaged universals, concluding that resistance and dynamism in legal culture can only emerge from a dialectical relationship between community and state, or from a situation where the boundaries between these two units of social organisation are constantly in the process of negotiation. In contrast, the limited recognition conferred on terms dictated by the state concentrates power in a community elite and tends to ossify legal culture.

Chapter Two. The Location of Community

1. Introduction

The chapter explores the theories and concepts chosen to illuminate research outcomes and frame the hypothesis that state violence toward communities ultimately empowers its members, whilst the accommodation of communities on terms designed by the state only contributes further to their ossification. The broad paradigm of legal culture frames analysis of the conditions under which law empowers communities, not only in terms of legal mobilisation in defence of communities as separate sites of resistance, but also the role law can play in creating a resistant consciousness within a non-state community. This is articulated through the concept of 'critical communitarianism' which explicitly identifies legal cultures as deeply affected by their articulation with the state.

The first section of this chapter, however, doubles back to discuss the location of community in both liberal and Marxist ideations of law and rights, noting the limitations of universal theories in accounting for diversity, and clarifying the concept of communitarianism as a situation in which alternative normative frameworks are formed through the immediate and local context of community. A discussion of the '*politics of difference*' demonstrates the process through which communities have been accommodated by the liberal state, whilst a critique of its limitations draws on Marx to place the state as a partial and oppressive force. This frames discussion of the centrality of local contexts to the hill communities under scrutiny due to their historic exclusion through the *colonial* politics of difference. Broadly, this theoretical discussion positions the postcolonial communities under scrutiny as defined by potentially resistant culture and by struggles for power and resources. The intention is to expressly locate communities as a potential focus of power and resistance as well as a site of legal meaning.

The second part of the chapter traces the development of the legal pluralism paradigm from its initial focus on ostensibly customary systems within a state hierarchy to its widening ambit as an explanatory tool for the proliferation of

alternative legal orders. Legal pluralism, it is asserted, explains the structural subordination of customary to state law, but not the differences arising in non-state legal systems with similar precolonial roots. Using the recently developed concept of '*critical communitarianism*' the chapter suggests these differences can be better illuminated through analysis of legal culture explicitly in the context of state/community relations. This concept is expanded to identify the extent to which power is dispersed amongst community members as a key variable of legal culture and a determinant both of the ways in which law is mobilised locally, and the way community members participate in the construction of legality, that is, their legal consciousness. The invocation of legal culture as a frame for analysis and contrast draws explicit attention to the narratives that surround legal practice. In the case in hand these narratives are driven by the immediate and local context of communities in constant iteration with the state.

2. Universalism, Culture and Community

2.1. Theories of Law and Rights

The early liberal characterisation of Western law introduced two notions absolutely central to its material practice, abstraction and neutrality.[67] The abstracted legal subject was equal before the law regardless of economic or social status, indeed, the investment of a chimerical equality in each legal citizen perhaps explained the popular appeal of liberal ideology. Abstract rights were vested by the state, which was seen as both the neutral protector of citizens from the abuse of power, and the guarantor of the stability needed for citizens to engage in markets. The institutions, practices and ideology of Western law were thus inextricably linked both to the concept of the state as the primary unit of government and to the progressive extension of capitalism as the mode of

[67] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992).

production from England to the rest of the world.[68] The notion of a particular type of (Western) law being conjoined inextricably with the emergence of the human from their natural condition mirrored the enlightenment trajectory of modernity. Kant observed the self-incurred and easy immaturity of man ceding to an emboldened state of reason.[69] Both Locke and Hobbes, the foremost political theorists of rights in the 17th century theorised law and political rights as emerging from and in opposition to a '*state of nature*'.[70]

Marx's theorisation of rights similarly established a similar close connection between the abstract political rights conferred by citizenship and the development of the capitalist state, though with a clear direction that the state was not neutral but representative of bourgeois interests. For Marx, the emergence of the political citizen created a two-fold life from the ruins of feudal structures, true man was found in his '*sensuous, individual, immediate existence*' only in the private sphere, with civic recognition limited to that of an *'abstract, artificial man... an allegorical, juridical person*'.[71] Abstraction was the form through which the relationship between man as an egoistic individual and the state was mediated, and notions of community and identity melted away or were relegated to a previous epoch to be replaced by class as the organising principle of resistance. Pashukanis advanced this theorisation by observing law as produced by civil society, based on a specific ideology and operating for the most part without coercive force.[72] He argued that

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[68]Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Pub 2000).

[69] Emmanuel Kant, 'Kant. What Is Enlightenment' <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> accessed 16 April 2018.

[70] Douzinas, (n 68)

[71] Karl Marx, 'On the Jewish Question'.(1844) https://www.marxists.org/archive/marx/works/1844/jewish-question/

[72] Evgeny B Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989). Tomlins, Christopher, *Marxist Legal History (2017)* Forthcoming -The Oxford Handbook of Historical Legal Research.

law fulfilled a material need for certainty in commercial transactions under capitalism, but also operated on a subjective level as a distinctive ideology that legitimised profoundly unequal social relations.[73]

Whilst illuminating the structural inequalities that attended to Western law however, the radical progressivity of Pashukanis essentialised Western law to a homogenous superiority, a theoretical move described by Hirst as the replacement of one form of reductionism, that of law to class oppression, with another, that of legal form to commodity form.[74] Hunt found any attempt to unify theories of state and civil law in one overarching generality produced a level of abstraction that inevitably homogenised legal subjectivity and denied the variety exhibited in legal form even within capitalist systems.[75] Marxist theory, therefore, found little space for heterogeneity in legal form and provided little scope for understanding the racial sources of legal pluralism and the extent to which a source of opposition to capitalism could be found in legal difference. In respect of this project, however, Pashukanis has a dual utility. First, his theorisation exposed the core concepts of liberalism as deeply imbued with capitalist ideology, in that abstracted equality concealed the rich identity of the 'real man' and his social position, whilst the asserted neutrality of the state is exposed as imbricated with capitalist interests. Additionally, Pashukanis understood law as originating in the social world, its ability to pacify and protect most powerfully evident in its subjective assimilation into the consciousness of the citizen. This notion of law as a specific ideology

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082322. Tomlins believes this attempt to create a genuine jurisprudence sets Pashukanis apart from antecedents who failed to theorise law other than as a veil of capitalist social relations. In doing so they fail to account for its specificity and multi-faceted roles and interpretations.

[73] Ibid.

[74] Paul Hirst, *On Law and Ideology* (MacMillan 1979).Pg. 110

[75] Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (Routledge 1993). Pg. 26.

chimes well with concepts of legal culture insofar as it locates law's power in the subjectification of legal concepts rather than coercive force.

2.2. *Community as an Intervening Variable*

Both liberal and Marxist theory, for different reasons, diminish the importance of community as a form of social organisation. The construction of contemporary rights, for example, is still theorised by political liberals in terms of individuals constantly making voluntary commitments to maintaining the state. Rawls exemplified a school of liberal thought that saw the state as providing a neutral foundation of equal rights through which difference could be brokered and diversity managed.[76] He believed that individuals within a liberal democracy were invested in concepts of the 'right', defined as a political consensus over how individuals should live together, before concepts of the 'good', defined as those elements of individual identity drawn from family, community or religion.[77] With ethnic and social diversity permanently etched into the political culture of liberal democracies, a conscious commitment to the abstractions of rights conceived in the political sphere was necessary to create social cohesion and unity.[78] Thus, the primary link between contemporary theories of rights and their enlightenment antecedents was the prominence attached to the concept of a self-possessed individual making a reasoned choice of allegiance to the political domain unencumbered by pre-ordained values.[79]

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[76] John Rawls, '*Justice as Fairness: Political Not Metaphysical*' (1985) 14 Philosophy and Public Affairs 223.

[77] Ibid.

[78] Rawls, J, *The Domain of the Political and Overlapping Consensus*, Pg. 160 in Derek Matravers and Jonathan E Pike (eds), *Debates in Contemporary Political Philosophy: An Anthology* (Routledge, in association with the Open University 2003).

[79] Ibid. Pg. 160. See also Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

Communitarian critiques of Rawls propounded the impossibility of a '*de-ontological self*', that is of personhood unencumbered by prior loyalties.[80] Sandel argued that people understood themselves in relation to their immediate attachments rather than the abstraction of citizenship, noting that;

'We cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are as members of this family or community or nation or people, as bearers of this history.'[81]

Rawls failed to account for the moral experience in insisting that the self could be detached from its immediate aims and attachments without creating a person wholly devoid of character and moral depth.[82] Thus, a concept of justice based on the '*good*', defined as localised, specific moral concepts should be inserted above the '*right*', being the abstracted notion of political justice that, in Rawlsian terms, transcends notions of community. Sandel challenged the rights basis of liberal democracy by suggesting that community values secured loyalty more immediately than the abstract and distant state, but created a vision of community as inevitably conservative through the identification of these loyalties in loaded concepts of family and tradition.

One of the most pellucid responses to Sandel's communitarian critique of liberalism focussed on the artificiality of the radical dualism it propounded, and suggested the inevitable result of Sandel's assertion of community *in opposition to* liberalism rendered the core concepts of both liberalism and communitarianism to

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[80] Michael Sandel, Liberalism and the Limits of Justice, in Matravers and Pike (n 78). Pg. 140

[81] Ibid. Pg. 155

[82] Ibid.

be equally unacceptable.[83] This dualism required a false choice between the concept of right, as represented by the social justice that founds contemporary liberalism, and the concept of a communally defined good rooted in plural and necessarily divergent traditions. According to this artificial dichotomy, justice was necessarily entirely ahistorical and asocial, or completely encased on particular social practices. Gutman stated;

'Either our identities are independent of our ends, leaving us totally free to choose our life plans, or they are constituted by community, leaving us totally encumbered by socially given ends'.[84]

Such a communitarian construct left the private, or non-state domain denuded of any potentially transformative effects.

This thesis asserts that communities hold just such a potential, but whether this potential is realised will depend on the narratives that surround it, of which one powerful strand will be its relationship with the state. A more helpful theorisation of communitarianism positioned community as a neutral unit of organisation, albeit one shaped and formed by their material and political context. Croce suggested communitarianism was neither conservative nor resistant, but indicated a situation where;

'Communitarian concepts such as community, family or political association are practical and social preconditions for the formation of personal identity.[85]

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[83] Amy Gutman, Communitarian Critics of Liberalism, in Matravers and Pike (n 78).Pg. 182

[84] Ibid. Pg. 182

[85] Mariano Croce and Andrea Salvatore, *Undoing Ties: Political Philosophy at the Waning of the state* (Bloomsbury Academic 2015). Pg. 9

Communitarianism in this theorisation signified only that identity was drawn from the immediate materiality of life rather than the abstract symbolism of nation or state. A communitarian notion of justice was based on notions of the 'good' found in the immediacy of community, or in Croce's terms;

'The highest common good represented by a particular lifestyle that is shared by all members of a communitarian context who identify themselves as belonging to a particular ethical or cultural tradition'.[86]

Communities were neutral, however, rather than inherently superior to the state, Croce argued that in regards to indigenous communities, a particular ethical or cultural tradition;

'Might reflect narrow and parochial concerns, (be) based on power differentials, may be harshly and indiscriminately coercive and may significantly harm weak subjects.'[87]

In the following discussions of community, this thesis follows Croce in his theorisation of communities as holding neither a superior nor inferior morality and thus containing the potential either to empower or oppress its members, and to resist or succumb to state power.

Establishing communitarianism as neutral in operation opens an important path to distinguishing territorially specific sources of political identity. Community with its emphasis on the immediate and the local as a basis for solidarity is not necessarily co-terminous with nationalist inspired loyalties that coalesce around shared symbols, historical narratives, and mutually recognised representations of commonalities such as language, culture, history, and territory in an imagined

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[86] Ibid. Pg. 9

[87] Croce, M, (2010) Is there any place for Legal Theory today? The Distinctiveness of Law in an Age of Pluralism. Pg. 38. https://www.researchgate.net/publication/256036361.

community.[88] Croce's communitarianism offers a mutability and flexibility in the concept of community appropriate to comparative study of the divergent evolution of communities separated by the almost diametrically opposed state ideologies of Bangladesh and India. In this thesis, community as a unit of analysis, and communitarianism as a theoretical and conceptual frame for its analysis underpins the contrast of the disparate historical narratives and legal cultures of the once unified Chakma nation.

2.3. The Politics of Difference

With this understanding of community established, the following brief discussion outlines the problematisation of ethnic communities in contemporary liberal philosophy, and the emergence of a politics of difference in western liberal states. This discussion is tangential in the sense that neither of the constitutional frameworks of Bangladesh and India fall easily into the category of liberal on the question of managing diversity, indeed subsequent chapters will demonstrate that the treatment of the hill communities from colonisation through partition to contemporary Bangladesh and India has been based on a distinctly illiberal cognition of their backward and primitive nature. It is informative, however, in illustrating the potential ontological conflict between the very notion of equal rights and the existence of community, and for its exposure of the partiality that inevitably imbues every state. Additionally, it reveals the interpellative effect of political recognition, or more specifically the potential recognition contains for essentialising cultures and denying their porous and fluid nature. In so doing, this discussion informs a context when the terms of state recognition still reference the derogatory and divisive colonial tropes of the backward tribe.

Although multiculturalism is an imprecise term, it is used here broadly to describe the existence of minority communities and cultural diversity within the borders of

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[88] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Rev ed. Verso 2006).

the state. As previously discussed, such communities generate alternative normative frameworks and cultural practices that coexist, sometimes uncomfortably, with the core liberal notions of abstract equality and state neutrality and the ingrained assumption of the normative superiority of the progressive liberal state.[89] A further response to the state of multiculturalism accounted for difference through recognition of identity within '*a politics of difference*'.[90] Rawlsian liberalism was deemed '*difference blind*' in positioning the equal rights proffered by the liberal state as a neutral ground through which differences can be acknowledged and synthesised. Taylor argued instead that if equal rights were to attach to the authentic self, a politics of difference was required that recognised the distinctiveness of the individual, noting that;

'The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity'.[91]

An 'authentic' recognition of individual rights involved acceptance that each singular identity is constructed through a '*web of interlocution*', more simply put, it is through discourse and interaction with others that identity is formed. Ergo, to recognise difference was not foreign to notions of equal rights and dignity, but grew from a new understanding of the human condition, that is the construction of the self by reference to unique and distinctive traits and practices. From this philosophical stance, Taylor concluded that full recognition of each individual necessitated recognition of different communities and minority normative frameworks within a democratic state. Whilst difference-blind liberalism projected a demeaning image onto minority communities from the superior vantage point of

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[89] Charles Taylor, *The Politics of Recognition, in* Charles Taylor and Amy Gutmann (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton Univ. Press 1994). Pg. 40

[90] Ibid. Pg. 40

[91] Ibid. Pg. 38

the ostensibly neutral state, the politics of difference reinforced the equal worth of minority communities and accepted the consequential variation in rights frameworks that allowed communities to practice their distinctiveness.[92]

At the same time, Taylor argued that the 'hospitable liberalism' he advocated was also '*a fighting creed*', and that lines would have to be drawn around acceptable variants from the majoritarian norms.[93] Though cognisant of the role of community in forming the self and the paradoxical intersection of diversity and equal rights, when moving to a political solution Taylor re-asserted the state as the arbiter of acceptability. Kymlycka also confronted the sometimes problematic intersection of state and community norms by differentiating between internal restrictions, that is limitations on individual freedom arising within the group, and the external protections that community members directed toward majority society.[94] He argued that liberalism, defined as a political system that maximised the freedom of each individual, should broadly reject internal restrictions but in recognition of the constitutive and subjective importance of group identity to individual freedom, should provide external protection to minority communities. Where conflicts arose between these liberal ends and group identity, however, Kymlycka felt the acceptance of internal restrictions on individual liberty was justified to protect the integrity of the group. Kymlycka also attempted to classify minorities and their rights on a regressive scale, for example First Nation communities deserved some form of autonomy within the state, whilst racial minorities deserved recognition of their cultural difference within mainstream society.

In the ensuing debate over the politics of difference, the problem of normative conflicts between state and minority communities arose most frequently over

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[92] Ibid. Pg. 61

[93] Ibid. Pg. 62

[94] Will Kymlycka, *Multicultural Citizenship* (Oxford Clarendon Press 1995).

gender relations, indeed some critics went as far as to suggest that multi-culturalism was bad for women in empowering patriarchy within the state.[95] This statement drew from instances where cultural recognition worked to diminish the rights of women of minority ethnic communities, the most notable being the acceptance of a cultural defence that violence against women has been legally sanctioned by the intervening variable of culture.[96] Whilst supporting Taylors theorisation of identity and recognition, Benhabib critiqued his dramatic shift from the philosophy of the self toward political solutions that placed the state as the arbiter of alternative cultures.[97] The same problem arose with the political solutions proposed by Kymlycka, insofar as he also privileged certain facets of group identity, namely ethnicity and culture, over others, namely gender and sexuality.

Benhabib asserted that a politics of difference that only recognised certain facets of group memberships essentialised cultures as definable wholes. This was only possible if viewed from the outside, but from the inside;

Participants in the culture, by contrast, experience their traditions, stories, rituals and symbols, tools, and material living conditions through shared albeit contested and contestable narrative accounts.[98]

Thus, Kymlyckas focus on '*societal cultures*' essentialised groups or communities, denied their internal plurality and in the process potentially silenced both

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[95] *Multiculturalism and Feminism: No Simple Questions, No Simple Answers*, Susan Moller-Okin (2002) in Abigail Eisenberg and Jeff Spinner-Halev (Eds) Minorities within Minorities: Equality, Rights and Diversity.

[96] For an example, see Mitra Sharafi, *'Justice in Many Rooms since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense'* (2008) 71 Law and Contemporary Problems.

[97] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002).Pg. 51

[98] Ibid. Pg. 5

individuals and groups within communities. Benhabib saw no conflict between individual rights and group protections if cultures and cultural identity within group boundaries were recognised as porous, fluid and contested, and engaged in complex dialogues with each other.[99] However, she saw that the logical consequences of recognition as constructed through the politics of difference could easily be illiberal in drawing firm boundaries around communities, engaging the state in policing these boundaries through external constructions of authentic life forms, and privileging the preservation of cultures over their reinvention and subversion.[100]

Benhabib engaged only briefly with the unique struggles of indigenous people, which she defined as '*peoples whose cultural identity is rooted to a particular region, territory or hunting of fishing domain*.' Their claims were not solely for recognition of ways of living but for restitution or protection of the territorial resources historically removed from or under threat by the state. Such resource claims were justified but, noting the potential incommensurability of indigenous cultures with gender equality norms, Benhabib argued the right of indigenous people to autonomy should be read with the right to participate in the wider community of the majoritarian state. Her view of recognition created a pre-supposition of continued discourse between community and state through which contradictions and clashes in systems of normative ordering were resolved through dialogic engagement.[101] This accommodation of indigenous recognition was, however, preceded by scepticism of their ability to survive even within a paradigm of recognition.

Benhabibs weak engagement with colonial history invited trenchant criticism of the idea that justice for indigenous people lay entirely in terms of their greater

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[99] Ibid. Pg. 184

[100] Ibid. Pg. 68

[101] Ibid,. Pg. 68

inclusion into the state and society'.[102] Coulthard argued that this presupposed the necessity of integration of indigenous people into the majority in order that their non-modern non-liberal norms were modified through inter-community discourse.[103] Where Benahabib suggested dialogic method was a source of resolution for the contradictions and tensions between state and group, Coulthard countered by drawing attention to the naivety of conceptualising discourse as neutral ground, highlighting its role in constructing power relations, either between state and community, or between indigenous community elites and group members. Indeed, Coulthard identified a violence inherent in the process of recognition in its subordination of the indigene on terms set by the state, with the inevitable consequence that difference was minimised by state management. Benhabibs underlying assumption of an intermediate place in which difference could be negotiated militated against honest confrontation of the colonial, racist, and patriarchal forms of domination that conspired to deny indigenous people their land and sovereignty. Coulthard, deliberately echoing Fanon, drew attention to the interpellative effect of recognition on the indigenous subject, by arguing that it necessarily involved the internalisation of inferiority. He instead distinguished '*discourses that naturalise oppression and discourses that naturalise resistance*', calling attention to the way that essentialised notions of culture could be deployed to '*transcend not reinforce oppressive structures and practices*'.[104]

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[102] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014). Pg. 99. Frantz Fanon, *Black Skin, White Masks* (New ed, Pluto-Press 2008).

[103] Ibid Pg. 99

[104]Glen Coulthard, Red Skins, White Masks (n 102) Pg. 103. Spivak coined the term strategic essentialism to describe such instances as '*a strategic use of positive essentialism in a scrupulously visible political interest*', thus accentuating the necessary and therapeutic role of essentialism in producing a counter narrative to the powerful. Spivak, Gayatri, *Can the Subaltern Speak? Pg. 66* in Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (Columbia University Press 1994). Pg. 79/80

This articulation of culture, resource claims, and resistance grounded the more idealistic aspects of Coulthards' theory, namely that the potential to challenge capitalism and the racialised inception of the liberal state lay in a consciousness emerging not from class or socio-economic marginalisation but from within the alternate lifeworld of indigenous peoples. In the context of settler colonialism, Coulthard asserted the incommensurability of indigenous claims with liberalism, and argued that if capitalism must die in order for these claims to be met, indigenous people should engage in the construction of alternatives to it.[105] Nothing less than ceding sovereignty to historically oppressed communities was acceptable.

What does this debate tell us about the case in hand? The first salient point is the identification of community as a problematic within the state, insofar as each attempt to theorise a politics of difference ends in an assertion of the primacy of the state and of its default power to determine the limits to community autonomy. In a postcolonial context such an unquestioned assumption of the state's progressive nature has the effect of ameliorating narratives of historic oppression and exclusion, and providing a normative justification for the continued exercise of state power. The second salient point is the highly mutable nature of culture, and the concomitant danger that processes of recognition might harden the external borders of communities, deny their porosity, and diminish or understate their internal heterogeneity. Finally, the postcolonial critique of recognition advanced by Coulthard drew the question of resistance to the fore. The limits of social constructivism were found in the idea that discourse solved the problematic contradictions that arose from communities as an intervening variable between state and individual *when the scope and terms of that discourse are set by the colonial state.*

[105] Coulthard, (n 102) Pg. 175

2.4. Resistance in the Postcolonial World

So far, this thesis has argued that the theorisation of community as the 'other' of progressive liberalism carried risks of essentialised conceptualisations of culture and community, and was driven by an underlying assumption that the liberal state was normatively superiority to the communitarian realm. Marxist theories of law shared a root in the conception of state/society relations mediated through fictions of equal rights and state neutrality, but still shed light on their ideological underpinnings and the operation of law on a subjective level. Nonetheless, in locating law as produced solely from the commodity form, untempered Marxist theory accounted only weakly for the heterogeneity of legal form in the global south, the location of community within distinctive legal forms, and the potential of communities to generate alternative and potentially resistant legal cultures. This section establishes the context for resistance and law in the hill communities as arising from the colonial production of the tribe as an autonomous political unit. It explores the displacement of both progressive meta-narratives by the interjection of colonialism and the production of certain South Asian communities as a highly particular ideological legacy of the colonial era. Once defined as tribes, the hill communities were only marginally subject to the cultural domination associated with colonialism, and survived as a site of alterity that now potentially destabilises the contemporary state.

In the highly pertinent context of legal pluralism, Merry defined colonialism as;

'a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavours to impose its cultural order onto the subordinate groups(s).'[106]

[106] Merry, Sally Engle, '*Law and Colonialism*', Law and Society Review, 25 (1991), 889–922.

The element of cultural domination distinguished the ontology of colonialism from imperialism, and was essential to understanding the theoretical dissonance that until recently characterised discourse between structural Marxism and postcolonial theory. In India, colonisation failed to displace systematically the indigenous population from their land and territory, and ended when the British relinquished power and ceded independence in 1947.[107] This relatively peaceful transition from foreign domination to independence on one level marked the defeat of colonialism,[108] but only after colonial rule had effected enduring changes in the cultural realm, in the form of English bureaucratic institutions,[109] the use of English as the dominant language of the Indian elite,[110] the transplant of Western legal institutions,[111] and, disastrously, the coercive introduction of land management practices inspired by the particularly English experience of capitalism.[112] In the light of the British colonisation of the cultural realm, the

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[107] Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Indian e., Picador India 2008).

[108] Mahmood Mamdani, '*Settler Colonialism - Then and Now*' (2015) 41 Critical Inquiry 1. Mamdani defines the settler colonialism of Australasia and the Americas as successful colonialism in that indigenous peoples were completely displaced. In Africa and Asia, however, colonialism was defeated and repulsed.

[109] Sirajul Islam, *Colonial Bureaucracy and Public Administration 1765-1947*, in Sirajul Islam, Harun-or-Rashid and Asiatic Society of Bangladesh (eds), *History of Bangladesh, 1704-1971* (Asiatic Society of Bangladesh: Distributing agent, Academic Publishers 1992).

[110] Fakrul Alam, '*Imperial Entanglements and Literature in English*.' (2008) 2 Asiatic IIUM Journal of English Language and Literature.

[111] Lauren Benton, '*Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial state*' (1999) 41 Comparative Studies in Society and History 563. Note however that Benton suggests these institutions were themselves a transposition of European pluralism onto the Indian polity. The result was a system neither Western or Indian but a chaotic set of overlapping jurisdictions.

[112] Janma Mukherhee, *Hungry Bengal; War, Famine, Riots and the End of Empire* (Harper Collin India 2015).Discussed in chapter 3 below.

delineation and production of communities as explicitly excluded both from markets *and* from the cultural legacy of colonialism is of central import to this thesis.

Postcolonial theory attempted to rectify the cultural deficit in universal or structural theories, that deficit being their perceived failure to account for the cultural and psychological facets of colonial experience and the irreversible effects of this failure on the consciousness of indigenous populations. Colonisation, according to Fanon, was explicitly racialised and worked on the colonised subconsciousness to instil a subjective inferiority enduring long after their actual, material subjugation had ceased.[113] The instillation of white, Western superiority over the cultural domain obliterated whole histories; colonisation denigrated and denied pre-existing social and political orders, and led to the internalisation of racial inferiority by the indigenous population.

The dissonance between Marxism and postcolonial theory arose from the materialist denial of the centrality of race and culture to the colonial experience. Bhabha exemplified a post structuralist reading of culture in his attempts to recover the dissonant and distinctive narratives erased through colonial domination of the literary canon.[114] He dissected postcolonial literature to illustrate how class consciousness, as understood in Marxist terms, could not develop within the splintered post-colonial narratives and fragmented subjectivities of the postcolonial world. This position was countered by Marxists who posited a theoretical commensurability between universal consciousness and heterogenous cultural contexts. Lazarus, for example, argued that though

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[113] Frantz Fanon, *Black Skin, White Masks* (New edn, Pluto-Press 2008).

[114] Homi K Bhabha, *The Location of Culture* (Routledge 1994). His core concepts suggest seeking a postcolonial culture in concepts of 'translation' and 'hybridity', but his analysis of Marx has been comprehensively criticised for its selectivity and partiality. This debate is beyond the scope of this thesis.

capitalism was heterogenous in form, its effects tended toward structuring societies in ways that undermined the diversity and centrality of culture.[115] This theoretical dissonance is worthy of exploration given its contemporary relevance to the location of the hill communities in India and Bangladesh, insofar as they were constructed in the colonial era according to racial categorisations but were also targeted for protections due to their primitive and backward nature.

Of direct relevance is the subaltern studies school in India, which initially used a Marxist frame to illuminate the specific failures of capital expansion in India, memorably captured in Guha's argument for an Indian exceptionalism formed around a concept of colonial dominance imposed without a concomitant hegemony emerging within the indigenous population.[116] The subaltern studies approach evolved into a more explicitly post-structural sociological analysis of the history and consequences of colonialism. Chakrabarty criticised the structuralist tendency to attach absolute primacy to economic transition in the development of resistance and class consciousness, and argued that the Marxist paradigm negated the contribution of caste, community and kin to the construction of Indian identity.[117] He surmised the baffling nature of political modernity in postcolonial India lay in a comprehension of the many alternate narratives to Capital that emerged from these deeply rooted social constructs. Further, he identified the historical materialist tendency in Marxism as inherently Western; with only temporal distinction in the outcomes of capitalist development, the global south

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[115] Neil Lazarus, *The Postcolonial Unconscious* (Cambridge University Press 2011).

[116] Ranajit Guha, Dominance without Hegemony, Pg. 210, in Ranajit Guha (ed.), *Subaltern Studies: Writings on South Asian History and Society. 6:*. Early volumes of SS criticism followed a Gramscian interpretation of hegemony, whilst later volumes were more explicitly postcolonial in the adoption of post structural theory to frame the histories of India they contained.

[117] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000).

was inevitably consigned to the '*the waiting room of history.*'[118] These many alternate histories modified capital's spread, deferred its self-realisation and challenged the Marxist insistence on an absolute coincidence between being human and being the bearers of the capacity to labour.[119] Postcolonial theory in this explicitly Indian context thus supported a possibility of alternate and resistant identities occurring in the spheres of clan, culture and community. Spivak also opened new avenues of postcolonial critique in directing attention more directly to the failure of structural theories to account for the psychological aspects of colonialism. She asserted the Marxist analyses of the early subaltern studies series unwittingly removed agency and individuality from those designated as belonging to the subaltern class by homogenising individual experience and consciousness.[120] Her critique doomed any attempt to recover subaltern consciousness to failure in that the very process of attributing a class identity to the oppressed denied their rich and textured identity.

This explicitly Indian rebuttal of the possibilities of a homogenised global experience still failed to account for one of most distinctive and exceptional features of colonial government, which was the creation and preservation of political forms entirely inconsistent with Marxist universalism.[121] Concepts of 'tribe' were specifically identified as antithetical to Capital because they;

'Are not about capitalists using traditional ideologies to dominate their workers, but about colonial states withdrawing potential laborers from

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[118] Ibid. Pg. 8

[119] Ibid. Pg. 97

[120] Rosalind C Morris and Gayatri Chakravorty Spivak (eds), *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press 2010).

[121] George Steinmetz, '*On the Articulation of Marxist and Non-Marxist Theory in Colonial Historiography*' 20 Journal of World Systems Research 281.

capitalist labour markets altogether – literally limiting the spread of capitalist economic forms'.[122]

Communities emerged through the *'rule of colonial difference'*, a term deployed by Chatterjee to describe situations where '*a norm of supposedly universal validity... is held not to apply to the colony as result of some deficiency of the latter'*.[123] The rule of colonial difference introduced an intractable paradox into British rule in that the systems of government adopted by colonial rulers specifically undermined their hegemonic power. To follow Chatterjee's logics, tribal communities considered too backward as to be incapable of reason and rationality were rendered incapable of loving their rulers and consequently could not internalise their normative order. In the realms of culture, community was thus transformed through colonialism into a stubbornly resistant political form that occurred outside the labour force and absent of class consciousness.

Still, the uncompromising dualism between Marxism and postcolonial theory limited rather than elucidated the concept of community in the contemporary South Asian context, in that these political forms survived within a structure of capital-in-dominance. Given the ubiquity of the state as the primary unit of government, it was more recently suggested that universals can be engaged in a postcolonial context without compromising the search for thickness and complexity in the subject.[124] Gidwani found an alternative politics of work displaced the colonial ideology of waste and improvement in the Patel clan of Gujerat, concluding that India now contained numerous political relations of difference that were '*transgressive of the established order, contradictory and*

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[122] Ibid. Pg. 287

[123] Chatterjee, (n 2).Pg. 133

[124] Uday Chandra, '*Marxism, Postcolonial Theory and the Spectre of Universalism'* (2017) 43 Critical Sociology 599.

fraught with danger'.[125] The sphere of non-capital was separate from the dominant form of social relations, subversive, potentially destabilising, but always intimately connected. Gidwani expressed the possibility that;

'Even when life is structured-in-dominance to capitalist value, (it) has remained an interlacing of multiple value-productions that are not-capital'.[126]

In a similar vein, Chandra suggested a fruitful navigation was possible between Marxist theories of culture and postcolonial theories of capitalism by analysing resistance in existing capitalisms.[127] In relation specifically to the tribal communities in India, he criticised the sterility of pitching idealised constructions of tribal communities as resisting subjects against anthropological studies that claim total identification with them. This unwarranted avant-gardism produced false representations of indigenous struggle that obscured both engaged universalism and the quest for thick constructs of identity. Similarly focussed on indigenous resistance, Hale considered how neo-liberal capitalism embraced cultural recognition of indigenous people as a neutralising strategy when faced with opposition to material expansion into their territory, highlighting the inter-relationship of material struggles for land, the quest for cultural recognition and the consequent need to navigate between these two aspects of indigenous resistance.[128] All these essays demonstrate the value of synthesising materialist with cultural theory in the search for the conditions that produce resistance.

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[125] Vinay K Gidwani, *Capital, Interrupted: Agrarian Development and the Politics of Work in India* (University of Minnesota Press 2008).

[126] Ibid.Pg. 30

[127] Uday Chandra *Marxism, Postcolonial Theory and the Spectre of Universalism'* (n 124).

[128] Charles Hale, *'Neo-Liberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America'* (2005) 28 PoLAR:

In this thesis, these conditions will be ascertained through an examination of legal cultures within a legally plural framework constructed around communities as autonomous units, in a region where the colonial politics of difference produced a mode of rule which encapsulated the hill communities in a state-in-dominance structure which was explicitly and deliberately absent of cultural domination. Despite postcolonial divergence in state strategies toward minority communities, analysis of legal culture will be suggested as an appropriate tool for identifying the many narrative strands that link contemporary strategies of state recognition of the hill communities with the exclusions of the colonial past.

2.5. Governmentality of the East

The final reference to the colonial politics of difference expressly addresses its propensity to exclude tribal communities from the technologies of modernity. According to Chatterjee, tribal communities were not only beyond capitalist markets, they were '*beyond policy*';[129] colonial governments deployed a highly specific '*governmentality of the east*', that produced communities as stable political entities exempt from the disciplinary techniques deployed by the state to control populations. Before moving to discuss legal pluralism, its framing in terms of Foucauldian concepts of power lends weight to the idea that legal pluralism is generative of divergent legal cultures that are themselves produced by power relations.

Power, its nature, source and manifestations evolved in Foucault's considerable canon of work from an initial theorisation as a deadening, oppressive and inescapable condition of modern life, to a more dynamic and productive understanding of power relations as an exercise of power always exciting a resistant opposition. Foucault initially observed modernity as precipitating first

[129] Partha Chatterjee, *Governmentality in the East* (2015) Lecture at the University of Berkeley. https://soundcloud.com/cirucberkeley/partha-chatterjee-governmentality-in-the-east

the demise of social control exercised through centralised Sovereign power, and enforced by law and performative punishment, and then the consequent ascension of a disciplinary power that was dispersed, localised, and exercised through invisible systems of normalisation and control.[130] Effectively, the modern subject was conditioned or disciplined to conform to dominant norms, and internalised the behaviours conducive or essential to the control of populations. This disassociation of structural forces and individual consciousness marked Foucault's rejection of the basic tenets of Marxist theory in that power structures were fragmentary and only tangentially and mystically related to social relations and the state. Thus, Foucault's characterisation of power as opaque, dispersed and all-pervading reduced the space available for human agency by its implicit denial of consciousness on any level emerging from a reasoned individual.[131]

Foucault's later theoretical adventures addressed the absence of structural reference points for the theory of disciplinary power by reference to the concept of governmentality, defined as an ensemble of;

'The institutions, procedures, analyses, and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power which has as its targets populations, as its principle form of knowledge political economy and as its essential technical means apparatuses of security.'[132]

Governmentality elicited the systematic nature of the operation of state power, or more specifically the role of state centred systems in objectifying populations through statistical and ethnographic endeavour. These techniques rendered

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[130] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (2nd Vintage Books ed., Vintage Books 1995). Pg. 201

[131] Alan Hunt, '*Getting Marx and Foucault into Bed Together*' (2004) 31 Journal of Law and Society 592.

[132] Michel Foucault, James D Faubion and Michel Foucault, *Power* (Penguin 2002). Pg. 219.

populations subject to various technologies of control in pursuit of dominant interests which were not structurally determined but unnamed and unspecified.[133] Governmentality produced a large number of diffuse exercises of power to which resistance could only occur sporadically, as part of a highly specific relation.

This articulation of power was further developed in Foucault's description of power as always involving a transaction of unequal social relations, in which each exercise of power contained the possibility of resistance eliciting from the subject.[134] This more dynamic theorisation was deployed by Foucault to explain the various types of struggles against power that emerged regardless of the exercise of disciplinary power. These included transversal struggles forming beyond state boundaries, immediate struggles directed at the 'closest' enemy, struggles by individuals to maintain their difference, and struggles against the privileges of knowledge.[135] Each struggle emerged from a particular relationship and a particular option, and in relation to each of these struggles for power, resistance is formed;

If it is true that at the heart of power relations there is insubordination then...there is no relationship of power without the means of possible flight. Each power relationship implies at least in potentia, a strategy of struggle, in which two forces are not superimposed, do not lose their specific nature.'[136]

Despite this, Hunt observed that Foucauldian resistance remained a weak concept in that the many instances of resistance elicited by the dispersal of power

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[133] Michel Foucault, *The History of Sexuality* (Vintage Books ed., Vintage Books 1990).

[134] Foucault, Faubion and Foucault , (n 132).

[135] Ibid. Pg. 330-331

[136] Ibid. Pg. 347

brought no possibility of unity.[137] In counterpoint, it has also been suggested that the unifying element of Foucault's theory was expressed by his notion of the political.[138] A political sphere was not possible without some form of aggregation of power, and logically a possibility of a similar aggregation arose in relation to resistance.[139] Thus, though modernity created subjectified methods of social control, and exercised power through their operation of publics, the process also potentially had the effect of creating political unity from the mechanics of oppression and resistance.

Legal pluralism in all its guises involves a decentring or dispersal of power. In the case in hand, the organising unit of community is situated as the object of state power and potentially the site of resistance. In the following exposition of the legal pluralism paradigm, Foucault's theories of power are referenced to elucidate the complex relationality of state to communities historically excluded from technologies of control. At the same time, Foucault's belief in the dispersed qualities of power and its insidious nature illuminate the struggles for power and resources that, according to Croce, legal pluralism always represents.[140] These struggles occur not only between community and state but *within* the boundaries of the communitarian field.[141] With this in mind, the discussion now turns to the colonial roots of pluralism, and the effects of the colonial exclusion on the postcolonial theatre of law.

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[137] Hunt, (n 130).

[138] Mark Olssen, '*Foucault and Marxism: Rewriting the Theory of Historical Materialism' (2004) 2 Policy Futures in Education 454.*

[139] Ibid.

[140] Mariono Croce, 'All Law Is Plural. Legal Pluralism and the Distinctiveness of Law' (2012) 44:65 The Journal of Legal Pluralism and Unofficial Law 1. Pg. 27

[141] Fauzia Knight, *Law, Power and Culture: Supporting Change from Within* (Palgrave Macmillan 2014).

3. Legal Pluralism

From the previous discussion of community, three core assumptions have been drawn. The first was that theoretically, community was a neutral concept that was neither necessarily regressive nor resistant, but creative of primary loyalties based on the immediate and the local. The second broadly related to the partiality that infused even discourse-based theorisations of multiculturalism and recognition in placing the liberal state as the arbiter of the limits of community and patroller of their boundaries. The third was that community in South Asia emerged under certain circumstances into a stable political form - that of tribe - intentionally constituted as external to capital and immured at least partially from the cultural domination associated with colonialism.

With these broad theoretical directions in mind, the remainder of this chapter discusses the articulation between community and law through the conceptual lens of legal pluralism, and more explicitly through the concept of '*critical communitarianism*'.[142] It argues that the related concepts of classical pluralism and of customary law potentially overdetermine South Asian communitarian law as a product of a particular colonial formation, in that whilst the colonial legal hierarchy still subordinates erstwhile customary law to the state system, *within* minority communities the way law is mobilised to position communities for or against the state produces distinctive legal cultures. Whilst legal pluralism requires an understanding of the effects of the dispersal of state power through legal form, *'critical communitarianism'* establishes these sites as also productive of legal meaning that is constructed in part through their relationship with the state. The concept of '*critical communitarianism*' in effect articulates a communitarian tendency of thought within law and is explored through the related analytical tools of legal mobilisation and legal consciousness.

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[142] Barzilai, *(n 5)*

3.1. The Colonial Roots of Legal Pluralism

So far it has been argued that the expansion of capitalism through colonialism produced a highly particular political form of communities intentionally excluded from markets and from the transplant of Western law. From this position, Marxist theories of law helpfully identified the structural inequalities that underpinned core liberal concepts, and the operation of law on a subjective level, but were inadequate to explain communities founded by a legally enforced exclusion from even the chimera of equal citizenship and thus from the psychological internalisation of Western ideologies of law.

Critiques of the commodity form theory that identified its homogenisation of legal form(*section 2.1*) resonate in the paradigm of legal pluralism, an oppositional antidote to the progressive narratives of both liberal and Marxist legal theory. At around the time Pashukanis was developing his general theory, Western sociology began to challenge a conceptualisation of law as necessarily generated by the state, presenting it instead as an '*offspring of society itself.*'[143] Meanwhile, ethnographies in the global south exposed the law-like social regulation generated independently by communities within non-state settings. By the mid-20th century, studies of alternative adjudication systems in the Americas, Africa and Asia catalogued examples of the complex legal reasoning deployed within oral systems, and challenged prevalent legal orthodoxies by positing oral systems as legal in nature.[144] In colonial settings, alternative systems of legal ordering were observed as capable of exhibiting the same faculties of rule and purpose as the Western

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[143] Eugene Ehrlich and Nathan Isaacs, '*The Sociology of Law*'(1922) 36 Harvard Law Review 130.

[144] Bronislaw Malinowski, *Crime and Custom in Savage Society*, https://wolnelektury.pl/katalog/lektura/crime-and-custom-in-savage-society.html#s21. Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way; Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press 1941).

canon,[145] and as characterised by a focus on process above form.[146] The concept of law being confined to the particularity of a technocratic and differentiated Western form thus lost traction in a slew of evidence of indigenous systems of social regulation being recognisably legal.

Legal pluralism as a theoretical paradigm emerged from these earlier explorations of legal systems decentred from the state, classical' legal pluralism arose in colonial settings when;

'the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography and when the parallel legal regimes are all dependent on the state legal system'[147]

Classical pluralism was in effect produced by the hybridisation of transplanted state centric legal systems and pre or co-existing systems of community regulation. The term described relationships which were always '*embedded in relationships of unequal power*', in that under colonial rule, 'customary' informal law was always subordinated to the ostensibly superior and more developed Western canon.[148] The labelling of non-state law as *customary* was itself revealing of an understanding of alternate legal systems as defined by their antiquity, unchanging nature, the primitivism of its practitioners, and their inevitable subordination to state law. Take for example this jurists' discovery of order within South Asian societies;

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[145] Ibid.

[146] Sally Falk Moore, *Law as Process: An Anthropological Approach* (2nd edn, Lit [u.a] 2000).

[147] Sally Engle Merry, (n 3). Pg. 871

[148] Ibid.Pg. 874.

'These people are not loose, incoherent assemblages of savages, but are very ancient societies, restrained and stringently directed by custom and usage'.[149]

The dichotomy between law and custom that characterised Western jurists' comprehension of alternative legal systems played into a much wider narrative that attributed indigenous populations with a timeless and static quality. Indeed, Fitzpatrick observed colonialism as producing a mythology that generalised the Western subject as enlightened and rational, and the non-western subject as savage and inferior.[150] Through the propagation of myth, European nations homogenised the infinite variety of social formations they encountered into broad racial categories. Their material objectives of extraction and enrichment were paralleled by a civilising mission that sought to impose *'order on chaos, creating forms and norms.*[151] For those living under indirect rule, however, customary law remained the primary or only form of legal regulation, leading Merry to conceptualise these ostensibly subordinate legal systems as spaces in which resistance and alterity could flourish.[152]

Though classical pluralism always implied the subordination of a non-state legal system to the state's legal architecture, the material reality of the colonial encounter belied a more complex constitutive relationship between the law of the coloniser and colonised.[153] Numerous indigenous ethnographies described how an iterative relationship between subjected populations and colonising powers

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[149] Rattigan WH, '*Customary Law in India'* (1884) 5th ser. Law Magazine and Legal Review.

[150] Fitzpatrick, (n 67).

[151] Ibid. Pg. 20

[152] Sally Engle Merry (n 3)

[153] Merry, Sally Engle, '*Law and Colonialism'* (1991) 25 Law and Society Review 889. In this exploration of that nature of colonial pluralism Merry defines legal pluralism as reflective of the grossly unequal nature of the relationship between coloniser and indigenous peoples.

created highly diverse forms of law that owed at least as much to this iteration as to custom. Snyder's study of Senegal, for example, revealed how the application of the customary label to non-state law conjured an image of a rather bucolic and static community, when in fact customary system of law that was relatively recent in origin and comprised an uneasy hybrid of capitalist market principles and substantially altered indigenous institutions.[154] Colonial hybridity saw the ideology of the coloniser *'working with what is already to hand without eradicating and existing the lifeworld'*,[155] or involved in a;

> *'Structuration-process in which actors draw upon elements of different normative systems and combine them in compounded legal rationalisation and justification schemes.'*[156]

The structuration process alluded to was a dynamic engagement between Western transplanted law and its customary other, of a customary sphere created by the iteration between coloniser and colonised even whilst being characterised as unchanging and rooted in the normative values of an ill-defined and ancient past.[157] The concept of classical legal pluralism illuminated the structural subordination of communitarian law in a postcolonial context, but fell short of

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[154] Frances Snyder, '*The Creation of "Customary Law" in Senegal*'(1981) 19 Journal of Legal Pluralism 49, Also see David Washbrook, '*Law, State and Agrarian Society in Colonial India*'(1981) 15, Power, Profit and Politics, Essays on Imperialism Modern Asian Studies 649.

[155] Simon Roberts, '*Some Notes On "African Customary Law*' (1984) 28 Journal of African Law 1. Pg. 5

[156] von Benda-Beckmann F, "*Law out of Context: A Comment on the Creation of Traditional Law Discussion*"(1984) 28 Journal of African Law 28 Pg. 31

[157] EJ Hobsbawm and TO Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983). One obvious parallel is in the concept of 'invented traditions', Ranger suggested in this essay that both the coloniser and colonised invented rituals and traditions specifically to gain respect and exert power.

explicating the nature of socially embedded systems of regulation that arose within and outside colonially anointed structures. The next section introduces the expanded theory of '*social science*' legal pluralism to extend analysis of customary legal practice beyond the conceptual yolk of colonial essentialism.

3.2. Law from Society.

The anthropological roots of legal pluralism perhaps account for its focus on the potentiality of law emerging outside of the state, and its expansion toward conceptualising law as made and enforced in multiple locations within and beyond the nation state.[158] When defining legal pluralism, Griffiths wrote that;

'A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of law, more than one 'legal order' is observable, that the social order of that field can be said to exhibit legal pluralism[159]*.*

Within this broad descriptive category, the colonial variant of legal pluralism was '*weak*' pluralism in that it described a particular *state-centred* legal form, whilst 'social science' or 'strong' pluralism portrayed a situation in which multiple alternative systems of legal regulation overlapped in less predictable equations. Griffiths drew heavily on Moore's concept of '*semi-autonomous social fields*' to conceptualise '*strong pluralism*' as a situation where different and competing rule-sets or fields existed within the same jurisdiction.[160] Moore's earlier argument was that the boundaries of the semi-autonomous social field were generated by 'a *processual characteristic*' rather than organisational considerations, processual

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[158] Sally Engle Merry, (n 3)

[159] John Griffiths, '*What Is Legal Pluralism?*' (1986) 18 The journal of legal pluralism and unofficial law 1.

[160] Sally Falk Moore, (n 146).

meaning the rule-generating nature of the social field. Thus, her concept focussed attention on;

'Issues of autonomy and isolation, or rather, the absence of autonomy and isolation, as well as focussing on the capacity to generate rules and induce or coerce conformity'[161]

Varying degrees of legal autonomy could exist within a social field, on a scale that moved from complete autonomy to complete domination, and many such semi-autonomous fields worked in articulation with each other, forming overlapping, mutually reinforcing or even conflicting normative frameworks within one domain.[162]

Moore thus not only created a conceptual foundation for social science pluralism, but also introduced a scalar element into the discussion by suggesting that each semi-autonomous social field was characterised by degrees of dominance and plurality. Griffiths adopted a similar scalar characteristic in his descriptive definition by defining legal pluralism on a scale of strong to weak. For Griffiths, however, it was not the degree of domination that determined strength, but the extent of autonomy of the social field from the state, broadly the more independent the regulation, the stronger the pluralism. State recognition, by implication, created a weak pluralism the object of recognition was absorbed into the state panoply, thus rendering colonial legal orders so subsumed within the state system as to be an extension of it. Strong pluralism, on the other hand, extended the paradigm toward understanding multiple forms of regulation as explicitly legal, ostensibly diffused the conceptualisation of law as emerging solely from the state,

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[161] Ibid. Pg. 58

[162] Moore (n 146).

or indeed solely from markets, and thus further diluted the eurocentricity of Western jurisprudence.[163]

This simplistic characterisation belies the agency of communities who achieve state recognition on their own terms. In the case in hand, even within a structure of state domination, classical pluralism will be shown to create the potentiality for resistant legal cultures emerging from oppressed communities. The work of Santos in constructing an explicitly 'postmodern' legal pluralism is usefully extended to the interior worlds of the hill communities. [164] His innovation was to suggest self-regulation allowed subaltern communities to make their own laws and created a space and potentiality for resistance to emerge, drawing inspiration from participant observations of quasi-legal adjudications in Brazilian favelas, some pertaining to transfers of land within the settlement which was illegally settled according to state law.[165] Regardless of the prevailing illegality of such transactions, they were experienced and observed as law within the Favela, being the *only* source of dispute resolution to slum dwellers living beyond the reach of state regulation. The Favela had developed its own rituals and signifiers, and enforced them through local sources of power such as local governing hierarchies and community coercion. As a consequence, a complex system of land regulation and transfer, entirely unconnected with the dominant state legality, had emerged from the Favela community.

Santos identified the connections between different legal orders and normative ordering to be a crucial area of study. He coined the term '*inter-legality*' to

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[163] Eurocentricity in this context relates to the idea of law as not only state centred but composed of formal rulesets and of rationality rather than morality. Western jurisprudence at the time might be said to be dominated by legal positivism. Discussed in Tamanaha (n 79).

[164] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, Butterworths LexisNexis 2002).

[165] Ibid. Pg. 155

emphasise a kind of non-chaotic fragmentation of law, characterised by multiple, overlapping sources of rule generation. Inter-legality was;

The conception of different legal spaces, superimposed, interpenetrated and mixed in our minds as much as in our actions...our legal life is constituted by the intersection of legal orders, that is by inter-legality[166]

For Santos, the relationship of any legal order with the state was essentially only one of many such relationships that arose within different '*constellations of power*', each constellation being a realm productive of its own legal ordering. Examples of these constellations included state, family, church, and community, all representing spheres of regulation that were linked and co-mingled, but which produced distinct sets of power relations, defined in the Foucauldian sense of being a social relationship of unequal power.[167] This theorisation was heavily influenced by the wider paradigm of globalisation, which presupposed that communities organised in ways that traversed local, national and global spheres, and were increasingly connected through global paradigms such as human rights and the indigenous people's movement for example.[168] Inter-legality was therefore

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[166] Ibid. Pg. 457

[167] Boaventura de Sousa Santos (n 164). Pg. 358

[168] For an exposition of how the global paradigm of human rights manifests in distinctive communities see Shannon Speed, At the Crossroads of Human Rights and Anthropology, in Mark Goodale and Sally Engle Merry (eds.), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press 2007). Shannon Speed's discussion of human rights also describes how human rights discourse has led to political resistance increasingly emerging as legal struggle. Claims engaged universalisms but are grounded in local specifics. The relevance of human rights discourse to the Chakma struggle is discussed in chapter four, section 3.3. Niezen provides a similar service in relation to the global indigenous movement. Ronald Niezen, *The Origins of Indigenism, (2003)* University of California, Berkeley.

both a cause and consequence of legal fecundity within the new reality of global society, and legal pluralism the foundation for a postmodern theory of law.

The notion of inter-legality is relevant to this study in that it will be shown in chapter five that more than one source of legal ordering exists within the communitarian arena in the CHT, and that furthermore, the mingling of potentially competing and ontologically different sources of law is productive of legal culture. Yet the near exclusive focus of Santos on the oppositional and resistant qualities of legal practice in communities, suggests an under-theorisation of the lop-sided role of the state in structuring inter-legality. The conceptual frame of critical communitarianism has been chosen precisely because it situates the state/community axis as central to the way law and identity is formed in the communitarian field. The next section considers critiques of legal pluralism, suggesting that the concept of a state-in-dominance must be tempered by an understanding of the state as itself heterogenous and polycentric.

3.3. State and Power

Many of the most trenchant critiques of Santos focus on the veil his particularly wide conception of legal pluralism throws over the unequal power of state and non-state sources of legal ordering. Tamanaha, for example decried the fuzziness of the definition of law adopted, drawing attention to the conceptual difficulties of de-coupling concepts of law from the state given the unparalleled symbolic prestige enjoyed by state law.[169] In a similar vein, Roberts raised the conceptual difficulty of a legal system without a legal subject and argued that only those systems of ordering experienced as law be defined as law.[170] Tamanaha and

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[169] Brian Z Tamanaha, '*The Folly of the Social Scientific Concept of Legal Pluralism*' (1993) 20 Journal of Law and Society 192.

[170] Roberts S, '*Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*' 42 Journal of Legal Pluralism and Unofficial Law.

Roberts together suggested it was the undeniable power and symbolic prestige of the state that gave rise to law-ness, thus confirming their belief in a state monopoly over the production of law.

These critiques highlighted a dualism between structural and post structural theory breached most effectively by Fitzpatrick, who suggested that a social field could maintain its distinctiveness even if the complex of Capital itself took precedence over any particularity.[171] His Marxist conceptualisation of legal pluralism argued that the dispersal of power to community in a legally plural environment occurred within a framework still dominated and structured by the state. For Fitzpatrick, legal pluralism was not satisfactorily explained as a mere element of a totality, but was better conceptualised as a more complex phenomenon in which law was partly legitimised through its interaction with pluralities that had the contradictory effects of constraining and enabling their operation.[172] His articulation of Marxism and post structuralism thus offered a theoretical understanding of Western law as arising from the operation of capitalist markets and dominated by the state, but also generating dispersed sites of legal fecundity productive of their own relations of power. This reconciliation of apparently dissonant theories is highly relevant to the Hill Tracts context in that the Chakma community maintain their separation from the state through law, but operate within a legal sphere that contains multiple struggles for power.

Shahar's perspective on the location of the state in legally plural order noted a similarity between legal pluralists and their critics in an apparently two-dimensional conceptualisation of the state.[173] In characterising state law as

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[171] Peter Fitzpatrick, '*Marxism and Legal Pluralism*' [1982] Australian Law Journal 45. Pg. 49,

[172] Ibid. Pg. 55

[173] Ido Shahar, *'state, Society and the Relations Between Them: Implications for the Study of Legal Pluralism'* [2008] Theoretical Inq. L 417.

homogenous, and always dominant, Tamanaha reduced customary systems to an adjunct of a monolith. Similarly, Griffiths strong-to-weak scale of legal pluralism suggested to Shahar that when the state recognises a customary system;

'The latter immediately becomes an integral part of the former, and loses any distinct social impact it ever had. Legal pluralism, as much as we can speak of it in such cases, is no longer real and consequential, but merely doctrinal or "nominal'[174]

According to Shahar, both positions were flawed in representing state law as separate, distinct and above society, when it was in fact internally heterogenous and polycentric. Boundaries between state and society were socially constructed and context dependent, just as the boundaries between state, non-state law, and non-legal social orders were always '*blurred and open to social construction and negotiation'*.[175] Using customary law in Israel as an example, she observed a relationship between state and non-state law constructed by dispute and negotiation and reflective of identity politics and powers struggles at a national level.[176] This approach suggested a relationship between the strength of identity politics and the extent to which communitarian law was utilised to reinforce the boundaries between state and community, in other words the exercise of legal choices in a plural environment was a practice of identity.[177]

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[174] Ibid. Pg. 429

[175] Ido Shahar (n 173).Pg. 433

[176] Ibid. Pg. 433

[177] Ido Shahar (n 173) argued that the strength of pluralism was measurable by the extent to which people indulged in 'forum shopping', defined as the phenomenon of people choosing the legal forum most likely to deliver a successful outcome, and legal forums choosing the plaintiffs most likely to augment their status and authority. See Von Benda-Beckmann K, '*Forum Shopping and Shopping Forums in a Minangkabau Village in West Sumatra'* (1981) 19 Journal of Legal Pluralism

This exposition of legal pluralism has provided the context for the study of legal culture through an explication of the close alignment between postcolonial communities and the production and practice of communitarian law. Postcolonial legal pluralism has been discussed in terms of state power and power relations, and connected to practices of identity in a multi-cultural state. The chosen frame of critical communitarianism for this thesis was informed by an understanding of communities as not only the focus of power, but also as a site of legal meaning. The next section explores in more detail the broad paradigm of legal culture and the concept of critical communitarianism, establishing in the process that legal pluralism, power and culture are intricately connected and productive of one another.

4. Legal Culture

4.1. Critical Communitarianism

The defining concept in this thesis is that of '*critical communitarianism*,' which refines broader concepts of legal culture to provide a more explicit understanding of the role of legal culture in the articulation between communitarian legal systems and the contemporary state.[178] The legal culture school initially developed to identify patterns of legally oriented social behaviour through the analysis of legal institutional composition and the more ephemeral values and aspirations that encase legal behaviours. Its study gained traction as a means of placing black-letter law within a social context, with culture itself posited as '*an essential intervening variable in the process of producing legal stasis or change*'.[179] Nelken observed law was a product of both action and identity being, *'like culture itself...*

[178] Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (n 5)

[179] Lawrence M Friedman, 'The Concept of Legal Culture', *Comparing Legal Cultures* (Dartmouth Publishing Company 1997).

about who we are not just what we do'.[180] Legal culture might be seen as theoretically connecting the practice of law with identity, emphasising the constitutive and formative role of law within culture, and establishing law's role in creating an orderly universe and reconstructing normative beliefs as palpably real.[181.]

By adopting '*critical communitarianism'* as its guiding frame, however, this thesis not only engages with the broad paradigm of legal culture, but also employs its sub-concepts as analytical tools. Barzilai's concept of '*critical communitarianism'* specifically illuminated an articulation of political identity, law and power relations which both recognised the disproportionate influence of the state , and established community as a potential source of resistance. It viewed:

'Nonruling communities as cultural foci of mobilization for, or resistance to, state law in the political context of state-society relations. It dwells on legal cultures as practices of those identities that have become embodied in legal consciousness and that have been generated through state-society relations as well as struggles for power.[182]

One critical facet of critical communitarianism was its emphasis on minority communities in the context of their relationship with the state and majority society, with political identity conceptualised as a construct of legal practice, and state dominance theorised as a function of social relations. Both state recognition and community resistance were therefore identified as closely aligned with, and even productive of, legal practice.

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[180] David Nelken, (n 4)

[181] Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006). Rosen and his precursor Geertz used legal culture as a means of describing the law within culture, rather than analysing particular legal cultures.

[182] Barzilai, (n 5), Pg. 1

Turning toward the state, Barzilai enlisted a Marxist perspective to illuminate its dominance in three instances of legal pluralism in Israel,[183] stating that

'Bourgeois legal culture is accordingly not a "veil of ignorance" (to use a Rawlsian term) but a veil meant to promote state domination. Legality, in post-Marxist phraseology, is a state-produced illusion that disguises the micro mechanisms of power in which discipline enforces subordination'.[184]

This critical sensibility explicitly rejected the predominant liberal assertion of state neutrality and identified the state as a multi-faceted entity broadly representing the interests of the dominant class. However, Barzilai's theorisation transcended the limitations of a strictly Marxist determination of class as produced solely by economic relations by suggesting instead the focus on political and legal culture offered a more fruitful frame for the analysis of difference in a multi-cultural context. Drawing on the idea of law as an '*identity postulate*',[185] Barzilai argued that state domination should be perceived as '*a constitutive force in the construction of political culture and legality*'.[186] Concomitantly, the cultural hegemony of the state rarely extended into non-ruling communities, which usually retained a level of cultural autonomy and were sources of diverse practices, including resistance. Critical communitarianism captured the complex positioning of non-state law within a power relation dominated by state approaches to diversity.

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[183] Ibid. Pg. 19. Barzilai examined the Arab-Israeli, orthodox Jewish community and radical feminists.

[184] Ibid. Pg. 20

[185] Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokai University Press 1989). Chiba theorised law as an expression of communal identity.

[186] Barzilai, (n 5). Pg. 20

Barzilai drew inspiration from the pluralist assertion that no one form of law was superior to another, and his consequent theorisation of legal culture was driven by a perceived duality of state violence and communally generated pluralisms. Cover phrased this dualism as an interpretative opposition, state law representing law-as-power, and community law representing law-as-meaning.[187] Barzilai, as a communitarian of the left, augmented the proposition by stating that nonruling communities represented a *primary* source of meaning in democratic regimes, and from this position posited that unique perceptions of the communal good were expressed in law by nonruling communities. He continued;

'Communal legal culture, as we now understand it, is not only about social being and legal consciousness but about the ways in which collective identities of nonruling communities are expressed in law and toward law'.

Minority communities expressed their alterity and resistance through their allegiance to community law, and by doing so drew attention the failure of the state to '*recognise, protect, and empower*' those who challenged its ideology and jurisdiction.[188]

A further tangential similarity between Barzilai's research object and this thesis was his alignment of state identity itself with a particular racial and cultural formation and the placement of both politics and law within the context of racialised state relations, and struggles for power.[189] Rejecting class relations as the sole source of legal structuration, Barzilai gave equal prominence to racial,

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[187] Robert M Cover, '*Nomos and Narrative*' (1984) 97 Harvard Law Review 1. Cover's understanding of violence was not of physical force, but of forced imposition of the dominant culture.

[188] Barzilai, (n 5). Pg. 34

[189] In Barzilai's case, one of the research objects was the Arab-Israeli community, and his research highlighted both their cultural marginalisation and political inter-connectedness with the state of Israel.

ideological and cultural factors when framing the community legal culture as an act of resistance against state power. The concept of critical communitarianism thus gave theoretical weight to the cultural formation of communitarian law, its propensity to mobilise, and its role in developing a resistant consciousness. For this thesis, it provides a powerful conceptual frame for interrogating the explicit links between community as a political form, legal practice, and with resistance to state domination. In an explicitly postcolonial context, the cultural turn of 'critical communitarianism' follows an established path of displacing Western meta-narratives with heterogenous and complex cognitions of both community and law. At the same time, it recognises the structural domination of capital and the state, and explicitly articulates the effects of this domination on communal legal cultures.

4.2. Critics and Sub-concepts

Critics of the legal culture school have highlighted the potential for cultural concepts to usurp the '*dirty work done by the idea of race*' in producing homogenised categories that obscure variety and difference.[190] Cotterell, for example argued that broad descriptors of legal culture implied a holistic and reified quality to legal systems or institutions that masked heterogeneity to create a legal essentialism.[191] Beckman similarly suggested that holistic views of culture obscured power differentials and economic inequalities, and in the case of legal culture obscured the very categories of the legal and the political.[192] Rather than obscure these differentials, however, this thesis uses the interpretive tools of legal culture to expiate power and authority in the communitarian realm and suggest

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[190] David Nelken, 'Using Legal Culture: Purposes and Problems', *Using Legal Culture* (Wildy, Simmonds & Hill Publishing 2012). Pg. 5

[191] Roger Cotterell, 'The Concept of Legal Culture', *Comparing Legal Cultures* (Dartmouth Publishing Company 1997). Pg. 28. Cotterell preferred the use of legal ideology to describe values and aspirations in law.

[192] Franz and Keeba Benda von Beckman, 'Why Not Legal Culture?', *Using Legal Culture* (Wildy, Simmonds & Hill Publishing 2012).

that power is itself a formative element of legal culture. In a further conceptual move this thesis will assert that legal culture reinforces, even produces community as a resistant political form. This shift in focus toward understanding political identity as constituted through legal culture is particularly salient to a postcolonial context, given the role played by law in creating the political form of 'tribe' in the colonial era, and the survival of these forms to the present day.

4.3. Mobilisation and Consciousness

The legal culture school has also been charged with a problematic imprecision and a consequent and related disutility in deconstructing complex and layered legal ontologies. Merry countered this criticism by disaggregating legal culture into sub-concepts suitable for use as methodological tools, namely the analysis of attitudes toward law, legal mobilisation and legal consciousness, and it was these sub-concepts Barzilai borrowed to construct his critical methodology.[193] This thesis explicitly utilises the sub-concepts of legal mobilisation and legal consciousness to structure the presentation of research results, so as to offer insight into the sometimes subtle differences occurring in ostensibly similar community systems. These sub-concepts are calibrated explicitly with the broader conceptual assertion of '*critical communitarianism*' and offer a powerful frame for interrogating community as the cultural loci of resistance. This, it is argued, holds great practical utility in the task of identifying the effect of different state contexts and illuminating the relationship between fields in the context of power and politics.[194] On this level of practicality, Merry promoted the disaggregation of legal culture into sub-concepts precisely because they were practically suited to

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[193] Sally Engle Merry, '*Legal Pluralism and Legal Culture*' in Brian Z Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development* (Cambridge University Press 2012) <https://www.cambridge.org/core/product/identifier/9781139094597%23c01940-298/type/book_part> accessed 12 August 2018.

[194] Ibid.

excavating the complex archaeology, multi-layered narratives and hybrid legal forms of postcolonial legal pluralism.[195] In an environment of complex intersectionality between history, legal form and political identity, it is suggested that these sub-concepts, drawn together in the guiding frame of '*critical communitarianism*' direct attention to many alternative and competing narratives that construct and frame communitarian law, and place its practice at the very heart of postcolonial notions of community.

Legal mobilisation refers to the extent to which individuals and groups turn to the law for help and that way that social movements rely on legal discourse as elements of strategy that helps to cement identities and ideologies, ergo in broad terms the way that law is deployed as a cultural resource.[196] This sub-concept plays into one prominent aspect of Pahari life, which is the presence of multiple competing groups and ideologies existing within the communitarian arena, and the multifarious utilities of law as both a tool for community regulation and as a strategic deployment that produces the community of 'Pahari' and reinforces its boundaries. It is elaborated further in chapter four as a precursor to analysis of elite perspectives of customary law.

Legal consciousness refers to the *'the way individuals experience and understand the law and its relevance to their lives',* and is both inflected with each individual experience of the legal system and inextricably connected to local or national culture.[197] Silbey refined this definition to mean;

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[195] Sally Engle Merry, 'What Is Legal Culture: An Anthropological Perspective', *Using Legal Culture* (Wildy, Simmonds & Hill Publishing 2012). Pg. 64

[196] Ibid.

[197] Sally Engle Merry, (n 195) Pg. 66

'Participation in the construction of legality, where legality refers to the meanings, sources of authority and cultural practices that are commonly recognised as legal regardless of who employs them and to what ends'.[198]

Employing legal consciousness placed law within a pattern of social practices through which the world was stabilised and objectified, and which, once the meanings attached to law have been institutionalised, limits or constrains the development of future meaning. With both observers of and participants in law partly responsible for its construction, the deployment of legal consciousness invited the employment of methodological approaches that located law in wider social contexts. Cowan divided the consciousness methodology into approaches that place law-first, that is approaches that radiate outward from those experiencing law to wider society, to broader socio-legal studies that survey legal participation as part of much broader studies of social attitudes.[199] Ewick and Silbey provided an example of the latter, their study of welfare claimants demonstrating how differential access to legal resources, and variable cognitions of the codes and languages of law have the effect of limiting access to law and producing different understandings of its effects.[200] In field research, this thesis broadly adopted a law-first methodology by focussing inquiries on the already defined customary arena, but mitigated against a possible failure to account for social context by collecting qualitative data from a broad sample of participants

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[198]Susan S Silbey, 'Legal Culture and Cultures of Legality', *Handbook of Cultural Sociology, eds. John r. Hall, Laura Grinstaff, and Ming-Cheng Lo* (Routledge 2010).

[199] David Cowan, '*Legal Consciousness; Some Observations*' (2004) 67 Modern Law Review 928.

[200] Patricia Ewick and Susan S Silbey, '*Conformity, Contestation and Resistance: An Account of Legal Consciousness.*' (2004) 26 New England Law Review 731.

and interested parties, and by constructing interviews that initially focussed on the social, historical and economic context of customary practice.[201]

The tools of legal mobilisation and legal consciousness will be put to work in excavating the narratives that surround the Chakma customary system in both Bangladesh and India, and the frame of critical communitarianism engaged to illuminate the different trajectories of a formerly unified system of social regulation, now serving Chakma communities in highly divergent state contexts.

5. Conclusion

The first section of this chapter explored the theoretical location of community as a site of resistance within progressive theories of rights. In liberal theory, even social constructivist approaches to recognising communitarian difference were shown to be grounded in a normative framework that privileged the state. Marxist theorisations of law and rights lifted the veil of state neutrality but nonetheless failed to account for the cultural and psychological effects of colonial domination. To address this lack, South Asian postcolonial theory was invoked to identify the possibility of resistance arising from the colonial politics of difference. Specifically, this chapter analysed the emergence of power relations constructed from the last vestiges of the governmentality of the east. The second section of this chapter engaged directly with the literature relating to legal pluralism and legal culture. The colonial roots of customary law were suggested as founding the contemporary alignment of communitarian law with community identity and resistance to the state. The concept of critical communitarianism was introduced to make explicit the many narratives that influenced the production of law in

[201] Naomi Mezey, '*Out of the Ordinary: Power, Culture, and the Commonplace*' (2001) 26 Law and Social Enquiry 145. Mezey argued the weakness of the law first school of legal consciousness was a failure to account for social context, whilst the socially orientated studies potentially found law in any situation, an echo of critics of the anti-pluralists discussed in section 3.3

community, and the sub-concepts of legal culture, consciousness and mobilisation introduced as appropriate tools for the analysis and comparison of Chakma communitarian sphere. Throughout this thesis these theoretical and conceptual reference points will be drawn upon to support the analysis and interpretation of research data, in the hope that this thesis will advance the study of legal pluralism and legal culture in the fragmented and conflict-ridden environment of the former hill territories.

The next chapter moves to an analysis of the historical narratives that frame the contemporary practice of Chakma law in the CHT. The first part documents the development of a hybrid customary system in the colonial era, noting the effects of territorialisation and legal homogenisation on the ideation of community in the Hill Tracts. The second part traces and interprets the troubled and contradictory narratives accompanying the resurgence of customary law as central to a struggle for land, cultural recognition and survival in independent Bangladesh.

Chapter Three. Invention and Return

1. Introduction

Cover emphasised the cultural paraphernalia that always accompanied law, stating that;

'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning'.[202]

These narratives inform the condition of critical communitarianism in any given location by contextualising state/community relations, and the extent to which those relations generate resistance. With this in mind, this chapter explores the historical forces that link the colonial creation of communities as autonomous tribes to the legal transformations that accompanied the colonisation and decolonisation of Greater India. The intention is to ground field research in a historicised understanding of the salience of colonially constructed customary law to its more recent mobilisation in opposition to state violence and in support of re-establishment of the CHT as an autonomous domain.

The first section of the chapter turns attention more directly to the CHT, and the engagement between the Chakma and the British that foregrounded enactment of the CHT Regulations 1900. It argues this encounter created community as an antithetical political form by bounding previously mobile nations within a fixed territorial formation, by investing these territories with vestiges of autonomy and by aligning them with customary legal practices that included a common property frontier. It then recounts the most relevant provisions of the colonial Statute, the CHT Regulations 1900.

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[202] Cover, (n 187) Pg. 1

The second part of the chapter traces the evolution of the legal institutions of indirect rule into a situation of 'classical legal pluralism' in the postcolonial era. It positions the recent reformation of custom as an '*act of return*', or an elite strategy that employed the CHT Regulations 1900 to legitimise claims for autonomy against the state, and hegemonize the fractured Pahari communities through appeals to an earlier source of shared consciousness. Through this strategy, customary law assumed totemic significance as a signifier of Pahari solidarity in a state context characterised by violence, dissembling tactics, and the interior fragmentation of community. Just as the state is multi-faceted, so the imaginary solidarity of the Pahari is shown to be buffeted by re-emergent nationalist loyalties and ideological divisions. The chapter concludes that whilst resurgent custom provides some stability to the boundaries of community, these fierce interior contestations are the narratives framing its local practice and are influential in determining legal culture.

2. The Legal Construction of the Tribe

Applying the notions of community and communitarianism in the hill territories requires an understanding of a constructed difference, that arose from the particular modes of domination adopted in the later phases of colonial conquest at the eastern borders of India. This section briefly outlines the racialised paraphernalia of indirect rule in India, demonstrating that the dualism of progressive liberalism set against community as ossified tradition infuses the historo-legal narrative of colonial domination in the hill territories. It describes how communities were essentialised through legal divisions drawn from exaggerated racial and ethnicised tropes expressly employed to neutralise indigenous resistance. In their new incarnation as 'tribes', the hill-based nations were coercively bound to particular territories, caricatured as child-like savages and legally defined by their anteriority to capitalism and Western law. This thesis argues that by forcing previously disparate nations into close proximity and attributing them with essentialised common features, the explicitly racialised governmentality applied to the hill territories created the foundation for a possible

solidarity drawn from an anterior status of communities considered beyond-capitalism and beyond-law.

2.1. Comparative Jurisprudence

To the point of the Indian Mutiny in 1857, British colonial policy was characterised by a utilitarian liberalism which promoted the extension and transplant of British legal institutions to Indian territory, despite being thoroughly imbued with an entrenched belief in the normative chasm separating England and India. In the aftermath of rebellion, however, jurist Henry Maine[203] successfully shifted imperial jurisprudence from its previously assimilationist trajectory toward a '*comparative jurisprudence*' explicitly conceptualised around concepts of indigenous difference.[204] Maine was profoundly anti-liberal in conceiving the legitimate role of imperial government as sustaining the deviation between settler and indigenous people rather than reducing it. Post-mutiny, he argued forcefully in the UK Parliament that the imposition of foreign law and land tenures had destroyed the functional coherence of Indian society with almost disastrous consequences for the Empire.[205] According to Maine, the replacement of kinship-based community and communal rights with private property and the evolution of status (*feudalism*) to contract (*capitalism*), should emerge naturally from the

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[203] Henry Maine (*1822 – 1888*) was a prominent jurist most famous for conceptualising legal development as the move from status to contract who drew much of this theory from his experiences as an administrator in India. Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010).

[204] Ibid. Pg. 30-37. Mantena identifies how even liberal philosophers asserting humankind a universal character found ways to justify despotism in the colonies. J S Mill reverted to the common characterisation of the indigene as children in need of development, revealing the disjuncture between the foundations and actualisation of liberal theory. Maine was different only in proposing that colonial difference should be actualised in modes of rule.

[205] Partha Chatterjee, '*The Curious Career of Liberalism in India*' (2011) 8 Modern Intellectual History 687.

internal dynamics of rural Indian society.[206] Maine envisaged a colonial government that would protect indigenous Indians from imposed, externalised change in order to maintain the functional coherence of their society. This would require robust indigenous institutions to be maintained within a state-dominated framework of unequal power.

From the point of mutiny, therefore, a temporal and spatial difference in the type of domination imposed on the indigenous Indian population produced what Mamdani refers to as a '*bifurcated state*'.[207] Urban elites experienced progress and to some extent embraced it, evidenced perhaps by the absorption of European concepts of modernity into the Indian independence movement despite the concomitant rejection of British sovereignty by its protagonists.[208] Indians were co-opted into colonial bureaucracies, and encouraged to understand British rule as providing a progression towards independence.[209] The rights of such cosmopolitan urbanites were *protected* by British civil power. Simultaneously, rural populations were characterised as static, unchanging and wild, and state institutions constructed so as to contain their wildness.[210] Responsibility for rural government and justice was frequently delegated to indigenous elites through Panchayat based structures, cementing the exclusion of rural communities from

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[206] Ibid. Pg. 690

[207] Mahmood Mamdani, '*Historicising Power and Responses to Power: Indirect Rule and Its Reform*' (1999) 66, 3 Social Research.

[208] Chatterjee, (n 2).

[209] Such improvements included opening civil service appointments to Indian candidates in 1866, although only 84 of 2644 senior civil service appointments were allocated to Indian candidates due to the gearing of civil service examinations to Oxbridge candidates. Ariful Islam suggests that the cultivation of this elite group seeded the independence movement in Bengal. Sirajul Islam, Colonial Bureaucracy and Public Administration 1765 – 1947 in Islam, Harun-or-Rashid and Asiatic Society of Bangladesh (n 35).

[210] Ajay Skaria, *Hybrid Histories: Forests, Frontiers and Wildness in Western India* (Oxford Univ. Press 2001).

participation in state institutions.[211] Outside the cities, civil protections afforded the urban elite were deemed to have no utility; customary power became the means through which sometimes oppressive traditions were *enforced*.[212] Maine's jurisprudence thus predicated the close association of the customary domain with rural affairs and framed the common characterisation of customary law as timeless and immemorial.[213]

A new form of governmentality accompanied this bi-lateral splitting. Fine racial and ethnic distinctions were imposed upon communities and materialised in a plethora of divergent modes of government and localised statutory instruments. This constant division, often justified by the responsibility to protect, expressed post-Mutiny neuroticism in its explicit purpose of neutralising the possibility of further revolt. Ethnographies of community transformed the indigenous population from a racialised Indian majority, with all its potentially dangerous homogenising tendencies, to ethnicised minorities unlikely to rise again to challenge the British state.[214] The customary domain as currently understood was founded on a protective ideology explicitly designed to neutralise resistance; it

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[211] Mahmood Mamdani, *Define and Rule: Native as Political Identity* (1st edition, Harvard University Press 2012).

[212] Ibid.

[213] The full definition of customary law offered by the current Chakma chief calls upon this trope to define Chakma/Pahari customary law; '*Established by immemorial rules which had evolved from the way of life...which were retained in the memories of the chief and his counsellors, their sons and their son's sons... coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their son's sons (sic), until forgotten, or until they became part of the immemorial rules.*' Roy, R D, *Customary Legal Systems of Asia* (2005), Pg. 6, Minority Rights Group, quoting Bekker, J.C., *Seymour's Customary Law in Southern Africa*, 5th edn. Cape Town, Juta & Co. Ltd, 1989, p. 11.

[214] Mamdani, (n 211). Pg. 53 A process described by Mamdani as the transformation of '*reified cultural identity into an administratively driven political identity, or ethnicity into tribe*'.

disguised technologies of rule '*crucially shaped by the assessment of indigenous tendencies of collaboration and resistance*'.[215]

2.2. Inner Lines

Maine's policies of division temporally aligned with the physical annexation of the frontier territories of British India and were at their most influential in determining colonial strategy in the north east.[216] The hill communities tended to be swidden cultivators, hunters and foragers, modes of production that, for the British, marked them as less developed than settled cultivators and vulnerable to exploitation.[217] Archival sources suggest a dominant narrative of colonial power deployed to protect the primitive against unscrupulous merchants and traders who sought to '*entangle the child-like tribal in webs of commerce, credit and marketable property*'.[218] The '*governmentality of the east*' as described by Chatterjee enumerated and categorised ethnicity, and in so doing transformed a threatening generality of rebellious outsiders into numerous comprehensible minorities defined and divided by law.[219]

It is important also to note that whilst statistical techniques provided the evidential foundation to the formation of community, the boundaries created

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[215] Chatterjee, (n 205) Pg. 692

[216] Defined in the colonial era as Assam and the North-East Frontier Agency, and now a grouping of the six states Assam, Meghalaya, Tripura, Manipur, Mizoram and Arunachal Pradesh attached to the Republic of India by a narrow land corridor of West Bengal. Sanjib Baruah, *Durable Disorder: Understanding the Politics of Northeast India* (Oxford University Press 2005). *Pg.8.*

[217] Beteille, (n 58). Beteille interrogates the difficulty of attaching any singular identity to tribe. See also James C Scott (n 7)

[218] Chatterjee, (n 205) Pg. 691

[219] Chowdhury, (n 14). Chowdhury emphasises the close connection between the military drive for frontier security and the form of government in the Chittagong Hill Tracts, an issue explored in more detail in chapter three.

between communities were simultaneously operationalised through law and reflected in legal practice. The statutory framework of the Bengal Eastern Frontier Regulation 1873 constituted a series of internal borders, or inner lines, beyond which migration, settlement and commercial activity within any geographical area enclosed by their provisions was prohibited.[220] Cultural diversity was reflected in the crude hierarchies introduced *within* the inner lines; territories were legally defined as partially backward, backward, or extremely backward; depending on the level of development observed by the British.[221] Degrees of exclusion corresponded with degrees of attributed backwardness, in a partially excluded area for example, trade with the resident tribes was regulated but permitted, whilst in a totally excluded area foreigners or indigenous outsiders could not enter without a permit, acquire land or settle, or develop any trade or agriculture projects.[222] In totally excluded areas, all domestic legislation was suspended, and legal and social regulation delegated to tribal jurisdiction on the condition indigenous rulers complied with colonial revenue requirements and aligned with British security objectives. Thus, for the vast majority of hill dwellers,

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[220] The Bengal Eastern Frontier Regulation 1873 encircled the hill areas of Assam and the Naga. After the delegation of powers to the Governor of India in 1919, they were extended to the Garo, Jaintia, Mikir, North Cachar and Lushai Hills. Sanjib Baruah (n 216) Pg.8. The legislation was the model for governing the hill areas and highly influential in the construction of the administrative framework of the CHT. Roy suggests that of greater direct influence on the CHT regulations was the 1896 Chin Hills Regulation that governed upper Burma. Devasish Roy, 'Devasish Roy, 'Challenges for Judicial Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts' (2004) 21 Arizona Journal of International and Comparative Law 113.

[221] The Government of India Act of 1919 determined the Hill Tracts as a Backward Area. The definition changed from 'backward' to 'excluded' in the Government of India Act 1935, which confirmed the CHT as a totally excluded area. Ibid. Pg. 118

[222] Bhaumik, (n 15) Pg.7 Bhaumik quotes Bodhisatthva Kar in describing the inner lines as providing a '*territorial frame to capital*' that placed its residents outside the historical pace of development and progress. The hill peoples were in effect deemed to belong to a different time.

the inner lines legislation ensured their experience of regulation would be through indigenous institutions, albeit institutions adapted to reflect a condition of perpetual domination. The inner lines legislation aligned the hill territories more with the African experience of colonisation in that;

'Indirect rule was mediated rule. It meant that colonial rule was never experienced by the vast majority as rule directly by others. Rather the colonial experience of most natives was of rule mediated through one's own'.[223]

2.3. Land and Territory

A final relevant point of legal division related to the effect of temporal difference and the enduring articulation between the racialised political form of 'tribe' and concomitant legal bifurcations in land administration in the excluded areas. Before discussing this particular aspect of indirect rule, it is worth recalling that the inter-connectedness of legal claims in a plural environment ensures that *'struggles over property are often struggles over power, and vice versa.*[224] Though land adjudications are currently effectively suspended in the CHT, political identity and claims for autonomy infuse legal discourse over forms of land ownership and territorial control. Struggles for power are thoroughly embedded in this discourse, making a historical narrative of property necessary to understand its contemporary relevance to concepts of community, indigeneity and identity.

In wider Bengal, the Permanent Settlement Act of 1793 established a state-centred framework in which permanent grants of land were made to an officially designated Landlord class (Zaminders) in return for a permanently fixed rate of revenue, non-payment of which would lead to the forfeiture of the land grant in its

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[223] Mamdani, (n 207).

[224] Franz and Keebet von Benda-Beckmann, *'The Dynamics of Change and Continuity in Plural Legal Orders'* (2006) 53–53 Journal of Legal Pluralism and Unofficial Law 1. Pg. 30

entirety.[225] Untitled or '*Khas*' lands were reserved to the colonial state to be distributed through the Zaminders, meaning their class held extraordinary power over subsistence farmers.[226] The legal concept of *'Khas'* materialised the ideological notion of waste as a moral precept, its forfeiture justified by underutilisation regardless of prior claim.[227] In contrast, the later annexation of parts of the hill territories consecrated their exclusion from the legal framework of the Permanent Settlement, in that 'totally excluded' status included the delegation of land administration to tribal jurisdiction in its entirety, albeit with residual power reserved to state bureaucrats. The territorially and temporally divergent legal framework of the totally excluded areas contained seeds of a recognition of land rights *unrelated to their utility,* and in so doing explicitly aligned alternate concepts of property with ethnic identity.[228] Whilst all of the political forms imposed by indirect rule in the hill territories prevented capitalist expansion to

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[225] Ranajit Guha, *A Rule of Property for Bengal - An Essay on the Idea of a Permanent Settlement* (Duke University Press, Durham and London 1996). Guha attributes Cornwallis with a physiocratic drive to reform land, in other words believing that the wealth of nations derived from land rather than mercantilism. The structures of the permanent settlement were to transform the landed class of Bengal from feudal lords to improving landlords under the English model. The Act was transformative in producing a wealthy and educated elite that would ultimately provide much of the loci for the independence movement. Pg. 183.

[226] Ibid.

[227] Vinay K Gidwani, '*"Waste" and the Permanent Settlement in Bengal*' (1992) 27 Economic and Political Weekly 39.

[228] Pauline Peters, '*Inequality and Conflict over Land in Africa*' (2004) 4 Journal of Agrarian Change Pg. 269. The delegation of land administration to tribal government was common in British Territories, Peters suggests that this form of rule tended to privilege both Western and Indigenous elites. Note also that there are suggestions in relation to other designated tribal areas in the hill territories there was dissension among indigenous people as to the best form of ownership with some favouring individual ownership or grants of land. See Bodhisattva Kar, '*Nomadic Capital and Speculative Tribes: A Culture of Contracts in the Northeastern Frontier of British India*' (2016) 53 The Indian Economic & Social History Review 41.

some degree it was only in localities considered unrulable that this profound alterity in the relationships between human and territory was preserved. The Chittagong Hill Tracts were one such territory.

3. The Chakma and the British

3.1. Chakma Mobility

The introduction to this thesis drew attention to the common characteristics of the hill peoples of South Asia, namely their shared histories of mobility and migration and the social practices that enabled frequent movement.[229] Many aspects of Chakma life conformed broadly to this characterisation, notably their reliance on swidden agriculture as the mode of production and the common property frontier required for its practice, and a culture that depended largely on the oral transmission of knowledge, history and law.[230] They were originally migrants, it being likely that the Chakma moved west into the Hill Tracts from Arakan no earlier than 600 years ago, though this is disputed by some representatives of the Bangladeshi state.[231] Despite cultural similarities to the interior nations of the Zomia hills, however, it has been argued that the Chakma occupied a '*zone of transition*' between plough cultivators of the plains and the

[229] Scott (n 7) Before colonisation, the broad swathe of mountainous territory running from eastern Bengal to western China was understood to have been occupied by small, diverse and characteristically mobile social groups.

[230] Scott (n 7). Pg. 248. Scott provides a generic name for all the South-East Asian hill communities as the 'Zomia', and explicitly includes the Chakma/Pahari in his definition.

[231] David E Sopher, '*Population Dislocation in the Chittagong Hill Tracts*' (1963) LIII the Geographical Review 338.Pg. 344. The Museum of Ethnography in Chittagong describes the Hill Peoples as having arrived in the CHT some 200 years ago, an evident falsehood given the existence of maps dating to the 16th century with Chakma settlements clearly marked.

swidden agriculturalists of the hills, their society exhibiting characteristics of mobility and of settled states.[232]

Elements of a prior mobility included a clan structure consistent with similar hill-based communities. Chakma society was sub-divided first into a number of wide community groups probably linked to area of residence (Gojhas), and then subdivided into clans or large family groups.[233] Chakma laws formed an expansive and undifferentiated rule-set covering family, medicine, social organisation and resource allocation which maintained the Chakma as a strictly endogenous group, with personal laws containing detailed prescriptions for the marriage of blood relatives, and a strictly patrilineal line of inheritance. Roy suggested this ruleset was applied within a flexible system in which regulation tended toward dispute settlement through discourse and orally transmitted laws.[234] Loosely characterised, it was these laws and this system of regulation that governed the Chakma before the gradual encroachment of colonial technologies of rule.

It was, however, the state like facets of Chakma society that placed them at the apex of the first engagements between the hill peoples and the British East India Company (BEIC). Buchanan's expedition in 1798 described a Chakma society intertwined with Moghul state, with settled cultivation amongst the Chakma predominant in the lowland clans occupying the Rangunia plains near Chittagong.[235] Further, the Chakma paid tribute in kind to the Moghuls in the

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[232] Ibid.

[233] Sirajul Islam, *Indigenous Communities* (Asiatic Society of Bangladesh : Distributing agent, Academic Publishers 2007). J P Mills, annotated by Wolfgang Mey, *J P Mills and the Chittagong Hill Tracts, Tour Diary, Reports, Photographs 1926/27* (2009).Mills suggested that the proximity of the Chakma to the Moghuls might have eroded the traditional kinship ties.

[234] Pg. 131.

[235] Archival evidence suggests that while under Moghul influence, Chakma territory extended beyond the hill areas to parts of the plainlands surrounding the City of Chittagong See Francis Hamilton and Willem

form of cotton cultivated on the plainlands, and their chiefs adopted 'Khan' as a postfix to underscore their cultural proximity to the powerful Moghul rulers.[236] Even in the hill-based clans where swidden agriculture provided the main source of livelihood, the Chakma permanently settled in riparian valleys and shifted only temporarily to the slopes for the jum season.[237] When the British East India Company entered East Bengal in 1750, therefore, the Chakma had adopted many characteristics of a settled state; were socially and politically organised under the aegis of a hereditary chief, defined themselves as a 'jati' or nation[238], had an effective military capability and were integrated commercially with the Moghul Empire.[239]

When the BIEC assumed the role of Diwan of Bengal in 1780, Chakma state-craft was tested by the authoritarian demands for cash payments from their chief, Juan Buax Khan, who, in response to British antagonisms, expressed his rejection of British rule by leading raiding parties against them for around five years.[240] Whilst his guerrilla tactics were initially successful, the Chakma were by this time economically dependent on commerce with the plains, and were ultimately

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van Schendel, *Francis Buchanan in Southeast Bengal, 1798: His Journey to Chittagong, the Chittagong Hill Tracts, Noakhali, and Comilla* (University Press 1992).

[236] Tributes were not taxes but a payment for the right to trade in Moghul territories. AM Serajuddin, '*The Origins of the Rajas of the Hill Tracts and Their Relations with the Mughuls and the East India Company in the Eighteeenth Century*' (1971) 19 Journal of the Pakistan Historical Society 51.

[237] Sopher (n 11).

[238] Note, however, the difficulties of distinguishing Jati/nation from Jani/state where tribal definitions are concerned. See Andre Beteille, *The Concept of the Tribe with Special Reference to India, (n 58).*

[239] Qanungo is keen to distinguish the Chakma from 'tribals', defining them as the fierce interior tribes which he identifies as responsible for the economic hardships experienced by the Chakma in the 17th and 18th centuries. Qanungo, *(n 12)* Pg.6

[240] Ibid.

defeated by a British trade blockade. In defeat, they were entreated to allow British military presence in their territories in the hills in return for protection from attack from the fierce tribes of the interior.[241] This early rapprochement required the Chakma chief to collect tributes to the British, but also restricted migration from the plains. Until the eventual annexation of the territory, the Treaty framed a tense and troubled relationship between the Chakma and the British, with frequent skirmishes over jurisdiction and power.[242] Chowdhury recounts how, in this interregnum, the chief's autonomy was gradually pared and an incipient British strategy to convert the hill peoples to plough cultivation introduced to the Hill Tracts as early as 1835.[243]

In 1860, as Maine's strategies of indirect rule gained traction in domestic government, full annexation of the CHT was signalled by its declaration as a district in Bengal in Act XXVII.[244] Captain McGrath was named as first Superintendent of the territory, and charged with mapping, managing and exploring the territory. In a pivotal moment in the colonial history of the region, he was instructed to;

'Take cognisance of and settle any disputes that arise between chief and chief, or between chief and the people of other chiefs, but (you will) leave the chief and the people to settle all other disputes as much as possible in their own way. You will issue no orders except through the chiefs'[245]

From 1860 to 1900, additional and sometimes contradictory legislative interventions extended control over the hill territories whilst materialising the

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[241] See section 3.2 of this chapter.

[242] Chowdhury, '(n 14).

[243] Ibid. Pg. 22.

[244] Roy, (n 220).

[245] Letter of appointment of Superintendent Captain McGrath from A R Young 1860. Author's copy.

protections of Maine's comparative jurisprudence. The office of Superintendent was upgraded to that of Deputy Commissioner in 1867, with enhanced powers to collect revenue vested in colonial government.[246] The CHT was brought within scope of the Bengal Frontier Regulation of 1873, which established inner lines between the north eastern border territories and the plains, and consolidated the eastern territories of Assam and the CHT under the rule of the Governor of Bengal.[247] The regulations also excluded foreigners from settlement without the permission of the Superintendent, restricted the applicability of national legislation, and placed significant prohibition on development within the ascribed Inner Line boundaries.[248] The extension of the Forest Act 1878 to the CHT restricted jumming, foraging and hunting in designated forests and precipitated the reservation of an estimated twenty percent of the CHT territory between 1880 and 1883.[249]

Howsoever couched in protective language, each new legal institution represented an exercise in Sovereign power and a denial of indigenous agency. For example, the protective boundaries introduced by the Frontier Regulation prevented settlement by foreigners or Bengalis in the Hill Tracts, but in doing so placed the hill peoples outside of new markets and placed the British in overall

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[246] W W Hunter, *A Statistical Account of East Bengal VOLUME VI. Chittagong Hill Tracts, Chittagong, Noakhali, Tipperah, Hill Tipperah* (Trubner & Co, London 1876).

[247] '*A Regulation for the security of certain districts on the Eastern Frontiers of Bengal, and for the better ordering of the trade with the hillmen living on the border of those districts*". The Regulation was extended to the districts of Cachar, Chittagong Hill Tracts, Kamroop, Durrang, Nowgong, Seebsagur, Lukhimpoor, and to the Naga Hills, Khassiah (Khasi) and Jyeteah (Jaintia) Hills, and Garo Hills with effect from April 1, 1873. See note 219 and section 2.2.

[248] Singh, (n 21) Pg. 54

[249] Devasish Roy, *'Sustainable Forest Management in the Chittagong Hill Tracts'*(Chittagong Hill Tracts Watershed Co-Management Project (CWTWCA) 2016). Pg. 9

control of all trade.[250] Similarly, the reservation of forests led to a massive loss of land to traditional modes of production, restricting jumming, foraging and hunting in a direct attack on the core livelihoods of the Pahari.[251] Irrespective of Maines jurisprudential narrative of gradual evolution, and regardless of the ostensibly protective terminology of the protective legislation, the realities of indirect rule tilted toward direct subordination of the Pahari.

Together these encroachments signalled a process of containment or 'territorialisation' through which the unfixed and unbounded space of the CHT was '*gradually reconstructed as a bounded territory during the long period of British rule.*'[252] In the bifurcated state of India, the inner lines legislation formalised the feudal status of the CHT communities, and institutionalised their geographical division from plain land Bengal. Their tribal designation forced the diverse hill nations into one leadership and administrative structure, imbuing their human diversity with the common colonial tropes of wildness and primitivism.[253] Law in effect corralled disparate and dispersed peoples into a single homogenised entity of tribe, thus producing a new community bounded by law and materialised by colonial policy.[254] The next section examines how, in the particular context of the CHT region, policies applied ostensibly to protect tribal nations in fact produced a new legal architecture and a new iteration of community.

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[250] Ibid. Pg. 54

[251] Ibid. Pg. 9

[252] Chowdhury, (n 14). Pg. 184. Chowdhury uses the concept of territorialisation to explain an expansion of rule that occupied physical, legal, agricultural and political space.

[253] A J Skaria, *Hybrid Histories* (n 210) Uday Chandra, '*Liberalism and Its Other: The Politics of Primitivism in Colonial and Postcolonial India*' 47 Law and Society Review 135.

[254] Whilst the law provided legitimacy to the government of the Hill Tracts, military operations to secure the borders continued throughout the 19th century, particularly in relation to the interior nations known then as the 'khukis' (now Mizo). Chowdhury (n 14).

3.2. Territorialisation and the Circle System

Under the precolonial system of tribute, the Chakma chiefs levied a capitation tax on clan members through the male household head, with the tax having an indirect territorial basis in being levelled on jum outputs, and elements of flexibility in that payments were suspended or reduced in times of hardship.[255] After their capitulation to the British in 1785, the main conduits through which taxes were collected and influence exercised over the CHT was through the Chakma chief in the northern area of the Hill Tracts and the Marma Bohmong chief[256] in the south.[257] Following annexation in 1860, however, the still powerful chiefs were increasingly perceived as a hurdle to the extension of sovereign rule. In 1873, the internal administrative boundaries of the CHT were amended to include a third administrative Circle ruled by a newly created Mong Raja, halving the territory of the Chakma chief and dispersing the power of both the Chakma and Bohmong chiefs.[258] In 1876 the hitherto informal relationships between the British and the chiefs were consolidated into formal Revenue Circles, defined as administrative areas in which the appointed chief assumed formal responsibility for collecting taxes on behalf of the colonial state but continued to rule the tribal population directly.[259] When an interior community succumbed either to military

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[255] Rajkumari Chandra Kalindi Roy, *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh* (International Work Group for Indigenous Affairs 2000). Pg. 57

[256] Before consecration of the Mong Raja, the Chakma chief was responsible for both the Rangamati and Khagrachari centred communities, and for more than 75% of the total population of the Hill Tracts.

[257] Serajuddin (n 236). Asserts that that British misinterpreted the tributes paid as taxes, and in doing so effectively asserting sovereignty over the Chakma in a way the Moghuls never had.

[258] Qanungo, (n 12). Pg. 58.

[259] Tamina M Chowdhury, *'Raids, Annexation and Plough: Transformation through Territorialisation in Nineteenth-Century Chittagong Hill Tracts'* (n 14). Pg. 216

domination or material inducement, they were absorbed and partially subordinated to the Circle system, and their leaders deemed subservient to the Circle chiefs in matters of taxation and government.[260] By these measures the Circle system imposed a territorial locus on the elite leadership structure of the Pahari communities, and precipitated the homogenisation of pre-existing systems of law and government.[261]

The political rationale of the Circle system was directly traceable to Maine's ideology of indirect rule in its brazen objective of dividing the chiefs and neutralising their capacity to generate resistance. Nevertheless, this organisational structure could not remove entirely the perceived obstacles to fiscal and commercial optimisation associated with the still-mobile agricultural practices of the Pahari. These ends were served by a persistent British campaign to shift the mode of production to settled agriculture from the long-standing practice of swidden agriculture, or jum. Land was perceived as a resource to be enhanced and made efficient through scientific rationality, the desire to make wastelands productive discernible in colonial records of the CHT.[262] In 1865, for example, the CHT Annual Report celebrated the disposal of *'waste lands'* amid discussion of

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[260] Pacification of the interior effectively paralleled the extension of legal controls over the three dominant chiefs. In the Annual Report on the Chittagong Hill Tracts 1865. G C Kilby Esq. Officiating Superintendent, Hill Tracts, to the Commissioner of the Chittagong Division discussed this process, exposing the difficult relationship between military and administrative power. '*The most powerful are the Shindoos but it is the Kookies that give us most trouble. We have opened negotiations with them. Less successful in holding meetings this year... The Howlong and Syloo too have never come down; they seem to dread treachery on our part should they render themselves to our power'.*

[261] Roy, (n 220). Chowdhury (n 14).

[262] Gidwani (n 227).

the abundant opportunities in the development of tea, coffee, rubber and timber plantations and the need for adventurous capitalists.[263]

The obdurate nature of colonial policy on jum was also at least partly attributable to another recurring trope in the colonial archive, that is the requirement for wage labour. Imported Bengali labourers were '*as good as useless'* in delivering British requirements due to their unfamiliarity with the hill territories, and susceptibility to the climate borne diseases.[264] In this light, jum agriculture was seen as the reason for Pahari antipathy to wage labour, one exasperated official observed;

'when a joomah (sic) has a sufficient crop, he leads a life of indolence for six months, drinking and shooting, and no amount of remuneration can induce him to leave his home'[265].

In offering the possibility of flight and apparently also providing an adequate livelihood, jum thus constrained British commercial ambitions, rendering land '*likely to remain uncultivated for some years to come.'*[266] Attempts to introduce plough cultivation also contained a fiscal rationale; colonial authorities sought to bypass the chiefs own revenue systems through inducing Jummas into plough cultivation, even going so far as to make land available outside of the chiefs territory for any Jumma wishing to convert.[267] Yet Hunter reported the surprising attachment of the Pahari to jum agriculture, very few households succumbed to

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[263] Annual Report on the Chittagong Hill Tracts, to the Commissioner of the Chittagong Division – dated 8th February 1865. From G C Kilby Esq. Officiating Superintendent, Hill Tracts, to the Commissioner of the Chittagong Division.

[264] Hunter (n 246). Pg. 77

[265] Administrative Report for Chittagong Hill Tracts. Bengal Archive. 1881. Paragraph 6.

[266] Annual Report on the Chittagong Hill Tracts, to the Commissioner of the Chittagong Division. Bengal Archive. 8th February 1865. Paragraph 51

[267] Hunter (n 246). Pg. 93. An area called the Kapas Mehal was set aside for Jummas willing to convert to the plough.

the considerable inducement of zero tax and free land.[268] Even at this early stage in the transformation of the hill communities, the Pahari exhibited a cultural resistance to the imposition of alien practices, suggesting that their community was produced by an iteration between its legal construction by colonial authorities and the agency exercised by its denizens in rejecting the inevitability of their exploitation.

Agency aside, the Circle system contained an inherent contradiction in being primarily designed to restrain indigenous power, whilst simultaneously rendering colonial administrators dependent on the chiefs and dewans to collect revenue and maintain order.[269] Ultimately this contradiction doomed attempts to bypass the chiefs to failure and eventually precipitated a new strategy of co-opting the anointed tribal rulers more directly into the structures of colonial rule, despite frequent and forcefully expressed reservations about their leadership and loyalty. A change in strategy was required because;

'If the substitution of plough for Jum cultivation is ever going to take root and... eventually to change the whole system of cultivation and mode of life amongst the Hill People, we must... try and devise some scheme for its extension which is not so entirely antagonistic to the chiefs.'[270]

The British strategy of co-option created a co-dependence that enriched the chiefs and their acolytes and impoverished the hill farmers, materialising a social system as reminiscent of English feudalism as of the indigenous system that preceded

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[268] Ibid. Pg. 92

[269] More than once the British considered removing the chiefs and running the Revenue Circles directly through the headmen/dewan positions. Mills, for example, recommended this course of action in 1927, citing the ruinous effect of customary taxation on the lay people. J P Mills, annotated by Wolfgang Mey, *J P Mills and the Chittagong Hill Tracts, Tour Diary, Reports, Photographs 1926/27* (2009).

[270] Mr H A Cotterell writing in Administrative Report of 1879. File no 119C, 10th March 1879

it.[271] By 1880, the composite effect of commercial sales, British settlement and extension of the Forests Act of 1878 had already severely restricted lands available for plough cultivation;[272] jum was in reality the *only* viable means of subsistence for most hill dwellers, but still the drive to end mobile agriculture appeared unabated.[273] Whilst the colonial government interposed itself as protector of the people against the chiefs, its administrators remained oddly blind to their own role in creating a customary system that, as a direct result of their interventions, extracted tax for commercial gain without the customary provision for relief, determining by their actions that famine became a constant and ghoulish handmaiden to British rule in the hills.

3.3. Law in the Hill Tracts

Similar uncertainties and contradictions emerged in relation to legal administration. Whilst indirect rule maintained a distance between British administrators and the day-to-day regulation of the hill peoples, a mode of domination that delegated land administration to the magisterial offices of the chiefs lay uncomfortably with an economic strategy that sought to reduce Pahari dependence on jumming. As a result, one notable effect of indirect rule on legal conduct was to create an arena in which power struggles between the coloniser

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[271] Chowdhury, (n 14).

[272] D R Roy, '*Sustainable Forest Management in the Chittagong Hill Tracts*' (n 248. Pg. 9. In terms of the Forests Act alone, an estimated twenty percent of the CHT territory was declared as reservations between 1880 and 1883 with jumming, foraging and hunting all severely constrained.

[273] Mr H A Cotterell; Volume 119C, 10th March 1879. Noted that land reservation caused a significant reduction in jum cultivation cycles, meaning that the fallow periods associated with the practice were also much reduced, as was land fertility. Chowdhury also finds this a reason for starvation in the Hill Tracts. The British, however, determined jum an environmentally unfriendly practice. Tamina M Chowdhury, *'Raids, Annexation and Plough: Transformation through Territorialisation in Nineteenth-Century Chittagong Hill Tracts'*(n 14).

and local elites were performed. In Bengal, the 'superior' nature of state adjudication was recognised by indigenous actors themselves, who even then, indulged in forum shopping between the diverse sources of religious, informal and state law.[274] In the Hill Tracts, a similar legal dance occurred as indigenous actors sought remedies in formal law against customary injustice. Although the bulk of cases were *'still decided by ancient custom'*, the British appeared convinced that customary magisterial powers were used to thwart the grant of leases for plough cultivation for which the chiefs received no tax revenue.[275] Colonial administrators frequently reverted to the language of protection as justification for the acceleration of leasehold grants, their contempt shown in an 1874 report that '*gauged public feeling'* and noted the increasing frequency of appeals to British justice due to *'the waning power and influence of the tribal chiefs, attributable to their weakness, selfishness and their incapacity'*.[276]

In other areas the ideology of protection appeared to augment the powers of the chiefs and maintain their exclusive jurisdiction. One area of direct judicial challenge to the scope of indirect rule arose in relation to the disputed jurisdiction over bond cases lodged with state Courts by Bengali money lenders seeking to enforce against the hill peoples. As early as 1862, a Captain J Graham, wrote that heavy debts borne by a large proportion of the population created conditions akin to slavery. The Commissioner responded that:

"One of the chief objects of the constitution of your appointment is to administer justice to the Hill People in your jurisdiction, and to prevent that oppression and plunder of poor and ignorant savages by the crafty

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[274] Lauren Benton, *'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial state'* (1999) 41 Comparative Studies in Society and History 563.

[275] R Proceedings of the Lieutenant Governor of Bengal, Political Department, Calcutta September 1874, Poll File 198 Pg. 88 – state of Public Feeling

[276] Ibid.

Bengallee money lender which may lead, as in the case of the Sonthals, to violence and bloodshed'.[277]

In a material representation of their self-attributed protective role, the Chittagong based administration strongly resisted the enforcement of contracts between Bengali and hill peoples in the formal British courts.[278] Arguing that such petitions should not be a matter of formal legal account, one Officer Hanky refers to the matter as '*conflict between common sense on one side and strict laws on another*',[279] due to the poor understanding tribal people had of the money economy. Yet the protective stance adopted by colonial rulers contained the same contradictory characteristics as their agricultural policy. Allowing an alternative route to justice through the formal courts undermined the chief's authority, and thus, paradoxically, the ability of the coloniser to rule through them. The matter was decided in favour of local resolution, and the continuation of the policy of referring cases to the CHT Deputy Commissioner, on the grounds that:

'The people are not yet fit for regulation, nor are their circumstances suited to it, and I would do everything in my power to administer the district on non-regulation principles as long as this may be possible.'[280]

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[277] Bengal Archive: Judicial proceedings 142 to 143, December 1862 Pg. 66 to 69. Letter from C. T Buckland, Esq. Officiating Commissioner of the Chittagong Division, to the Secretary of the Government of Bengal. (No 84 Dated the 16th May 1862).

[278] Chatterjee notes the British paternalism in relation to money lending was used as a major justification for annexing the north east. Chatterjee, (n 205)

[278] Civil procedure in the Chittagong Hill Tracts – no 990, 8th March 1872. From H Hankey Esq., Offg. Commr. of the Chittagong Division. To: The Offg. Secy. To the Government of Bengal, Judicial Department

[279] Civil procedure in the Chittagong Hill Tracts – no 990, 8th March 1872. From H Hankey Esq., Offg. Commr. Of the Chittagong Division. To: The Offg. Secy. To the Government of Bengal, Judicial Department

[280] Ibid.

Up to 1900, uncertainty continued to infuse discourse over the jurisdiction of wider Indian state law to the Chittagong Hill Tracts. The brief, highly general letter of 1860, along with the Bengal Frontier Regulation of 1873 formed the primary statutory instrument for the administration of the Hill Tracts until 1900, but the imprecision of its drafting created considerable legal ambiguity and contestation over the application of national legislation. A stream of British Indian legislation had been promulgated since the initial annexation of the Hill Tracts, including the Indian Forests Act, Anti-Slavery Act, the Excise and Stamp Duty Act, and the Indian Penal Code. The state judiciary favoured the equal application of these laws to the territory, an assimilationist construct that would provide equality before the law, at least insofar as experienced on the Indian plains in key civil and criminal matters. Although central government had directed that law in the Hill Tracts be conducted in the spirit of Indian civil and penal codes, their direct applicability was resisted by successive local administrators, who argued that;

'The justification for this legislative barrier is that 'the procedure followed in such a peculiar circumstance locally as the Chittagong Hill Tracts...is hardly to be expected to be defined by hard and fast rules'[281]

The Hill Tracts demanded a more flexible approach to the delivery of justice, in the light of their exceptional, or '*backward' nature*', an attitude that betrayed the frequency with which colonial administrators rationalised their limited understanding of the indigenous population by reference to primitive tropes.[282] This might also explain why, at the same time, colonial rulers engaged in a fierce

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[281] Letter from W B Oldham Esq – Commissioner of the Chittagong division to the Chief Secretary of the Government of Bengal; Dated Chittagong 28th November 1894.

[282] Rakhee Kalita Moral, '*Rumour, Rhetoric, Rebellion: Negotiating the Archive and the Witness in Assam*' (2015) New Series 82 NMML Occasional Paper History and Society.

battle with the indigenous elite in their attempts to change fundamentally the lifestyle of the peasantry. Even when observing this struggle through the inevitably partial archival accounts of the period, it is possible to read the Pahari, not as passive recipients of British regulation but as exhibiting a recalcitrance that directly influenced the particular form of CHT Regulations in the creation of a legislative boundary around the hill communities that partially reflected an indigenous construction of the limits of the state.[283] In the last preserved report to the Commissioner before the promulgation of the CHT Regulations, it was recognised that;

'Whatever the defects of tribal jurisdiction I am strongly inclined to the view that it is the only system that works in the Hill Tracts at present'.[284]

3.4. The CHT Regulations 1900[285]

This brief history of the events leading to the enactment of the Chittagong Hill Tracts Regulation 1900 has suggested that the institutions of indirect rule, and the legally plural system it created were riven with ambiguities and contradictions. The ostensible preservation of indigenous institutions was accompanied by strategies of settlement and territorialisation that radically altered indigenous society, just as the ideology of protection was destabilised by the commercial and political objectives that had driven annexation. Despite the many uncertainties of colonial rule, however, it was Maine's vision that triumphed when the

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[283] In an earlier work, Scott theorises such recalcitrance as a particular form of resistance James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale Univ. Press 2000).

[284] Annual Report for Chakma state, Poll File C 27, 1, 27th April 1899, From F R S Collier, Commissioner of CHT, to Chief Secretary of the Governor of Bengal

[285]Chittagong Hill Tracts Regulation 1900 https://mochta.portal.gov.bd/sites/default/files/files/mochta.portal.gov.bd/page/c5700903_fd1e_4de2_985e_065ba9e2971c/CHT_Regulation_1900-Eng.pdf

geographically specific manual of colonial rule was finally produced in 1900. The Chittagong Hill Tracts Regulation 1900 consolidated all previous legislation, enshrined both the political autonomy of the area under the chiefs and the territorial basis of that autonomy, and finally clarified the institutional structures of self-regulation.

This geographically specific extension of the inner lines confirmed the chiefs as Revenue Collectors and Judges, and the status of the CHT as a backward and totally excluded area. It defined not only the borders of the Hill Tracts with Tripura, Burma and Assam, but the territorial borders of each village, Mauza[286], and Circle. The three most established chiefs, Bhomong (Bandarban District), Chakma (Rangamati District) and Mong (Khagrachari District), were confirmed as leaders of the three administrative circles, with overarching responsibility for land administration, forestry (except in reserved forests), taxation, civil law and limited responsibility for penal matters. The chiefs were granted the inducement felt necessary to encourage settled agriculture in that tax levels for plough cultivation were set at a lower level than that for jum.

In addition to confirming the geographical limitations of each chief's area of rule, the regulations created a strict legal hierarchy, with the chief at the apex. The next level of hierarchy placed the headmen in charge of defined Mauzas, or grouping of villages. The headmen took over the revenue collection function of the Raja's dewans and khisas, being vested with statutory powers to collect tax on Jum lands, rents on leased lands, and taxes accruing for grazing rights and Khola (grass) lands.[287] Like the dewans and khisas, the headman's position was hereditary and carried with its substantial powers, and like the chief, the headmen

[286] One Mauza replaces the administrative districts of Taluks, each Mauza is a group of villages under one headman

[287] Sections 42, Collection of Jum Tax, Section 43 Collection of Rent, Section 45 Collection of Khola Tax

were substantially enriched by these positions.[288] Under the headmen each village had a karbari, who functioned as a support to the headmen in collecting tax, resolved disputes at a village level and undertook a variety of social and welfare functions to maintain the prosperity and harmony of the village. Whilst the roles of chief and headmen were minutely defined in the CHT Regulation, the karbari are recognised without a detailed exposition of their functions and responsibilities.

The Regulation contained a limited recognition of a common property frontier in its confirmation of jum taxation and of the headmen's role in land mutation, though technical 'ownership' was vested in the Deputy Commissioner as a representative of the colonial state. The chiefs, through their headmen, were delegated sole responsibility for land allocation and transfer within limitations prescribed according to its size and type. Leases would be granted by the Assistant Commissioner, but only on the advice of the headman. The grant of usufruct and homesteading land was delegated to the indigenous headmen of the respective Circle Offices, albeit with their powers curtailed by each grant being phrased as only a recommendation to the Deputy Commissioner, and the legal concept of 'khas' or empty land excluded by implication from the Regulation. Recognition of a Jum cultivators' usufruct rights over hilly areas also implied broad acceptance of the resting cycle of the shifting cultivator, and thus created a legal basis for arguing the existence of collective ownership.[289]

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[288] Devasish Roy refers to the positions as 'traditional' as opposed to other elements of the regulations that were colonial, the reason being this direct transmutation of precolonial office to colonial officers. Roy, (n 220)

[289] Section 34 (1) No settlement of Government Khas land shall be made in the district of Chittagong Hill Tracts except to the extent and in the manner specified below: -

(i)The quantity of cultivable or cultivated flat land to be settled for plough cultivation with a single family of hill-men or non-hillmen residents shall be such as added to the quantity of such land already in its possession does not exceed 5 acres.

The CHT Manual thus encapsulated the inconsistencies in policy present at the time of enactment; some rights were expressly protected, as in grazing and grasslands whilst recognition of others was only implied by the framework, as in the case of jum.[290] It circumscribed the chief's powers, but also legally enshrined continuation of the capitation tax and through it, indirectly recognised jum agriculture and the necessary existence of the commons. Yet this ambivalence distinguished between ownership, expressly delegated to colonial institutions, and ambiguous and inconsistently framed usufruct rights had the legal effect of underscoring state sovereignty over the region.[291] Curiously, the composite effect of the Regulation was to privilege both usufruct rights and state ownership *over individual tenure* in the hill areas, suggesting that in regard to land ownership the CHT Regulation merely reflected the material reality of a small landed class and majority population still reliant on the commons for livelihoods. In effect, short-term tactics triumphed over long-term strategy to create the enduring legal paradox of the CHT Regulation; in protecting collective rights they also provided a statutory mechanism for their usurpation by the state.

The final section of the Regulation is equally salient to the current constitutional debate over political autonomy for the region and the applicability of indigenous custom as it related to land. The 'excluded' status of the Hill Tracts was captured in provisions under Section 52, which prevented settlement by foreigners or Bengalis without the permission of the Deputy Commissioner of the Hill Tracts,

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(ii) A lease for plough cultivation and for grove plantation under sub-clause (1) shall be granted by the Deputy Commissioner:

[290] Roy, (n 220). Pg. 149

[291] Peters argues that recognition of private and collective rights empowers national and local elites to alienate land from the most marginalised. *Pauline Peters, 'Inequality and Conflict over Land in Africa'* (2004) 4 Journal of Agrarian Change 269.

and the Region remained outside civil jurisdiction of the Indian courts.[292] In criminal matters, headmen were charged with the delivery of justice in line with existing customs, except in the case of serious crimes in which case they were required to apprehend criminals and handover miscreants to appointed magistrates. Tribal jurisdiction was preserved in civil matters, however, so as to accentuate the state/customary binary created by the Statute. In civil litigation, the regulation accentuated the informal basis of the customary system by prohibiting the use of lawyers or attorneys within its jurisdiction.

3.5. Summary

It might be argued that the CHT Regulation represented the struggle for power over territory and custody of legal rule that Croce sees in all instances of legal pluralism.[293] In seeking resolution to this struggle, however, the British produced as much as they preserved, by constituting a new form of government and law, introducing a less flexible and more hierarchical political structure, and delegating responsibility for land administration in ways that accelerated class stratification. In any case, the Manual as drafted suggested that by 1900 pre-existing customs had been so substantially altered by preceding decades of British domination that customary law was already a hybrid of indigenous practice and state imposition developed within a colonial power relation that oppressed and disempowered. Yet, paradoxically, the CHT Regulation was also a transformative legal milestone, in its recognition of the Pahari as a territorially defined community, and in its formal ensconcing of communitarian legal culture in the legal technologies of the state. Inside the Circles, political structures, revenue systems and land tenures were both hybridised and homogenised, with only the personal regulations of each nation sustained as markers of identity. From this point, therefore, the CHT

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[292] Section 52. This section was amended in the 1962 constitutional reforms introduced under the martial government of Pakistan to enable Bengali settlement.

[293] Croce (n 140).

nations formed one community of Pahari which was defined externally by its common exclusion and internally by a combination of radical difference and an attributed political form, that of tribe, which was inextricably connected to the practice of law. In this way, the CHT Regulations paved the way for the form of communitarianism in the contemporary CHT, establishing the wider Pahari community as the cultural foci of resistance against the state.

4. Courts, Continuity and Change

The remainder of this chapter traces the lineage between the legal consignment of the Pahari to the anterior and alien political form of tribe and the existence of critical communitarianism in the contemporary Hill Tracts. This lineage emerges from the redeployment of Pahari customary law in Bangladesh as a symbol and material instrument of indigenous agency, and the valediction of customary institutions as emblems of community identity. In documenting the phenomenon of resurgent custom in Africa, Comaroff noted that;

*'This resurgence is itself part of an ur-process increasingly dubbed **re**traditionalization…the referential '**re**'; It points away from a linear history in favour of a different temporality, a **re**-cursive one: a history of **re**petition and **re**production in which the past returns in hyperbolic intensified form'*[294]

The following analysis follows Comaroff in confronting the myth of customary continuity in Bangladesh, arguing that the legal deployment of custom accentuates an essentialised and homogenised Pahari identity to strengthen elite claims to territorial and political autonomy. It documents, in effect, the tortuous process through which the Pahari communitarian system not only became the foci

[294] John L Comaroff and Jean Comaroff (eds), *The Politics of Custom: Chiefship, Capital, and the state in Contemporary Africa* (The University of Chicago Press 2018).

of mobilisation against the state, but also the gradual *re*-consolidation of customary law as a practice of a highly contested and unstable political identity.[295] It argues that though the boundaries of community are reinforced through this instance of legal mobilisation, community so defined remains imbued with an inherent instability bearing directly on legal consciousness, and forming the subject of the remaining chapters of this thesis.

4.1. Custom Redux

In this thesis, the state/society relations that produce the hill people's communitarianism are interrogated through the medium of the Constitution of the Republic of Bangladesh. As a precursor, therefore, this section considers South Asian constitutionalism, and the shared instabilities that appear in the polities of the nations of former British India regardless of the constitutional form adopted after Partition. Constitutionalism indicates the shared normative assumptions that ground meaning and purpose of national government, and frame legal discourse and constitutional law.[296] Tushnet and Khosla suggested all South Asian states experience an '*unstable constitutionalism*', defined as;

'A phenomenon in which all participants in national politics appear to be reasonably committed to the idea of constitutionalism…yet they struggle to settle on a stable institutional structure embodying a form of constitutionalism appropriate to their nation'[297]

The five states of South Asia shared difficulties in absorbing and harmonising features of the nation's experience derived from the divisive tactics of a colonial

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[295] Barzilai, (n 5)

[296] Laura Cata Backer, '*From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*' 113 Penn state Law Review 671. Pg. 679

[297] Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism: Law and Politics in South Asia* (2015). Pg. 5

past, those difficulties often manifesting in situations of *'ethnic conflict, social disorder and profound diversity'.*[298] In these conditions, constitutions became the foci of mobilisation and dissent, due to the co-existence of competing and conflicting visions of nation. In effect, there was shared agreement about the centrality of the Constitution to the state, but dissent over its meaning and purpose. This resulted in a prevailing instability as the accentuated, essentialised difference of a bygone era returned to unsettle state hegemonies. It is with this understanding of both the centrality of constitutionalism to the Republic of Bangladesh, and the inherent instability in its construction that the following analysis of its contents should be considered.

Chapter One introduced the Chakma by describing briefly the cataclysmic events that had accompanied decolonisation, namely the mass displacement of Chakma following the damming of the Karnaphuli River, and the ways in which nation building in the revolutionary state of Bangladesh caused further tectonic shifts in the lifeworld of a once protected region. It opined that since Partition, regardless of whether government was democratic or autocratic in composition, there was an unwavering tendency toward a unitary government form and a centralised state. The new democratic Republic of Bangladesh continued the centralising and majoritarian tendency of its precursors in a constitution that created a highly centralised state architecture, and defined a nationalism expressed through the language and cultural signifiers of the ethnic Bengali, making it almost a polar opposite to the detailed federalism and integrationism that founded its powerful neighbour, India.[299] From the inception of Bangladesh, these constitutional characteristics weighed heavily against the consensual integration of minority communities into its technologies.

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[298] Ibid. Pg. 5

[299] Constitution of the Peoples Republic of Bangladesh. http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367

The Constitution contained a strong expression of fundamental rights(part one), economic rights(part two),[300] and fundamental freedoms(part three),[301] against which the culture and alterity of minorities were hardly recognised. Article 9 stated;

The unity and solidarity of the Bengali nation, which, deriving its identity form its language and culture...shall be the basis of Bengali nationalism.

With Bengali-ness an ethnic categorisation, and with a number of the smaller communities speaking different languages and practising different cultures, the Constitution as drafted appeared to perpetuate the exclusion of minorities.[302] Limited recognition of minorities related only to special provisions or reservations to be made for '*backward sections of citizens*' used in Articles 28(4) and 29 in the case of government employment.[303] The colonial trope of 'backward races' was adopted to identify peoples outside of the mainstream culture, but unlike the Constitution of India, the definition of backward was not aligned with protective institutional arrangements.[304] Additionally, the organs of local government were minimal and muted; sections 59 and 60 determine only that the constitutional right to elected local bodies *may* include administration of public works, the maintenance of public order and the preparation of plans for economic

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[300] Ibid. Article 11 - The Republic shall be a democracy in which fundamental rights and freedoms and respect for the dignity and worth of the human person will be guaranteed.

[301] Ibid. Articles 26 to 47 Those freedoms included secularism, freedom to practice religion, rights to property, and freedom of movement,.

[302] M N Larma, the MP for Rangamati in the early years of the Republic protested the Bengali elements of the Constitution for their ethno-centrism. Chakma (n 39)

[303]Constitution of Bangladesh (n 297) Article 29(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

[304] Tribal Rights are recognised in the Sixth Schedule of the Constitution of India, and discussed in more detail in chapter six of this thesis.

development, a situation that reflects the authoritarian Basic Democracies Order enshrined in the 1962 Constitution.[305] Whilst the constitutional commitment to democracy and rights represented a departure from the previous oppressions of Pakistani rule, the almost centrifugal construction of the state continued a trajectory that played to a relatively homogenous population of Muslim Bengalis, and reflected the fevered ethno-centric nationalism around which rebellion against West Pakistan had first coalesced.[306]

It is in the light of these movements on the national stage that the emergence of the Jumma/Pahari as a Chakma-led political force must be considered. As valley people, the Chakma were most affected by the largescale environmental displacement caused by the loss of cultivable lands through the damming of the Karnaphuli River, and it was after this cataclysmic event that political activism amongst the Chakma accelerated exponentially.[307] Chakma activist M N Larma was elected to Parliament in 1969 to represent the Rangamati constituency, and took up his seat after the new revolutionary government took power in 1971. In 1971 he created and led the first common Pahari political party, the Jana Samhati Samiti (JSS), expressly to represent the increasingly marginalised Hill Tracts communities in the new Republic.[308] The JSS leadership was largely Chakma, but positioned the party explicitly as representing all indigenous communities

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[305] Schendel (n 20). Pg. 119. The Basic Democracies Order was introduced on the transition to martial government in 1958 and enshrined in the 1962 constitution. Under the BDO local elections were permitted but their representatives subject to unelected bureaucrats who controlled resources. In this the BDO resembled colonial government and was reproduced in the 1972 constitution.

[306] Raghavan (n 24).

[307] Harikishore Chakma and Centre for Sustainable Development (n 21)

[308]The United Peoples Party. Before the JSS Larma was a member of the Rangamati Communist Party; Marxism was one element of his Jumma nationalist ideology. JSS changed its name post conflict to PCJSS or United Peoples Party of the Chittagong Hill Tracts.

against the state, creating a 'new nationalism' symbolised by and grounded in the obvious commonality of jum or swidden agriculture.[309] '*Jumma nationalism'* thus called into existence a new political identity based partly on the common mode of production and a shared history of colonisation and oppression, and partly on a Marxist-derived ideology that was expressly modern and expressly *'anti-feudal'*.[310] From the birth of the new nation, therefore, JSS claims for exceptional treatment for the Chakma/Pahari were entirely at odds with the vision of state emerging from the post-war coalition and depicted by the Republic's first Constitution.[311]

The struggle between state and the Pahari as represented by JSS/Santi Bahini was at its apotheosis in the long interregnum of martial government that began in 1975 with the assassination of Sheikh Mujib. It was a period in which constitutional government was suspended and a campaign of almost spectacular oppression waged against the hill minorities.[312] Ergo, constitutional marginalisation did not, of itself, generate the conflict between the state and the Pahari, nevertheless it established a frame in which future attempts to accommodate difference within the state were subject to interpretation as attacks on its fundamental nature. From the early dismissal of Chakma overtures toward

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[309] Described by Biltu Chakma as using the mode of production as a source of solidarity, it was '*not cut and paste Marxism, we used some of his ideas and some of our own'*. Interview 6 March 2016

[310] An attempt at nation-building according to Willem Van Schendel, (n 63)

[311] Huq (n 26). The Constitution was drafted by a conference drawn from the political parties who had supported the revolution.

[312] There are many accounts of the conflict. Various amnesty reports recount the gross human rights violations on the part of the army. Amnesty International (ed.), *Bangladesh: Unlawful Killings and Torture in the Chittagong Hill Tracts* (Amnesty International 1986). Adnan gives a historical account of the conflict to explain the continuing marginalisation and poverty of the hill dwellers in 2004. Shapan Adnan, *Migration, Land Alienation, and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh* (n 41).29/05/2019 01:21:00

Mujib's revolutionary government, to later attempts to resolve the insurgency through limited concessions to autonomy, the lopsided nature of a much-revered Constitution provided grist to proponents of a uni-cultural state and opponents of formal recognition for the Pahari peoples. Thus, when the Santi Bahini and the newly elected Awami League government signed a formal peace accord in 1997, claims for constitutional legitimacy derived solely from revitalised custom. The unitary and centralised Constitution of Bangladesh and the unstable constitutionalism that accompanied it framed and partially explained the return to prominence of customary law in the Hill Tracts. It is to this exposition that discussion now turns.

4.2. The Act of Return

Exploring the recursive nature of custom in Africa, Alexander discussed the complex backdrop to the still present binary of traditional, ethnic and informal nature of customary legality set against the modern, civic and formal state law. She wrote:

While the act of "return" is often authorised as a step back in time, tapping into something ancient and resilient, at its core are struggles over resources, rights, and institution-making are very much of the present.[313]

In the case of the CHT, this thesis argues that the Chittagong Hill Tracts Peace Accord 1997 (CHTPA) marked a pivotal moment in the narratives surrounding a customary legal system weakened by decades of atrophy and decline.[314] In the first of many visible '*acts of return*', sections of the Chakma elite mobilised customary

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[313] Jocelyn Alexander, The Politics of states and Chiefs in Zimbabwe, Pg. 134 in John L Comaroff and Jean Comaroff , *The Politics of Custom: Chiefship, Capital, and the state in Contemporary Africa* (n 294).

[314] The Chittagong Hill Tracts Peace Accord 1997 full terms are available at this link. https://peaceaccords.nd.edu/sites/default/files/accords/Chittagong_Hill_Tracts_Peace_Accord.pdf

law to augment their power in relation to the state, running the risk of essentialism in deploying a colonially rooted conceptualisation of the Pahari as a homogenised 'tribe', and a myth of de-historicised and continuous customary governance.[315] Ostensibly intended to provide a template for the orderly integration of the Hill Tracts into the mainstream polity, the CHTPA also marked the point at which the dichotomous conflict between the state and the Chakma-led Santi Bahini fragmented to internecine and decentralised warfare. This led to the dissolution of customary legal holism and its replacement by a condition of internal legal plurality.[316]

Central to this thesis is the idea that this fragmentation and plurality created competition over legal meaning, facilitated legal transformations and in so doing produced a more open and dynamic legal culture. Indeed, chapter four will show that at the level of strategy, each mobilisation of customary law recreated the customary system as a practice of identity, and chapter five will show that at a local level, each mobilisation of law was dialogic, contested, and formative of new levels of legal consciousness. Under the banner of critical communitarianism therefore, the state's failure to attain a lasting peaceful settlement to previous conflicts confirmed the Pahari community as the culture foci of resistance.

The following discussion both elaborates on the role played by the CHTPA in mobilising customary law as emblemic of Pahari identity, and explains why its limitations returned the customary arena as a site of contestation. The '*act of return*' followed a prolonged period of decline in a customary system already unsettled by the displacements of Kaptai and the disruptions of the war of independence. Later, during the intense early phases of insurgency, customary law was ill-suited to maintaining order in the face of the mass displacement and

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[315] Namely the PCJSS and the Chakma chief

[316] The Constitution's objective was stated in its preamble as '*to elevate political, social, cultural, educational and financial rights and to expedite socio-economic development process of all citizens in CHT*'(n 299)

containment,[317] and government sponsored illegality.[318] Anecdotal evidence collected during fieldwork suggested that in many areas of the Hill Tracts the customary system either fell into abeyance or was subsumed into alternative methods of adjudication during the years of conflict.[319] In areas of Santi Bahini control, a new and more democratic system of village governance replaced the traditional system with elected village committees and judicial Gram Panchayats that were backed by military force.[320] Headmen and karbari retained an honorific role within their Gram Panchayat system, but greater power lay with the selected members and Santi Bahini commanders.[321] In fieldwork, one of those former commanders recounted that the new system of village governance and dispute

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[317] Around 70,000 Chakmas were fled army and settler violence at the height of the conflict, most finding their way to large refugee camps in South Tripura. See Sumanta Sen, India Today, 31 July 1981, https://www.indiatoday.in/magazine/indiascope/story/19810731-bangladesh-army-lets-loose-reign-of-terror-against-tribal-groups-residing-in-chittagong-hill-tracts

Indian Pressure for a solution to the refugee problem is thought to have driven the Government of Bangladesh to negotiate the peace accord. The refugees began their return in 1997. See BSCAL, Business Standard, 29 March 1997. https://www.business-standard.com/article/economy-policy/first-batch-of-chakma-refugees-return-home-197032901118_1.html

[318] For a full account of the transmigration programme and its effects on land alienation and the demographics of the Hill Tracts see Adnan (n 41 and n 312).

[319] For example, in the fieldwork site of Heretaba, the entire village was moved to an army cluster village at some point during the late seventies until 1986, during which time the customary system could not operate. Any village system was seen as potentially seditious. Before that, the older residents recalled Santi Bahini holding Panchayats in concert with the customary system.

[320] S Mahmud Ali, (n 43) Adnan (n 41). Both authors describe the internal organisational structures of the Santi Bahini and their system of village governance.

[321] Rupayan Dewan, CHT Citizens Committee, interviewed 17 March 2016. Rupayan Dewan had been the Santi Bahini commander responsible for the implementation of the system,

resolution was designed and implemented with the express intention of supplanting the supposedly 'feudal' structures of the circle system; Santi Bahini wanted to both unite and organise the Pahari, and to this end wanted '*an enlightened and intellectual system of justice'.*

The mobilisation of the customary system in the terms of the Peace Accord therefore represented an ideological volte face by a weakened Santi Bahini, precipitated by the disintegration of both internal discipline and external support in the later phases of the insurgency. They had been profoundly divided even before the architect of Jumma nationalism, M N Larma, was murdered in 1982 by Indian backed secessionists from within his own party.[322] The internecine struggle that followed led to fragmentation within the movement, a much wider disaffection with the Santi Bahini, and the rise of alternative sources of political power in the civilian arena.[323] Thus, when the GOB shifted toward a strategy of negotiation, the JSS represented only one of the Chakma-led political groupings in the Hill Tracts. The powerful symbolism of Jumma nationalism ultimately failed to engender a common political consciousness even within the Chakma community, and resurgent customary law filled the space left by its splintering with a more neutral indicator of Pahari solidarity.

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[322] The long faction, headed by M N Larma favoured a long drawn out guerrilla struggle, and sought autonomy for the CHT. The short faction, headed by Priti Chakma favoured a quick and violent conflict, and were apparently close enough to the Indian government to believe they would have their support. Ahmed, (n 38)

[323] The government of General Ershad offered an amnesty to all returning fighters after the split in 1982, and started to work towards political solutions. This included establishing the first Hill District Councils in 1989. The first elected leader of Rangamati District Council, Gautam Dewan, remains a highly respected leader of civil society through the non-aligned CHT Citizens Committee. Interview with Gautam Dewan and Mongshau Chowdhury, CHT Citizens Committee, 2016

Further, JSS hegemony had never been complete in relation to the other communities of the Hill Tracts, one source of internal discord and external disaffection with Santi Bahini being its failure to expand the leadership much beyond the Chakma nation.[324] Less dominant communities expressed their marginalised position in rejecting the JSS, if not the concept of the Jumma. From them emerged alternative sources of political power, the Mro, for example, established their own Bahini in opposition both to the state and the Chakma,[325] whilst the Khumi gave vent to desire for a better life by absorbing urban Bengali influences into their rural community.[326] Set against the cultural and political fragmentation of the Pahari group, the homogenised customary system provided a relatively neutral and depoliticised character to community solidarity as defined through shared rights to the commons, whilst simultaneously encapsulating precolonial traces of the unique cultures and personal laws of the separate Pahari nations.[327] It could be argued that customary law provided an alternative source of Pahari solidary; when the imaginary of the 'Jumma' lost its lustre, custom became a neutral antidote to the bitter political contestations over the guardianship of Pahari nationalism.

General Ershads government commenced peace negotiations directly with Santi Bahini in 1985. During fieldwork, conflicting accounts were offered of the

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[324] Ahmed, (n 38)

[325] Matthew Wilkinson, *'Negotiating with the Other: Centre-Periphery Perceptions, Peacemaking Policies and Pervasive Conflict in the Chittagong Hill Tracts, Bangladesh'* (2015) 5 International Review of Social Research 179.

[326] Nasir Uddin, *'Paradigm of "Better Life": "Development" among the Khumi in the Chittagong Hill Tracts'* (2014) 15 Asian Ethnicity 62.

[327] One area of fieldwork was Taunchyangya rather than Chakma. Respondents confirmed that their village governance was Taunchyangya run, and Taunchyangya laws were used to resolve personal disputes. In the case of an appeal within the customary system, the Raja would convene a panel that would include Taunchyangya community members. In their view, the customary system was able to encompass their difference.

emergence of custom in those negotiations, Binoy Chakma, for example, claiming responsibility as a government negotiator for persuading Ershad to consider including customary law in the final settlement with Santi Bahini. Former JSS participants were more prosaic, stating that their re-appropriation of customary law was a strategic act that deployed de-historicised custom as source of '*extra power*'.[328] When Bangladesh returned to democratic government in 1992, intermediaries between the state and the insurgents were drawn from the new generation of civil society leaders, and were joined by the Chakma chief.[329] As the insurgency crumbled, and the possibilities of victory receded, the inclusion of the customary system in the terms of the CHTPA reflected a gradual shift toward a constitutional and legal consolidation of Pahari power within the by-then inevitable confines of the Bangladeshi state. For the Santi Bahini/JSS, the customary system legitimised claims of territorial autonomy, and offered a means of hegemonising the diverse and increasingly fractious Hill Tracts communities. This thesis asserts that the mobilisation of custom on a strategic level through the CHTPA was successful in reinforcing the boundaries of community around the Pahari and their territorial circles against the state, but failed to ameliorate the erosion of confidence in the JSS and their nationalist ideology amongst the wider population.

4.3. After Peace

When the CHTPA was signed in 1997 its limitations were, even then, to the fore. Majoritarian objections to its institutional features were captured by Rashiduzziman as a public foreboding at the;

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[328] Personal accounts of the negotiations were provided by Binoy Chakma, a member of Ershad's government, but also a sitting headman in the Rangamati Circle, and Rupayan Dewan who was one of the Santi Bahini Commanders leading negotiations for the insurgents.

[329] Roy, (n 62) Pg. 70

'*assumed constitutional impropriety of the pact, the infringement of Bangladeshi sovereignty, and discrimination against Bengali settlers in the CHT.*'[330]

His analysis also highlighted the potentially instability of the new local government bodies in that larger communities generally and the Chakma community particularly were favoured in the allocation of seats, leading some opponents to refer to the arrangements as creating '*a new Chakma Raj*'.[331]The most salient criticisms emanated from within the Pahari community, however. Primary amongst them was the absence of concrete provisions on the most visible and intractable consequence of the conflict, that of illegal land alienation and settlement.[332] Further, the CHTPA lacked a clear timetable for implementation so that successive governments were under no clear commitment to action any particular provision of the Accord.[333] Finally, being a political accommodation rather than a document of legal standing, the document's lack of constitutional status meant even its limited provisions were subordinated to the tumult of Bangladeshi national politics. Roy opined this failure demonstrated the bad faith

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[330] M Rashiduzziman, '*Bangladesh's Chittagong Hill Tracts Peace Accord: Institutional Features and Strategic Concerns*'(1998) 38 South Asian Survey 653.Pg. 654

[331] Ibid.Pg. 656. He finds the justification for this departure from unitary constitutionalism in geo-political pressure from India to end both the conflict and the refugee crisis in Tripura, not in any emic desire to recognise minority communities.

[332] Identified by Roy (n 62) as the major hurdle. During fieldwork, PCJSS respondents insisted that the GOB had promised further measures to address the settlement issue, it is perhaps a reflection of their relatively weak hand that these were not formally include in the CHTPA. It has been suggested that by ignoring the structural roots of the violence the CHTPA consecrated its continuation. Bhumitra Chakma, 'Bound to Be Failed? The 1997 Chittagong Hill Tracts Peace Accord', *The Politics of Peace* (Institute of Culture and Development Research 2012). Pg. 132

[333] Pranab Kumar Panday and Ishtiaq Jamil, '*Conflict in the Chittagong Hill Tracts of Bangladesh: An Unimplemented Accord and Continued Violence*'(2009) 49 Asian Survey 1052.

of the GOB at the time of the settlement, and suggested military hands were instrumental in seeking rebel disarmament without a concomitant commitment from the state.[334]

Opaque, imperfect and contested, the limitations of the CHTPA radically affected the internal dynamics of the Pahari community, not only failing to generate hegemony for the PCJSS but causing a major split in Pahari representation. The main Chakma led opposition, the United Peoples Democratic Front|(UPDF), opposed the CHTPA and resisted disarmament at the time of signing. UPDF leader Rabi Shankar Kumar claimed during fieldwork that UPDF fears of government dissembling had been more than realised;

'If you read the accord, you realise that the PCJSS had to fulfil all their obligations before the government completed any of its obligations. They (the PCJSS) came above ground for the Accord and now they have no more leverage, so why should the government implement it?'[335]

As implementation stalled, internecine violence erupted between the UPDF and the PCJSS who then re-armed to mark their power and territory against each other rather than the state. Rather than heralding peace, the CHTPA thus appeared to precipitate a more complex phase of conflict, characterised by factionalism, and conducted amid constant rumours of insidious Army culpability.[336] In a mirror to the constant splitting of community and political

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[334] Roy, (n 62) Pg. 70

[335] A separate political party that grew from disaffected members of the Hill Women's Federation, the Hill Peoples Committee and the Hill Students Council, all of which were civil society organisations whilst the JSS/Santi Bahini were still proscribed, and were excluded from negotiations. It has always been and remains resolutely anti-Accord. Interview with Rabi Shankar Kumar 3rd April 2016 and 26 May 2016.

[336] Bhumitra *Chakma, Bound to Be Failed? The 1997 Chittagong Hill Tracts Peace Accor*d', (n 330). Pg. 139. In terms of Army culpability, the

allegiance so characteristic of the Indian north-east, both the PCJSS and the UPDF subsequently divided again into rival factions, with the death toll from internecine struggles between Chakma-led cadres rising exponentially in 2018.[337] Divisions between the Chakma and various Pahari nations similarly destabilised an Accord containing a notable lack of safeguards for the smaller communities given their extreme vulnerability.[338] Turning attention of its ontological failings. Wilkinson observed that:

'The tendency to create 'Others' at the state's periphery involves anachronistic and Orientalist simplifications of often complex and heterogeneous groups and situations.[339]

The GOB oversimplified the conflict as unifocal, or as '*a case of the modern Islamic Bangladeshi state contesting and taming a primitive and savage periphery*[340]', and in so doing left the UPDF, representatives of smaller communities, and civil society activists without a political outlet. In this difficult context, the political strategy of re-traditionalisation was deployed by a certain sector of the Pahari elite to remedy the lack of constitutional space for recognition. The '*act of return*' in the CHT thus marked the transformation of military conflict

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recent split in the UPDF with its violent consequences has been publicly attributed to Army intervention in indigenous internal party politics.

[337] Roy, (n 62). Baruah defines this a '*durable disorder*'. Baruah (n 216).More than 10 UPDF activists have been killed in the Khagrachari area in 2018 by this splinter group, suspected of being funded by military intelligence. Seven people were killed on 18th August 2018, with the latest killing of 2 activists in the surveyed area of Sebakhon. https://www.thedailystar.net/country/news/2-updf-members-shot-dead-rangamati-1636942

[338] Wilkinson M, 'Negotiating with the Other: Centre-Periphery Perceptions, Peacemaking Policies and Pervasive Conflict in the Chittagong Hill Tracts, Bangladesh' (2015) 5 International Review of Social Research 179

[339] Ibid. Pg.181

[340] Ibid. Pg. 188

to political and legal discourse, in that only a customary system exhibiting the nomenclature, structures, and legal institutions of its colonial heritage could provide a legal foundation for future claims to political autonomy and land rights, At the same time, the CHTPA structured a new phase of internecine conflict that ensured day-to-day customary practice drew from the localised and immediate context of a contested and fragmented post conflict arena.

4.4. Re-formed Boundaries

The CHTPA was given statutory force by a series of statutory instruments after 1997. The three Hill District Council Acts of 1998 constituted an elected Council within each circle area to be composed of tribal and non-tribal residents in the proportions of two to one.[341] The Regional Council Act of 1998, created an overarching Regional Authority for the CHT with members drawn from each of the Hill District Councils to oversee all delegated HDC functions. Their dual enactment expressed the state's intention to transfer responsibility for policing, tribal justice and land management, the maintenance of law and order, education, agriculture and forests, social welfare and various economic development functions such as fisheries, and cooperatives to autonomous democratic institutions.[342] Below, it is argued that these enactments represented a re-assertion of the Pahari community as a political form drawing legitimacy from customary constructs, but also envisaged a transformation occurring in the nature of that community.

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[341] Rangamati Hill District Council Act (1998) http://rhdcbd.org/old/_act/RHDC%20Act%201989.pdf. Non-tribal residents are more explicitly defined in section 4(aa) as those with a permanent address within the CHT territories, and as legally holding rights to land. The exact proportions of representatives from each community is also specified, with the Chakma dominating in the Rangamati Circle. (Section 4(b)).

[342] RHDC Act (1998) Sections 1 to 21.

A critical distinction between the colonial Circles and the re-formed customary system was the transfer of appellate and controlling power from state bureaucrats to elected bodies with relatively autonomous control over local government. The headmen and karbari were explicitly recognised in section 66 of the HDC Acts as holding delegated power to settle disputes that were '*social, cultural or tribal*' in accordance with the customs of the tribe. Similarly, chiefs were explicitly recognised as the appellate court within the customary justice system in Section 66(2), and vested with the right to sit on the local Councils should they so wish in Section 26. The insertion of democratic structures was intended to alter the power relations between chiefs, political leaders and lay people. The second distinction was the creation of the Regional Council(RC), which established the CHT as a discrete region, and the Pahari as a single homogenised legal community across the three circle areas. This counterbalance to executive power was unique in Bangladesh, exciting the Jamat-Y-Islam(JIB) accusation that the Regional Council Act 1998 undermined the unitary, majoritarian, nature of the Bangladeshi state.[343]

Custom was also explicitly deployed in the Acts to maintain the legal distinction between plain land Bangladesh and the CHT in relation to land administration. Section 64 of the HDC Acts brought responsibility for land transfers under democratic control, stating that:

Notwithstanding anything contained in law for the time being in force –
(a) no land including the khas-land suitable for settlement within the jurisdiction of (Rangamati) Hill District[344] shall be leased out, settled

[343] JIB was the foremost Islamist party in Bangladesh and are now proscribed as a terrorist organisation. JIB made this claim as parties to the constitutional challenge in the Badiuzzaman v Bangladesh case, which they funded. Discussed in Section 4.5 below.

[344] Each Act inserted one circle area, e.g. Khagrachari, Rangamati and Bandarban.

with, purchased, sold out or transferred otherwise without the prior approval of the Council.

Together, the HDC legislation and customary governance created a land system in which communal rights were expressly recognised. It was subsequently underscored by the Land Dispute Settlement Commission Act 2001, which created a mechanism to resolve land disputes caused by the return of the mainly Chakma refugees from Tripura.[345] Section D (4 and 5) of the 1997 Peace Accord recommended a Land Commission composed of a retired justice and the relevant Circle chief, to settle land disputes according '*to the existing rules, customs and usages of the Chittagong Hill Tracts*'. Under the Land Dispute Settlement Commission Act 2001, possession would be returned to the lawful owner in the case of any settlement made against the existing laws of the CHT so that the lawful owner was evicted from this land.[346] The combined operation of the Land Commission Act and the HDC Acts thus enshrined recognition of communal land tenures, transformed state control into local control, and as long as separate provisions on voter registration were abided by, guaranteed a Pahari majority on the Councils. The deployment of custom in post-conflict legislation explicitly endorsed *progressive* notions of community in the hills and reinforced their continuing divergence from the plains insofar as the jurisdiction of communitarian law and the nature of legal pluralism.[347]

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[345] During the conflict, nearly half a million Chakma people were displaced by the conflict to the refugee camps of Tripura. Their return is believed to have been an express condition placed by India on the Bangladeshi government in return for their support in resolving the conflict. In 2002, however, returning refugees found their land occupied by Bengali settlers, most of whom were incentivised with financial and material support and unquestioning Army protection to settle in the CHT as part of the transmigration policy. Singh, (n 21). Adnan (n 41)

[346] (Section D 6(1) Land Commission Act

[347] Displacement and land-grabbing in rural plainland communities is also common, but the barriers to formal justice for the more marginalised

After enactment, the potentially transformative nature of the new autonomous bodies became mired in GOB delay, thus contributing to rather than alleviating tensions in the Hill Tracts. At the time of fieldwork, the new District and Regional Councils remained unelected interim bodies due to a bitter dispute over what determined permanent residence of the CHT.[348] In short, Pahari representatives refused to participate in elections until agreement was reached on the status of recent Bengali settlers, and the Regional Council under PCJSS leadership deferred elections until this point of definition was settled.[349] Meanwhile, settler organisations, supported by right-leaning and Islamic parties insisted on their constitutionally enshrined equal right to vote. The marginalisation of these democratic bodies was keenly felt even by those co-opted into their membership, for example the current members of the Rangamati Hill District Council, all Awami League ımembers appointed by the government in the proportions set out in the legislation.[350]Despite receiving their seats through patronage, they attributed the failure to hold elections to the government;

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groups in society, women, Adivasi, and the poor generally are so great that for large tracts of the nation, the informal Salish, religious and community specific legal orders are the only source of justice available.. When addressing the 25th Conference of Family Law Courts in 2001, Justice Hassan stated that '*The causes of backlog and delay in our country are systemic and profound... As a result, the current backlog and delay problem in our country has reached such a proportion that it effectively deny the rights of citizens to redress their grievance*'. Justice K. Hasan, *'A Report on Mediation in the Family Courts: Bangladesh Experience'* (2001).

[348] Shahid Hossain, UNDP cluster leader, interviewed 8 October 2015. The government continues to argue that functions have been transferred to the HDCS but central government retains control of all financial management and key service such as policing.

[349] Ushaton Talukder, MP for CHT, confirmed this refusal personally at interview.

[350] Rangamati Hill District Council Workshop held on 15 March 2016 with Brisa Keta Chakma, Rangamati HDC leader and four Council

'Only when they (the RC Electoral College) are elected will the Regional Council be effective... at present, we are the men of the government, we are rewarded by the government, we can't speak against the government. If this type of interim council runs for two or three more terms then political unrest will explode in the CHT.'[351]

In conversation, Councillors also alluded to the ways in which regional autonomy had been undermined subtly, by reducing the hierarchical status of the CHT Minister and the leader of the HDCS within the labyrinthine bureaucracies of the Bangladeshi government.[352]

Similarly, the newly convened Land Commission became rapidly embroiled in a political dispute over composition and membership after its first highly partisan and inflexible Chairman made clear his sympathies with the settlers.[353] The Commission was promptly boycotted by the Circle chiefs and was never convened successfully. An Amendment Bill presented in 2013 tackled criticisms of its statutory composition, but initially failed to assuage Pahari concerns over the efficacy of the Commission. In 2013, the PCJSS presented a 13-point amendment proposal to government, focussing on the lack of explicit provision for fringe land

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members, Striti Bikash Tripura, Salin Kumar Chakma, Remi Liara Pankhya, Charimoni Taunchyangya.

[351] Ibid.

[352] Ibid.

[353] Justice Khadimul Islam, the former Chairman of CHT Land Commission, made clear his opposition was to its status *in relation to formal state law.* He still campaigns against the CHTPA and for the rights of settlers, stating in 2015 '*It was unnecessary to bring the Amendment because the laws of the country were enough to solve the disputes. In truth, the Amendment has created serious misunderstanding between the tribal people and the Bengalese"* Quoted in Reza Mahmud, 'Bangalees Fear Evacuations: Tribal Men Rapidly Grabbing Lands: Mutual Understanding between Bangalees and Tribes Disappears' *Parbatta News* (9 January 2017).

disputes[354] and the limitation of consideration to lands 'occupied' rather than 'settled' in the Commissions' jurisdiction.[355] The Amendment Act finally passed into law in 2017, with the three-year enactment delay widely attributed to interventions by the Army who opposed resolution of outstanding land cases on grounds of public disorder.[356]

The labyrinthine process followed to implement the CHTPA illustrates how a lack of constitutional grounding for a recognition of Pahari exceptionalism placed the community of colonial construction in a precarious position. Whilst the promulgation of legislation suggested a new era of community autonomy, in reality settlement and land alienation continued, and demilitarisation barely progressed. The predictions of Peace Accord opponents proved remarkably prescient as its implementation was constantly subverted by instabilities on the national stage. And, throughout the post-conflict period, factionalism and division have characterised the political leadership of the Pahari, investing the customary arena with an inherent but creative instability.

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[354] Fringe lands surround Rangamati Lake and appear when the water levels are low. These lands offer 1 or 2 crops a year and were awarded to many Chakma people after the valley was flooded in 1962.

[355] (*Point 5*) of the 13 Point Amendment. Copy of the proposal provided by Mangal Kumar Chakma, Press Secretary of the PCJSS.

[356] Shahid Hossain of the UNDP confirmed the role of the Army in delaying the Land Commission Amendment.MP Ushatan Talukder stated that '*...some politicians within the Awami League think that if the Land Commission is executed then the Bengali settlers will be victimised...even after agreement no point is taken forward, it is left in the hands of the civilian/military bureaucrats...we have de facto military rule*.' Political opposition to the Land Commission from the political right and Islamist parties highlighted the threat to sovereignty, for example, Retired Major General Syed Muhammad Ibrahim represented the known army position in stating that; "*The Land Commission Amendment Act diminishes the government's authority on the sovereignty of Bangladesh. If the government implements the Act, then the country might lose one tenth of land.*" http://parbattanews.com/en/land-commission-amend-act-challenges-govt-control-on-cht/

4.5. Constitutional Recognition

In the more recent period of turbulence arising from the authoritarian activities of the Awami League (AL) government, constitutionalism has proved central to their legitimising strategy. After winning the first fair election in seven years, the AL used their incumbent status to secure constitutional changes that shifted the Republic closer toward its originary ideals, but with significant concessions toward the rise of popular Islamist sentiment. The 15th amendment of 2011 illustrates this aporia, in that it reinserted secularism into the preamble, but married its apparent nod toward inclusivity with the confirmation of Islam as the official religion of the Bangladeshi state in Article 2, thus anointing the state as secular *and* Islamic.[357] The same complex iteration of political and legal spheres framed the treatment of minorities, as illustrated by the insertion of a more specific protection of minorities for the first time in Article 23A of the 15th Amendment:

'The state shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities'

An apparently strong clause left open the question of how protection should be delivered, and did not extend any specific political concessions to minority groups. Thus, the first positive constitutional recognition of minorities confirmed a weak approach to diversity that acknowledged minority 'culture' but not their political agency. A grudging admission of diversity into the primary legal institution of the state lionised the nebulous concept of culture, while offering no concomitant

[357] Article 2 now reads 'The state religion of the Republic is Islam, but the state shall give equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions.'

remedy to the structural inequalities between majority and minority communities.[358]

The most recent act of return involved the Pahari-led legal mobilisation to achieve constitutional recognition of the exceptional status of the CHT in the Supreme Court of Bangladesh. This was achieved through an articulation of current constitutional provisions and the CHT Regulations 1900 in a series of seminal cases.[359] Wagachara Tea Estates (2014) is selected for analysis due to the more revealing nature of its judgement, and for the explicit articulation of legal mobilisation with political and constitutional discourse in the judgment. In this case, the Supreme Court was asked to consider whether the Deputy Commissioner (DC) or the Land Commissioner had jurisdiction over land disputes, a case again turning on whether the DC's primary jurisdiction as conferred by the CHT Regulations still had legal force. Parties to the case had gained opposing judgements from the DC and the Land Commissioner, the first being empowered to authorised land mutations under the CHT Regulations, the latter drawing his authority from Act of state. The explicitly political frame of reference was underscored by PCJSS support for the primary jurisdiction of the colonial Regulations, and the appointment of Raja Devashish Roy as chief Advocate to defend this position. The opposing party was funded by the now proscribed Islamist Jamat-Y-Islam Bangladesh (JIB), who hoped for a rejection of the CHT's special status as an autonomous region and the re-assertion of an absolutely unitary constitutional frame. The case rested on the articulation of the CHT Regulations 1900 and the default interpretation of Article 149 of the

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[358] Bearing out Hale's argument that recognition of indigenous cultural rights is a neo-liberal strategy to neutralise opposition to development whilst continuing to marginalise economically. Hale (n 128).

[359] The cases are *Wagachara Tea Estate Ltd v Muhammad Taher and Others* (2014) Supreme Court of Bangladesh Civil Appeal No. 147 of 2007. Rangamati Foods Ltd (2014) confirmed the jurisdiction of custom over national VAT regulations. Badiuzzaman v Bangladesh, 7 LG (2010) HCD dealt with the constitutional legality of the RC and HDC Acts.

Constitution that denoted any law valid unless explicitly repealed. The Court recognised the CHT Regulations 1900 as having the full force of law under the Constitution of Bangladesh, and signalled a distinct shift in jurisprudence toward legally validating the Pahari community as a unit of social and administrative organisation, and as a political form existing within the state.

In the course of their judgement, the Supreme Court analysed both the legal foundation of customary exceptionalism *and* the political context of the legal debate, to conclude resolutely that the CHT Regulations remained in force throughout the period of Pakistani rule.[360] They drew attention to the explicit invocation of the CHT Regulations in various legislative instruments by state of Bangladesh since 1997,[361] and argued that the sessions courts established in the CHT in 2008 supported rather than undermined the specific form of CHT legal pluralism because it required judges to try civil cases in accordance with the existing laws, customs and usages of the district. The Judges felt this amounted to the implicit recognition of;

'a wide body of customary laws on land, forests and other natural resources that are crucial safeguards for the indigenous people and other residents of the area.'

In seeking a historicised version of custom, however, the judges moved toward a remarkable parody of colonial mores; their essentialising tendencies most

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[360] Regardless of the re-designation of the Hill Tracts as a tribal rather than excluded area in the 1962 Constitution of Pakistan, and of the subsequent removal of tribal Status by the Constitution (First Amendment) Act, 1963

[361] The Judgement confirms that the actions of previous Pakistani governments in removing the 'excluded' status of the CHT in the 1962 Constitution of Pakistan, and the subsequent removal of tribal Status by the Constitution (First Amendment) Act, 1963 had not repealed the Regulations. Further that the CHT Land Commission Dispute Settlement Act of 2003 confirmed that land disputes were still to be determined by reference to the custom and practice in the Hill Tracts.

apparent in the utilisation of precedents from the Supreme Court of India to define tribal peoples according to the Sixth Schedule of the Indian Constitution, itself a product of the protective ideologies of colonial rule:

'Tribals are historically weaker sections of the society. They need the protection of the laws as they are gullible and fall prey to the tactics of unscrupulous people, and are susceptible to exploitation on account of their innocence, poverty and backwardness extending over centuries.[362]

In this way, the boundaries of community were explicitly drawn around the territorialised administrative circles and their indigenous residents, whilst customary law was conceptualised as an already and always existing reality protected by the 1972 Constitution. A customary system expressly defined by continuity and stasis was uncomfortably juxtaposed with a de-historicised narrative of the turbulent relationship between state and community. Prima facie, Wagachara underscored the exclusion of community from the linear temporality of the West, representing custom in the '*hyperbolic, intensified form*' noted by Comaroff.[363] The shift in judicial tendencies toward recognition betrayed the dynamism of the customary field even as it sanitised it, exposed the complexity of the narratives surrounding customary law, and provided a rationale for its strategic co-option as the legal and constitutional route to indigenous power. As the prime example of legal mobilisation as a strategy of resistance, Wagachara expressed the governmentality of the colonial era retooled as an expression of autonomy, and resurrected customary law as an identity practice that bound the Chakma to their indigenous neighbours in a restated and resurgent community of the oppressed.

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[362] Quoted by the SC from Armendra Pratap Singh v. Taj Bahadur Prajapati, AIR 2004, SC, 3782.

[363] Comaroff and Comaroff , (n 294)

5. Conclusion

This chapter focussed on a historo-legal analysis of the role of law in demarcating the communitarian boundaries of the Pahari, and marking both peoples and territory as exceptional in legal and constitutional terms. It showed that community in Bangladesh has retained elements of its exteriority to Capital, but as a political form can no longer be considered stable given the maelstrom of political, constitutional and legal controversy that surrounds its survival in the contemporary state. It explored the links between community, identity and law through the linked processes of 'territorialisation' in the colonial era, and 're-traditionalisation' in the more recent past. By tracing the birth and rebirth of the communitarian field, it connected the historical narratives of the Chakma/Pahari to the legal form of 'classical pluralism', and aligned the political community of the Pahari with the practice of customary law. It demonstrated that the customary legal system was substantially reproduced in the latter stages of the state/Pahari as source of hegemonic and legitimising power for the Pahari elites. Finally, it suggested that custom was mobilised specifically to stabilise the borders of community and state in a situation of considerable fragmentation within both. In utilising the conceptual frame of 'critical communitarianism', this thesis thus suggests that the strategic mobilisation of customary law established the reconstructed Pahari community as the foci of both culture and resistance.

Comaroff similarly understood the resurgence of custom as a consequence of the reification of difference emerging from the waning of universalism, stating that:

Ours, it seems, is an age that essentialises and valorises identity, above all racialised cultural identity; an age in which the right to difference is both legally (if unevenly) protected and convertible (if unevenly) in im/material property.[364]

[364] Comaroff and Comaroff, *(n 294)*

The narrative of the birth, decline and return of custom in this chapter exposed the intricately constructed connections between the customary legal domain and a 'valorised' Pahari identity. Yet throughout, Pahari identity has been shown to be a fragile and mutable, and culture itself a site of contestation. Internal fragmentation and its effects form the object of the next chapter, which uses the sub-concepts of legal mobilisation and legal culture to illuminate the effect of these irresolvable tensions on the customary/communitarian sphere in the Chakma dominated Rangamati area of the Hill Tracts. Specifically, and within the conceptual frame of '*critical communitarianism*', the next chapter draws on elite perspectives of customary law to understand the relationship between these historical narratives, the practice of communitarian law and the legal culture generated by the chaotic iteration of a fragmented, unstable state and a constantly splintering community.

Chapter Four. The Curators of Culture

1. Legal Culture and Methodology

The previous chapter illuminated the territorial, legal and identitarian boundaries of community in the CHT context, tracing the construction of those boundaries to the composite effects of colonial territorialisation and its consequent balkanisation of the Hill Tracts, and the resurgence of custom as a critical tool in the decades-long struggle against state dominance. This chapter explores the instability these measures created from the interior of community, with the ultimate goal of understanding the effect on the distribution of power within the Chakma community and the potential for 'critical communitarianism' to be produced.

'Critical communitarianism' was invoked in chapter two to position community as the '*cultural foci of mobilization for, or resistance to, state law*', and legal culture was placed as '*practices of those identities that have become embodied in legal consciousness*'.[365] In summary the theoretical discussion proposed that the collective identities of non-ruling communities were expressed in law and through the practices of communal legal culture. An explicitly critical frame placed state/community relations as a formative element of legal culture, and the sub-concepts of legal mobilisation and legal consciousness as disaggregates of legal culture. In the next three chapters, these sub-concepts are employed as analytical tools in a qualitative analysis of legal culture in Bangladesh and Tripura. The intention is to ascertain whether '*critical communitarianism*', that is a resistant form of communitarian law, can be identified in either or both research sites. As the focus turns toward presentation of field data, this section first deals briefly

[365] Barzilai, (n 5) Pg. 1

with the methodological critiques of the legal culture school advanced in chapter two.

The concept of legal culture has been criticised as too slippery and imprecise to have analytical value, a valid enough challenge given the broad categories of social behaviours categorised under the banner of culture. Merry recommended that this criticism could be ameliorated by disaggregating different aspects of legal culture, thus minimising the risks of over-generalisation and honing the utility of the wider concept as a comparative and analytical tool. This thesis addresses this methodological problematic by following Merry's technique, and Barzilai's frame in employing analytical tools from a disaggregation of legal culture into the dimensions of legal mobilisation and legal consciousness.[366] Disaggregation facilitates the identification and comparison between different elements of legal culture, in the expectation that these sub-concepts can be reconstructed to demonstrate the existence, or otherwise, of '*critical communitarianism*'.

The second critique related to the potential risks of essentialism; concepts of legal culture were so broad they masked legal heterogeneity, effectively absorbing the pejorative and essentialising connotations of culture generally.[367] This critique suggested a particular view of culture already discredited by legal pluralists who identified culture as highly mutable, fluid, and intimately connected to relations of power.[368] Merry argued that postcolonial cultures were already marked by hybridisation and creolisation rather than uniformity, suggesting a '*dynamic, agentic and historicised understanding of culture*' entirely appropriate to the current context of a legal culture effectively remade by the contested narratives

[366] These concepts were not mutually exclusive, but allowed different perspectives to be garnered as the conduct of law within the overarching concept of legal culture.

[367] Nelken, (n 190), Pg. 1-57

[368] Merry, (n 195). Pg. 55

surrounding it.[369] During fieldwork this critique was directly addressed by engaging explicitly with questions of leadership and power in discussions, and in so doing offering a potential to identify and theorise power relations within and around the customary systems under scrutiny.

This chapter uses qualitative data collected during fieldwork to ascertain what Nelken referred to as the '*more nebulous aspects of culture*', that is the ideas, values, aspirations and mentalities that motivate its influencers and practitioners.[370] It starts with a brief account of the state perspective on custom in the CHT, which reveals the aporia between the states formal support for the customary system, and the contradictory effects of the state's desire to extend formal justice. The second section uses field data to illustrate the contribution of actors on the borders of the communitarian arena to a legal culture distinguished by the febrile and creative nature of its practices.[371] The final section turns more explicitly to the dimensions of legal mobilisation and consciousness to commence an exploration of subject positions adopted by elite customary practitioners, political and civil society activists and interested community members. The chapter concludes by ascertaining whether the community envisioned from this analysis of attitudes to and mobilisation of customary law supports the notion that the communitarian domain is the cultural foci of resistance to state law, and thus whether the first elements of a state of '*critical communitarianism*' exists in the Chittagong Hill Tracts.

2. The State and Customary Law

At this point it is perhaps useful to recall Shahar's assertion that the state itself is non-monolithic, multi-faceted and internally plural, and to understand the state in

[369] Merry, (n 193) Pg. 55

[370] Nelken (n 2).

[371] This includes a state representative, development actors, the state legal profession, and the wider social movement.

Bangladesh as both fragmented and fragile.[372] Indeed, the problem of accounting for the presence and counter-intuitive positioning of the military against democratic representatives of the state emerged as one of the greatest challenges to the project. The formal state perspective offered by the CHT Secretary, Naba Kishore Bikram (NBK) Tripura should be read with this limitation in mind.[373] At the time of fieldwork, NBK Tripura was the most senior official in the CHT Ministry created to oversee implementation of the Peace Accord with responsibility for coordinating the policy responses of all other government Departments to the commitments made in 1997.

NBK Tripura confirmed that the government's current position on the issue of settlement was to preserve this status quo, he could not envisage the return to a majority Pahari demography. Consequently, the government was committed to a form of legal pluralism that recognised the rights of both Pahari *and* settler communities. In his view, state support for the communitarian system reflected the ruling party's pragmatic desire to maintain access to justice for the indigenous people, but was accompanied by a concomitant desire to serve the settler Bengali community by strengthening the institutions of the formal system. Government support for traditional Pahari institutions were thus structured so as to '*consolidate their role within their own communities*', as a source of justice for the hill peoples '*while alternative routes to justice were constructed*'. Material state support for the communitarian system reflected a pragmatic desire to maintain

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[372] Shahar, (n 173) Bangladesh is ranked 29th from bottom in the 2018 index of fragile states, its position dropping due to recent unrest and the attacks on democratic rule by the incumbent AL government. https://fundforpeace.org/fsi/wpcontent/uploads/2018/04/951181805-Fragile-states-Index-Annual-Report-2018.pdf

[373] When fieldwork was conducted Naba Bikram Kishore Tripura held the posts of Secretary to the CHT Ministry, and Chair of the Chittagong Hill Tracts Development Forum (CHTDF) simultaneously, holding the main administrative responsibility for implementing the CHTPA and coordinating state approaches to the CHT across the 58 ministries of government.

access to justice for the indigenous people, all the while serving the settler-Bengali community by strengthening the institutions of the formal system.

The government was committed to reviewing headmen's remuneration, then held at pre-1971 levels, and to training headmen on land and property issues in order to improve the quality of customary justice.[374] However, these reforms were designed solely to consolidate their role within their own communities given that no action was being considered to reduce the settler population. Having confirmed that the demographic status quo would be maintained, Tripura asserted that delays in transferring the customary system to the democratic control of the autonomous councils were largely attributable to the reluctance of the chiefs to accept democratic authority over social disputes. This chimed with his expressed view that the authority of the customary system had '*eroded over time*'.

'Customary law used to be very strong and very powerful, but at that time there were no other institutions, and no formal codes. The practice has weakened as these codes have become more established. The Peace Accord contains provisions to pass authority for social disputes to the HDCS, and this was reflected in the HDC Act. The Circle chiefs are opposed to this, as it is felt to undermine traditional institutions.'[375]

State policies toward extending formal justice mechanisms would increase the routes to justice available to the Pahari and by implication would weaken the identitarian aspects of communitarian law and strengthen the role of the state in community governance. It seemed the policy toward legal pluralism as expressed by NBK Tripura perceived customary recognition as a pragmatic and temporary accommodation only whilst the state strengthened its power, and betrayed an ambiguous commitment to autonomous rule. His account of the state approach to

[374] A function previously funded by the UNDP-CHT Development Programme.

[375] Interview with Naba Bikram Kishore Tripura, 18 October 2015

customary law confirmed that though the Courts had apparently consecrated the Pahari community as a still-stable political form, the boundaries that the community elites sought to re-erect between state and Pahari minority remained '*blurred and open to social construction and negotiation*', adding another layer of considerable complexity to the narrative surrounding communitarian legal culture.[376]

3. Legal Culture from the Borders

In chapter two, Fitzpatrick's conceptualisation of legal pluralism raised the possibility of a separate legal sphere being structured with the state-in-dominance but retaining its apartness within that structure. The concept of 'critical communitarianism' was then employed to position non-state law as the focus of identitarian, and potentially subversive legal practices within this state-in-dominance structure. A different conceptualisation of legal pluralism emerged in which even a constitutionally legitimised and thus formally subordinate customary legal system could potentially provide the foci of mobilisation against the state. The work of post-structuralists like Santos suggested that even the most discretely bounded non-state system contained a potential for concepts and ideas to be admitted, for inter-legality.

The previous chapter's description of the highly political resurrection of customary law suggested a communitarian environment characterised by contestation and rapid change, and the concept of inter-legality appears particularly well suited to assist in understanding the porous nature of community borders in the CHT. The next section explores these contestations through analysis of the attitudes and aspirations of key influencers. It groups the interviews held with social movement representatives directly engaged in the resurrection of custom but from a position of exteriority. The necessary qualification to that statement is that exteriority is as

[376] Shahar, (n 173) Pg. 433

mutable as community boundaries, participants played many roles simultaneously, operating both within and without customary legal system and were fluid in the positions they represented. Nonetheless, the term 'exterior', with this qualification, best illuminated the exceptionally rich network of actors and organisations that surround the Chakma with particular and often conflicting perspectives on the meaning and utility of customary law.[377]

3.1. Donors and Development

The first exposition of attitudes and influences toward the customary system relates to those organisations and actors who have participated directly in initiatives related to legal pluralism and the practice of dispute resolution. The influx of international development organisations and actors after 1997 was part of an explicitly post-conflict programme of social development that referenced and supported each provision of the CHTPA.[378] The largest of these initiatives was the United Nations Development Programme (UNDP) CHT Project initiated in 2001, which saw a €20 million investment in post-conflict capacity-building activities directed at improving the lives of the most marginalised CHT communities.[379] From 2008 to 2014, resources were provided to traditional

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[377] In respect of state systems, distinctions made by Friedman as to the internal and external dimensions of legal systems were critiqued by Cotterell as unworkable due to the embeddedness of law within complex and broadly spun webs of social meaning. The problems are present in this research also and the use of *exterior* in this thesis refers explicitly to parties who wish to impose change on the customary system from outside the boundaries of community, whether they are members of that community or not. Friedman (n 179). Pg. 33

[378] International development in the CHT practically ceased during the years of conflict after the kidnap of two Shell Executives in 1984. Anti-Slavery Society Report Number 2, *The Chittagong Hill Tracts, Militarization, Oppression and Hill Tribes* (n 19).

[379] Details of the project are available on the UNDP website. http://www.bd.undp.org/content/bangladesh/en/home/operations/project

leaders for training headmen and karbari, logistics and small-scale projects. Investment in logistical and revenue support for customary personnel was at such low levels, however, that most initiatives were confined to the chief's offices and not dispersed to lower levels of the circle hierarchy.[380] Research participants who worked with the chiefs on the programme offered a jaded perception of the Circle system as an organ of empowerment. Take for example, the current Project Director, Shahid Hossein.

'The three chiefs do not co-ordinate and so traditional government is not emerging as a powerful institution. It is hard to balance without strong leadership within these institutions. There needs to be a wider dialogue, that covers both the higher-level parties and the grass roots'.

Perhaps due to this frustration and despite their commitment to augmenting the customary system, UNDP funds also supported initiatives that produced alternative governance mechanisms and potentially increased the level of local pluralism. Village committees were established to distribute small amounts of seed capital, usually with women officiating as part of the gender workstream. This part of the UNDP programme also sought to train headmen on women's rights with a view to changing the patriarchal elements of customary law, but with the subtle difference of dispute resolution being targeted as one of many village governance mechanisms.

Development interventions outside of the UNDP umbrella also suggest a willingness to circumvent the customary system in the pursuit of the perceived

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s/crisis_prevention_and_recovery/chittagong-hill-tracts-development-facility/chtdf-home.html

[380] Funding through the CHTDF was channelled through the chief's offices, and included an allowance of around 30% to be spent on 'logistics' or capital investment. Given the low level of funding this tended to be invested in office equipment and enhancements for the chiefs only. The Author designed the capacity building programme for the Mong Circle in 2011.

advantages of human rights for villagers, indeed, a proliferation of rights-based organisations have intervened with the explicit agenda of changing the historically connected, and communitarian aspects of customary law by harnessing it to various development initiatives. As an example, the Centre for Integration Programme and Development (CIPD), a local NGO, developed a model-village approach whereby customary officials sat with the villagers as equals to plan their future development, with the aim of fostering an explicitly indigenous approach to development that encapsulated territorial identity, self-governance, cultural regeneration and ownership of land and natural resources. The model, as explained by the Programme Director, drew from the category-driven frames of 'indigenous' values and human rights:

'We have a development goal, that every village in the CHT will prosper, they think of society, where all are equal, there is gender equality, they have the humanitarian moral value'. (Lisa Chakma)

Nonetheless, the customary system remained the favoured option of villagers in terms of dispute resolution because of its familiarity and a value set not easily translated into the language of development.

'You can't really describe this thing to the modern world, through the actions of the person, you need to understand the cooperation, the sincerity of the people, you have to understand the unity and togetherness, they have a communal understanding'. (Lisa Chakma)

Like the UNDP, the CIPD openly supported the customary law even as their activities underscored and accentuated its weaknesses.

A similar aporia occurred in relation to the explicitly legal interventions undertaken by the Green Hill organisation, a Chakma-led NGO working on programmes specifically seeking the codification of customary law, and the introduction of written records and standard procedures. Director Rupan Chakma noted;

'Human life and society are not static...society is changing and customary law also needs to improve, to make changes in line with globalisation and the local socio-economic environment'.

Rupan saw certain aspects of the customary system as targets for legitimate intervention, examples were hereditary appointments, the lack of resource and environmental knowledge of customary officials, and the gender-bias inherent in the rule base of most if not all indigenous communities.[381] He thought the rule-set of the various Pahari communities should take a written form so that legal practices could be monitored and its ethical base sustained in the face of development.[382] In both NGOs, a well-intentioned developmental approach to already re-substantiated customary institutions effected a weakening of their ontological difference from state law. By providing alternatives or limiting its jurisdiction, they invited a mercenary approach to dispute resolution that promoted forum shopping, increased the level of pluralism within the communitarian arena and weakened the identitarian aspect of the customary system. Development interventions thus not only inserted a rights basis into the customary system, but also fragmented legal choices by the introduction of alternative dispute resolution mechanisms.

These externally powerful actors undoubtedly influenced behaviours within the customary system, but on a relatively small scale. The CIPD, for example, established a handful of model villages out of the 1300 villages across the Rangamati Circle district. The UNDP project was of greater duration and more generously funded, but still targeted only the most marginalised areas, and was thus unlikely to engender comprehensive and consistent transformations. These

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[381] Of the eleven hill communities, only the Mro nation is matrilineal.

[382] A consistent theme would emerge around corruption, that is the capacity of the headmen to administer the customary system ethically and to avoid graft. Rupan noted that he had experienced headman corruption and felt that codification would reduce poor practice and extortion.

limitations were acknowledged by research participants, who were pragmatic about customary institutions remaining the only source of justice for many Pahari in rural areas.[383] At the same time, they recognised the system as rooted in values other than those introduced by development, expressing their feeling that customary law reflected Pahari culture, albeit that culture was ambiguously expressed.

3.2. Advocates in Formal Courts

Advocates of any sort have been statutorily debarred from representing parties in dispute resolution in the Circle system since the enactment of the CHT Regulations 1900. However, a strong cohort of Pahari legal advocates has developed mainly to represent indigenous people in the Sessions courts both in the circle districts and beyond.[384] In Rangamati, advocates operated as lawyers within the state Court but were also on the borders of the customary system, being able to refer cases either to the customary system or advance them within the state system.[385] Their views offered a window on the extent to which the

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[383] The largest development driven study of legal access in the CHT was conducted by an NGO, and confirmed the high level of usage in village areas. Debashish Kundu and others, '*State of Justice in the Chittagong Hill Tracts: Exploring Formal and Informal Justice Institutions of the Indigenous Communities.*' (Research and Evaluation Division, BRAC 2011) 44.

[384] Sessions Courts were set up in the three circle districts in 2007 after a campaign by the Bangladesh Legal Aid Services Trust. Before that, applications to formal courts were made to the Chittagong District Sessions Court. Indigenous advocates worked both locally and in other District and Dhaka court. The Rangamati Bar has been operating since the 1970s.

[385] Many advocates were involved in community activities in others ways, one was actually a headman in the customary system and was working with the PCJSS to take a formal land claim through the state Courts.

Pahari were availing themselves of formal justice routes and the perceived benefits and barriers to doing so.[386]

The advocates suggested the number of Pahari people seeking formal resolution of legal claims was rising, but still formed a small proportion of the overall number of formal lawsuits in the relatively recently convened Sessions Courts. Further, despite the greater availability of legal remedy in state courts, only one of the fifteen advocates questioned felt that the diminution of the customary system was desirable. The majority felt elements of the customary system needed to be changed, but its legal institutions still held a central symbolic and emotional value for the Pahari communities. Protim Roy felt that;

'The circle system is a symbol of a civilised nation...our King is not a monarch, he is only the social head (or) a symbol of the community'.

Another legal elder, Gynandra Chakma, argued that customary legal practice reinforced the identity of small communities of indigenous people in particular, maintaining the integrity of those communities and keeping the peace. Some of the elder advocates were, however, able to confirm that the customary system had undergone a renaissance since the Peace Accord having fallen into abeyance even before the conflict, a matter expressed by Protim Roy as a collapse of the customary system during the time of conflict, with it returning 'day-by-day' after the peace accord. Sushmita Chakma attributed its more recent revival first to attempts by the Chakma Raja to make it relevant and then to the ongoing involvement of NGOs in its reform.

The advocates were first hand witnesses to the practical utility of customary institutions. This was expressed in terms of the accessibility of customary law, the

[386] In the absence of formal statistics on usage. I was advised by advocates that though they thought some statistics were collected by the Court they were not made public, and they did not think that ethnic backgrounds were recorded.

speed of dispute resolution and the level of comfort felt by Pahari complainants in the formal courts. For villagers the cost and time spent travelling to a formal court was considerable, and for more vulnerable complainants such as women, the act of travelling itself was considered to invoke risks. The lack of formality in customary law, and the minimal cost of customary justice and the familiarity between complainants and their local representatives all made the customary system a more attractive option in rural disputes, to the point that most respondents would recommend the customary over the formal system if there was equal jurisdiction over a case. The Pahari had a residual fear of law enforcement and formal courts were perceived as hostile environments with cases conducted in Bengali rather than local languages.

That said, system limitations relating to gender relations and formality were legitimately the subject of ongoing reform. Further, the consensual nature of the customary system made it ineffective in the many land disputes that had arisen between indigenous residents and settler residents. Though the customary system was formally empowered to adjudicate all land issues, and the headmen were meant to approve all land transfers, it could not extend to the settlers because of the racially charged context of land settlement. In other words, the fact that customary law aligned so closely with community identity placed the settler outside its jurisdiction. As explanation, Projon Chakma told of the many indigenous people who had tried to register land during the settlement crisis of the 1970s and 1980s, but without knowledge of the system had often done so using easily disputable physical markers such as trees and streams, whilst government forces had registered land using the formalities and language of state law. This had led to a common situation of overlapping registrations and settlements which were highly charged politically and could not be resolved in a customary court where only a mediated solution was viable. Even so, Pahari villagers were so reluctant to attend court that Projon produced an example of a villager who gifted five acres of land to an illegal Bengali settler just to avoid a court battle.

The second limitation related to the remedies available within a customary court and in particular, the lack of any available mechanism to enforce judgements. The headmen could do nothing to enforce their judgement whilst a government officer could implement. Sushmita Chakma felt that customary leaders had no jail so people could easily avoid the consequences of customary decisions, and now a guilty party could move abroad or to a city to avoid customary judgements. As a result, many headmen invited political parties into customary hearings to enforce their decisions. The solution for this fundamental failure in the customary system was perceived to be codification of customary laws.[387] Hla Dhwa Prue Marma, the current Chair of the Rangamati Bar, highlighted the issues arising from the inconsistency in the way laws were applied by the chiefs, broadly]the Chakma chief was progressive but the other chiefs were not.[388] All of the Advocates felt that codification needed to be authorised through democratic rather than customary offices to give statutory force and consistency to customary laws.

The third aspect of the customary system that troubled formal advocates was the position of women within the customary system. All but one of the eleven hill communities were to some extent patriarchal and patrilineal in nature, and only Marma community laws allowed women to inherit property formally. In addition to gender discriminatory personal laws, the practices and procedures within the customary system were prejudicial towards women. Tuku Talukder, a Chakma woman advocate felt that the customary system was incompatible with human rights and needed to be changed to bring its adjudications up to a modern standard. She pointed to the hereditary nature of appointments as a problem to be

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[387] Protim Roy had produced informally a codified version of the laws of all eleven communities with support from local NGOs. These had been circulated widely but the codes had not been adopted by the chiefs. Protim Roy is both an advocate and cousin to the Chakma chief but holds radically different views on codification.

[388] The example given was the difference in inheritance laws applied to the Marma communities in the Bohmong and Mong Circles.

solved, but also noted the efforts of the current Chakma chief to address the procedural unfairness that arose within the customary system, and to appoint a woman karbari in every village. Women were becoming more educated and demanded change, and she felt that customary officials were now more responsive to their needs and demands. This meant a rights-based customary system was not a tautology, but reform needed to be centrally driven and consistently rolled out. Similarly, Sushmita Chakma was optimistic about the initiatives rolled out by the Chakma chief in terms of gender, and felt that women were far more likely to get a fair settlement in the customary system now. Both women were members of the Women's Resource Network, which had been working for a greater female representation on all local bodies, and had been closely involved in designing the gender-based reforms of the Chakma chief.

The advocates appeared to support the incorporation of customary law into local statutory bodies, to manage better the more complex legal problems that arose in the CHT now its borders were effectively open for development. Paradoxically, the alignment of custom with democracy was perceived as a way of sustaining custom against other sources of justice as pluralism strengthened with the advent of new courts. Further, the system was perceived as being infinitely adaptable in ways that the state system was not, and better suited to advancing human rights as long as the people within it understood custom as mutable and responsive. Legal mobilisation of customary law was perceived clearly as an identity practice, whilst legal culture was seen as closely connected to the creativity and innovation of its practitioners, and thus dynamic and adaptable.

3.3. Social Movements, Indigeneity and Human Rights

In her study of the Pahari community as a social movement, Gerharz illuminated the alignment of indigeneity with a much broader liberal coalition of political and civil society influencers on the national stage, all driven by a wish to engender fundamental change to the centralised and majoritarian formation of the Bangladeshi state. She wrote that;

'By arguing that inequality based on culture and ethnic-religious belonging characterises nationalism in Bangladesh, the demands articulated by the activists highlight models of a more democratic, diverse and plural society.'[389]

Chapter three demonstrated that Jumma nationalism formed the ideological basis for the Pahari armed struggle before the indigenous movement was active in Bangladesh, and only after military action faltered were concepts of indigeneity strategically assimilated into the ideology of both political and customary Pahari activists. During the conflict, it was also the case that human rights abuses inflicted on the Pahari were brought to the attention of global human rights activists and used to exert pressure on the Bangladeshi state to desist.[390] In the post conflict arena, as Gerharz recounts, indigeneity provided a shorthand for campaigns for limited self-determination and land rights that transcended the CHT region and the particular struggle of the Pahari. Through the strategic alignment of wider liberal causes with the Pahari, the discursive strands of human rights and indigeneity were 'vernacularised' for digestion in a local context.[391] The explicit question posed in this discussion of legal culture is how or whether global concepts of human rights and indigeneity find explicit expression as adaptations to customary law.

To describe or analyse the hugely complex social movement that has grown around indigenous communities in Bangladesh is beyond the scope of this thesis,

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[389] Eva Gerharz, '*Indigenous Activism in Bangladesh: Translocal Spaces and Shifting Constellations of Belonging*' (2014) 15 Asian Ethnicity 552.

[390] Notably, the work by Amnesty International in publicising human rights abuses by the military were instrumental in causing Ershad's government to negotiate with Santi Bahini. See note 45.

[391] Mark Goodale and Sally Engle Merry (eds), '*The Practice of Human Rights: Tracking Law between the Global and the Local*' (Cambridge University Press 2007). Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 American Anthropologist 38.

but the following examples are offered as illustrations of its reach at national and global levels, and thus its potential impact on legal culture. The Indigenous Peoples Parliamentary Caucus was composed of sympathetic members of parliament, and since 2011 has lobbied specifically for constitutional change and legal recognition of indigenous people through adoption of ILO 169 and the UNDRIP (2012).[392] The International Day of Indigenous People has been celebrated annually since 2008, and unites plains-land indigenous communities with the Pahari to raise the profile of land issues and recognition within the state and internationally.[393] Close links between these institutions and Pahari regional organisations are manifold; research bodies such as the PCJSS-managed Maleya Foundation have been formed explicitly to connect with international indigenous movements. Raja Devasish Roy is a member of the United Nations International Working Group on Indigenous People. The environmental vulnerability of Bangladesh has become closely associated with indigeneity through the work of high-profile research groups such as the Society for Environment and Human Development.[394] The Association of Land and Development is a federating body for 278 NGOs working in the field of land rights, and has paid special attention to the ongoing alienation of land from the Pahari people, its chief executive Samsul Huda noting the CHT situation as complicated by the concentration of strategic

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[392] Kamal (n 59).

[393] Eva Gerharz, '*Indigenous Activism in Bangladesh: Translocal Spaces and Shifting Constellations of Belonging*' (2014) 15 Asian Ethnicity 552. Gerharz identifies this event and surrounding initiatives as being one of the primary mechanisms for generating indigenous solidarity. The author attended the event in 2012 and 2015, noting the presence of most major research bodies, a wide range of NGOs, and representation by the PCJSS and national Awami League politicians.

[394] SEHD has published extensively on the environmental degradation caused by settlement and uncontrolled development in the Hill Tracts. See Roy, Gain and Society for Environment and Human Development (n 10). Philip Gain and Society for Environment and Human Development (Dhaka, Bangladesh) (eds), '*The Chittagong Hill Tracts: Man-Nature Nexus Torn*' (Society for Environment and Human Development 2013).

and commercial army interests in the region. That the Awami League was acting in concert with the military made this time an unfortunate moment in history that necessitated a common resistance. Through the work of these organisations, issues of land, environment, human rights and minority recognition became embedded in a much wider discourse on the nature of the Bangladeshi state and inextricably connected to the global indigenous movement.

An expanded example has been chosen to illustrate the transference of legal concepts from global to local and the possible effects of the vernacularisation of global discourse on the legal culture of the customary system. The CHT Commission was a European Union funded organisation created to monitor the progress the CHTPA and was peopled by international, national and Pahari Members. Since 1999 it conducted missions and investigations in the CHT, and used its international influence to draw attention to implementation failures and ongoing abuses of state power.[395] For Commission members, the articulation between identity, indigeneity and human rights was elemental to securing Pahari rights to equal citizenship. Two of its senior Members, Khushi Kubir and Ifteqar Zahman,[396] drew attention to the dissonance between the Awami League's stated policy of CHTPA implementation and the material reality of continued settlement and political stasis, feeling it attributable to their shift from a democratic to military source of legitimacy. Commission member Shapan Adnan

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[395] The CHT Commission is funded mainly through EU funds to monitor the implementation of the Peace Accord. Since an attack on Commission members in 2014 on a mission to Rangamati, no further missions have been undertaken. The view of the three Commission Members interviewed, that is Khushi Kubir, Shapan Adnan and Iftekar Zaman, was the attack by a group of Bengali Settlers was commissioned by the Army, who then failed to offer any protection to the delegation.

[396] Khushi Kubir was a human rights activist of substantial renown, having working national rights-based organisations since the 1980s in the fields of rural development. Ifteqar Zahman is the Director of Transparency International Bangladesh, and has placed himself under great personal risk by openly challenging corruption in the state government.

noted that the degradation of the state experienced in the last decade explained the prevailing atmosphere of illegality in the CHT, contributing to the erosion of traditional values and the rise of marketised responses such as corruption amongst the Pahari communities.[397]

In this difficult context, the customary system was viewed sympathetically, as a means to establishing a moral alternative to state disfunction. Kubir felt that allowing indigenous people to practice customary and personal laws was a form of recognition of their distinct identity. In relation to customary property and land, she noted that; '*the exploitation of resources could be stopped if the customary laws were reinforced*', whilst acknowledging that the customary system contained elements that needed to be changed; '*some part of the customary rituals, also have to be looked at, to ensure that is egalitarian and friendly to women'.* Custom featured in discourse as a necessary signifier of identity and alterity but was also perceived as flawed by the limitations placed on its scope by the state, or more specifically the ongoing failure to incorporate the system into democratic mechanisms.[398] Nirupa Dewan confirmed this aporia to an extent, but was more effusive about the value of customary law to communities and highlighted changes already being made by the Chakma Raja to addressed inherent inequalities in the customary system.[399] Perceptions of the customary system in the context of the social movement were, therefore, of a system that was both elementally representative of a better life, and simultaneously, the target of legitimate reform.

3.4. Summary

Some broad tendencies at least can be drawn from this review of attitudes and perceptions of the customary system from those working at its borders. First,

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[397] Shapan Adnan is an independent academic specialising in land rights.

[398] Ibid.

[399] Nirupa Dewan is a Rangamati based educationalist, teacher and human rights activist.

external actors perceived the customary system as the legitimate object of etic change, as a domain over which influence and power could and should be exercised. That said, the nature of and source of that change, and the potential impact on legal culture differed considerably. Development driven reforms tended to contribute to a stronger legal pluralism by providing alternative routes to law and dispute resolution, and a consequent weakening of the links between territory, identity and law. The effects on legal culture might be the dissolution of customary alterity in the hope that the boundaries between community and state might also become less defined. A paradox therefore emerged in that stronger pluralism weakened the identitarian aspects of the customary system, and consequently increased instability and contention within the communitarian domain.

There was broad support amongst the lawyers and civil society activists surveyed for the maintenance of strong borders to the customary system, set against state law. Referring again to the concept of critical communitarianism, amongst these latter groups, law appeared the cultural foci of mobilisation both in terms of its strategic utilisation to support the wider cause of Pahari autonomy within the state, and in terms of driving reforms and adaptations necessary to position the Pahari as falling with the international category of 'indigenous'. Further, the utilisation of human rights discourse to throw light on the nefarious activities of the state was embedded in the construction of Pahari identity and legal culture. Influencers perceived the customary domain as highly labile, and capable of community-led adaptation, but all the same supported adaptations such as codification, and incorporation into the local councils that would introduce state controls over the communitarian domain. Nonetheless these reforms were clearly perceived as linked to democratisation and the redistribution of power away from the appointed custodians of the customary legal system, and were not seen as inconsistent with the uniquely accessible and community led customary system.

4. Elite Mobilisation and Consciousness

4.1. Customary Mobilisation

The next stage of analysis turns toward the interior of the Chakma/Pahari community to present the results of discussions with the elite custodians of customary justice, namely Chakma customary and political leaders from the Rangamati area. They were questioned on their perceptions of community leadership, the role and function of customary law particularly in relation to notions of community, and the theories of change applied by them to the customary system. Their responses reveal both commonalities and inconsistencies in cognitions of legal culture emanating from the Chakma leadership, but a surprising confluence of opinion over the necessity of mobilising customary law in pursuit of community autonomy, or in other words the development of law as an identity practice.

4.2. The Chakma Chief

Through historical happenstance and contemporary endeavour, the current Chakma chief remains the most visible and prominent of the three Circle chiefs. Raja Devasish Roy was head of Chakma Circle office and clan chief of the Chakma people, and also an international indigenous activist, academician, and Advocate at the Dhaka Bar. Whilst cognisant of the effects of colonial intervention, Roy believed in the alterity of customary legal practices, their necessary independence from the state and propensity for both gradual and rapid adaptation to material contexts. He identified the evolutionary and socially rooted aspects of the customary system as its major strength;

'Customary law I always say is like a path. If it is practised it is a custom. If it is not practised it is not accepted. If there is no consensus it ceases to

be a custom. And that I think is the positive side of customary law vis-a-vis statutory law... customs have always evolved'.[400]

As a noted international spokesperson for indigenous rights, in both principle and practice Roy steered the Chakma Circle's iteration of customary law toward alignment with the global indigenous peoples' movement. He had introduced procedural changes to the Rangamati Circle that recognised the disadvantage of women seeking justice in their marital village, women's participation in hearings, and children's rights in reflection of the UNDRIP commitment to human rights.[401] Nonetheless, Roy calibrated the inequalities experienced between individuals within the Customary system, with the inequalities experienced between the majority Bengali and the Pahari communities. Where there was a conflict, such as in CHT adjudications on land and inheritance, he believed the position of the Pahari vis-à-vis the majority/state should take precedence over the individual rights, and an alternative method of recognising any individual injustice found *within* the customary system. Roy might be said to represent the strongest perspective on the necessity and desirability of *emic* change to the customary system. He identified a legal culture in which law was absolutely embedded in society and indicated that changes in society must precede changes in the law. Reforms were carefully designed to maintain system continuity and neither disrupt extant legal practices, nor cause dissent amongst customary personnel, rather, they were intended to engender changes in legal consciousness amongst customary officials that would indirectly reform customary practice. In adopting this approach to causality, Roy articulated a legal culture imbued with an

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[400] This description was taken from a previous 2012 interview with Raja Devasish Roy.

[401] The reforms included a range of measures, such as requiring panels to include representatives of a woman's home village, women becoming involved in investigations, strengthened protections against domestic abuse and changes to rules on child custody that emphasised the rights of the child.

anteriority to the state *and* the democratic institutions of the CHTPA, placing him at odds not only with the dominant political leaders but with most of his own customary personnel.

The inherent adaptability of the customary system caused Roy to believe that a reformed customary system could encapsulate multiple community-based concepts of justice within the current territorial framework, and move all communities toward a common reflection of rights. He stated;

'Why not a customary court for everyone, including Bengalis? The formal courts are conducted using the adversarial system of the British, the judges a neutral umpire of a clash between two advocates. But the parties are not equal, their equality is fictive. There is no reason why (a customary) notion of justice would not work for all residents of the CHT'.

Roy envisioned an expanded customary system offering access to justice for all the marginalised communities of the CHT, including Bengali settlers. This belief was perhaps linked to a strong opposition to the increased legal pluralism at a local level; for example, Roy has opposed the active campaign by the Bangladesh Legal Aid Services Trust (BLAST) to establish a consistent and uniform family court system in the CHT, precisely because he felt increased legal pluralism weakened customary jurisdiction.[402] In this, his views as to how to serve the Bengali settler communities diverged from both the official state position and that of many high profile human right activists.[403]

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[402] Family Ordinance 1984 determines that all districts should have family courts in addition to customary arrangements. The CHT was exempt. Maimuna Ahmed and Sathi Muktasree Chakma, *'Family Courts in the CHT: At the Intersection of Gender and Ethnic Identity'* (BLAST 2011).

[403] Most research participants felt that the divide between settler and Pahari was too great and too bitter to be bridged through the customary legal system, amongst them Shaheed Hossain of the UNDP, CHT

His strong belief in the bounded nature of the customary system also militated against reform of the system through the autonomous HDC bodies, Roy stated;

'My hunch would be not to go through any such formal attempts to reform the customary law through the district and regional councils, because these bodies, although two thirds of members are indigenous people, they are not tribal institutions, they are state institutions. They are not above party politics, or above electioneering. It is not very clever to surrender your self-determination to an institution over which you have no control'.[404]

Thus, Roy presented a jurisprudential interpretation of the customary system as already complete in terms of its structures, laws, and theory of change. He advocated the customary system be preserved as independent of the formal legal system, showing a distrust of state institutions that led him to oppose the subordination of the customary systems to the autonomous HDCs. His mobilisation of the customary system was against the state but was also a mobilisation for a Pahari identity that was de-historicised to the extent that it referenced an imaginary continuity. His legal consciousness was constructed around a view of the Pahari as indigenous, diverse and internally harmonious. Roy's characterisation of the customary system clearly represented the legal consciousness of a specifically indigenous/Chakma/Pahari 'we'.

4.3. The Headmen

The Chakma chief was almost universally respected as the customary leader, but his approach to leadership and reform of the customary system was not universally shared even amongst his direct henchmen. Even at this senior level of customary

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Secretary NBK Tripura, and the PCJSS Chief Operating Officer, Shapti Padhu Tripura.

[404] In the Indian state of Mizoram, Chakma law has been codified under the auspices of the Chakma Tribal Autonomous District Council.

leadership, the political imperatives of customary resurgence displaced and frustrated the de-historicised customary domain conceptualised by the chief. A broad consensus on core elements of legal culture splintered in respect of the necessity and type of reforms needed to the system.

The headmen have occupied a pivotal position in the customary system since assuming revenue collecting duties from their dewan/khisas predecessors under British colonial administrations. In the CHT Regulations, their duties were designated as collecting jum taxes and operating the appellant function of the customary legal system with all its attendant duties.[405] They are formally appointed to leadership of one Mauza, a territory that will usually include about five villages and their appointed karbari. Positions are hereditary and patrilineal, though all appointments have to be approved by the Deputy Commissioner.[406] From the colonial era to the 1960s, the position of headman carried with it a promise of personal wealth and localised power through their entitlement to one third of the annual tax revenue collected on behalf of the Raja.[407] Further, their primary responsibility for allocating Jum land and effecting all other land transfers, allowed them to retain the most valuable lands for personal use.[408] Older research participants recalled a time when the headmen/dewan were wealthy, elevated and distant, often requiring performative acts of subordination from the villagers.

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[405] The headmen collect taxes, have sole responsibility for land mutation, are responsible for community leadership and fulfil the appellate function within the legal system, as well as locating miscreants on behalf of the state police in felony cases.

[406] This was considered a formality but anecdotally there have been recent instances of headmen's appointments being turned down.

[407] Tax was divided into thirds, one third to the headmen, on third to the Raja and one third to the state.

[408] Advocate Jewel Chakma suggested land was still a source of wealth by some respondents, as was the ability to make (illegitimate) charges for land transfers.

The headmen's status and income reduced drastically in the years following Partition; the state refused to raise levels of capitation tax to the point that it was so depleted by inflation that collection was purely ceremonial.[409] Payment for land transactions has never been permitted, though there were persistent rumours expressed during field-work that some headmen charged for this service, and would alienate land to Bengali settlers at the right price.[410] The headman's government salary was a negligible 1000 BDT a month, far less than personnel in the HDCS and state village Porishad, and in spite of their necessary role in supplementing state police and civil jurisdictions in Pahari majority areas. Of the twenty-one headmen of the Rangamati Circle interviewed during field research, all except one combined their customary duties with other business interests or professions out of necessity. Many saw little benefit to their children inheriting their customary office.

In self-defining their role, the headmen named their appellate function in the customary system as most importance, followed by their role in preserving the cultures and customs of the Hill Tracts. These customary roles are often articulated explicitly in terms of the positioning of the Chakma as an indigenous community in global discourse. Their expertise in land allocation was also mentioned frequently; whilst the headmen could not settle land disputes between settlers and indigenous people they could still affect transfers between indigenous people and also allocate jum lands for cyclical cultivation. Their social welfare function was defined as making sure that the landless or poor amongst the community were offered some sustenance in the absence of government support.

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[409] The completion of the Tax Collection cycle used to be an Annual Rajpunna Festival, where the headmen would present the Raja with his share of the monies, and would often bring gifts from the villages. When festivals are held now they tend to be celebrations of culture, though they are no longer annual events in any of the Circle areas.

[410] This perception was common amongst development actors, and strongly expressed by Advocate Jewel Dewan, who shared the schedule of fees charged by some headmen for land mutations.

They were also highly influential in being a conduit for information passing between the Raja, political leaders, development organisations and the karbari of the villages.

The headmen frequently conceptualised the customary system as providing continuity with a prior way of life, though not always in such nuanced tones as their customary leader. They highlighted its role in underscoring the unique identities of indigenous communities, and upholding national traditions in personal and land laws. Customary law, in the words of one headman '*holds society together*', in both a spiritual and pragmatic sense;

'We are different from the majority Bengali people, we have different cultures custom and tradition, so having customary law is important for that reason. There are also some things that don't exist in national law, the national laws don't recognise our laws, for example in national law there is a document to claim land, in the CHT there are often no documents, it is inherited from their parents'. (Iti Dewan)

The social elements of the customary role were also considered elementary to the customary system, headmen ensured that rituals relating to birth, marriage and death were observed according to Chakma tradition. The customary system was identified as a means of managing relationships amongst the young, particularly in the relationships between younger boys and girls.

'Customary law is based on traditions that started from the beginning of civilisation, it's good for us, it's good for society…relationships must be recognised by society, must be endorsed by custom and tradition'. (Manindralal Chakma)

This idea of society being structured by custom recurred frequently, and was expressly identitarian in positioning the Pahari community as antithetical to the unstructured, disordered nature of Bengali society. Traditions were married with more recent solidarities, for example, the fact that all Pahari communities could

practise their own customs within the customary framework was offered as evidence of a common indigenous identity;

'Every indigenous community has its own customs and traditions, the Taunchyangya have their own customs and the Marma have their own customs and traditions...it's the customs that are defining us as indigenous communities, our variety'. (Sujit Dewan)

Tradition was thus expressly presented as an assertion of the value of diversity as opposed to the majoritarian homogeneity associated with Bengali society and state law.

Amongst headmen respondents, the efficiency of the customary approach in terms of the length of time taken, the cost and the practical hurdles of formal justice was identified as its major appeal. One example advanced was of a land case that a Pahari had chosen to take to a formal court. The case took six years to resolve and the plaintiff had to sell much of his land just to fund the action, according to Mrinoy Chakma, '*formal court cases take a long time to have a verdict, in customary court they are very quick'.* There was still no alternative to the customary system in many CHT areas given the relative poverty and geographical isolation of many villages, and the customary system was both necessary to meet the practical requirements of policing and dispute resolution, and valued as a symbolic representation of difference and independence.

The majority of headmen did not hark back to the kind of ossified tradition invoked by Maine and his counterparts in the Victorian judiciary, rather they represented an iteration of customary law that existed in an anterior space, developed according to the lived practices of the Pahari and allowed cultural differences to be celebrated rather than homogenised. Law was mobilised in opposition to the state, to retain the separation of the community, and legal consciousness drew on both history and pragmatism to understand law as an arbitrative and discursive practice. Yet there was also an understanding of problems occurring due to the inherent inconsistency in law as practised between

communities, across the different geographies of the CHT and between different social classes. This was seen as a weakness by the more educated headmen in relation to karbari justice.

'They can all give different solutions, they can give different punishments, they can be partial, for example if there is a theft, the karbari can give three different decisions on the same set of facts'. (Babatosh Chakma)

Thus, the very adaptability of tradition, valorised by the Chakma chief, was perceived as damaging to the credibility of the system due to the numerous versions of customary practice, both liberal and illiberal, that emerged from it. Despite the best efforts of the Chakma chief and the more articulate advocates of traditional justice, the headmen perceived these inconsistencies as garnering contempt from powerful state and political actors, and inviting reformist attention from the development players and activists who had supported previous stages of the struggle. The majority of the headmen, therefore, dissented from the views of the Chakma chief in believing greater formality was of practical benefit to the customary system. Opinions were divided over whether the customary system should be codified, but the majority of headmen supported the integration of the customary system with the HDCs, and the assumption of control over the system by the political leadership. Even whilst broadly supporting the chief's conceptualisation of the customary legal culture, they saw no conflict between a legal culture drawn from a historical practice and indigenous identity, and the democratic institutions conjured into being through the highly political CHTPA. Indeed, integration into these structures was a legal mobilisation necessary to provide statutory sanction for the customary system, and reinforce the boundaries of community against the state. Their legal consciousness was formed from an understanding of precolonial Chakma tradition hybridised with the ideologies of nationalism and democracy formed through the insurgency.

4.4. The Karbari

In the CHT Regulations, the roles of the chief and headmen were clearly designated as regards their revenue raising and land mutation functions whilst the role of the village karbari role remained mysteriously under-defined. The karbari was a hereditary appointed village leader who managed and policed each village, and supported the headmen in land management and tax collection. During fieldwork, karbari described a full and expansive role that is summarised below by Buddha Chakma, who inherited the karbari office on the death of his Father in 2014;

'Amongst my duties is to change the ownership of a piece of land, I have to make a recommendation to the headmen. Then the headman will activate the registration of the land or the mutation. I also help the headman to collect the taxes in my village. There are also disputes in my village, internal disputes, in relation to land and family. There are problems, women related, guest relations,[411] sometimes there are family disputes, husband and wives quarrelling and beating wives, and some people occupy other peoples' lands'. (Buddha Chakma)

Buddha Chakma's analysis of the karbari role was fulsome in covering the social, development and dispute resolution functions described by most karbari participants in research, and reflecting the headmen's definition of their role as it should be practised. In his judicial role, Buddha was clear that land cases were dealt with by headman and karbari, but personal cases were heard by him in public and he was solely responsible for arbitrating a settlement. In individual disputes law was mobilised to maintain the autonomy of the village and legal consciousness perceived law as a means of returning the village to equilibrium;

[411] Guest Relations is a translation of 'Gorba Hudum', a ceremony that checks family trees for conformity with Chakma Law prior to a Chakma marriage.

'Obviously in a prosecution there is a loser but I try to make an agreement, not the win or lose thing but a settlement'. (Buddha Chakma)

Variety, however, characterised the karbari's perception of their role. Within each locality it appeared highly dependent on the relative power of the karbari to other sources of community leadership, be that the headman or local political activists.

The hereditary route to the karbari position was no longer the sole route into office. In 2015, Rani Yan-Yan, a respected civil rights activist in addition to her formal duties, drove a fundamental change to the customary system with the introduction of female karbari chosen by their community for their competency alone.[412] The longer-term objective of the initiative was having a female karbari in every village, at the time of field research over one hundred appointments had been made. The process described by Rani Yan-Yan in bringing about this fundamental reform was instructive in demonstrating the different approaches to mobilisation within the customary system, even when the objective, this time of gender equality, was shared. Her initial approach had been to change the rules of the customary system to allow women to inherit the office of karbari, but this had been opposed by chief Devashish Roy, not because he opposed women's full and equal participation in the customary system, but because he felt such wholesale change would be experienced as sudden and unwelcome amongst the majority of customary practitioners given the slow and incremental progress being made toward gender parity in rural areas. Rani Yan-Yan's narrative of this reform is worth recounting in detail;

'We both understood that ensuring women participation in the justice system would warrant women's voices being heard, but would not necessarily guarantee that women's assessment /resolution would be taken on board while placing the verdict; unless women hold leadership

[412] Rani Yan-Yan is Queen of the Chakma peoples and of the Chakma Circle.

position in the customary system. Since there was no wide consensus among general people (especially among the karbari) that women should inherit karbari-ship in the existing customary system, we had to come up with an alternative way by which we could see women playing leadership roles in the society. It would not only empower women in our society (not only the women leaders but also women, in general) but also would pave the way to naturalise the idea that women can be traditional leaders'.

The introduction of women karbari to the customary system represented a form of legal mobilisation that synthesised external influences, in this case human and gender rights, with the foundational structures of the customary system to effect change in law *and* society. The effect of one such appointment, Rini Chakma, on the women in her village usefully illustrated the effects of such mobilisation. Whilst not strictly legal, the existence of a leadership structure in which women were expressly recognised and involved instigated changes in consciousness that would inevitably affect the conduct of customary law. In Rini's case, the CIPD development organisation had supported the village in setting up a Woman's Samiti (committee), and identifying candidates for karbari. Their story continues below.

'Before the Women's Samiti, we had to struggle, that is our history, we were alone, but we were not together. When the CIPD came we were shy, some of the women were in teaching posts, so they were asked to put together a platform so they could tell their stories. Rina was told she was a natural, so she was made karbari. (CIPD) gave advice and support in setting up the Samiti. Before that, we only knew each other by their

children's names, but now we know our personal names. We have become friends'.[413]

The solidarity expressed by the women villagers was reflected in numerous practical initiatives led by Rini Chakma in her karbari role, which included a savings club, collective cultivation, practising the art of conversation, learning to write and even learning the Chakma alphabet. Now the women reported that;

'We are very much happy they made the karbari through the Samiti, we can now talk without hesitation... When we face problems or need money we can go to the karbari or to the Samiti for help. If we get to the karbari quickly they can solve these problems, if the karbari is a lady we feel a lot better'.

Giving sustenance to the chief's argument for emic change, Rini Chakma and her woman colleagues argued strongly that their empowerment through customary reform had irrevocably changed the balance of power in their local community. In the village, customary institutions were mobilised expressly to challenge male power and develop female solidarity.

4.5. Political Mobilisation

At the time of field research, the PCJSS remained the most powerful regional political force, with the former insurgent leader, Santu Larma ensconced as the appointed leader of the Regional Council, and the PCJSS party dominating urban and rural politics in the Rangamati Circle. To the north their main opposition, the anti-peace accord UDPF dominated the Khagrachari Circle area,

[413] A meeting was held with approximately forty women at Rini's village, located around an hour's boat ride from Rangamati. Though some men attended they were told to sit at the back and not participate in discussions.

and held power in the Sebakkon Mouza area of the Rangamati Circle.[414] Though both parties are Chakma-dominated, their political perspectives represented ostensibly oppositional narratives of the efficacy of customary law and captured an essence of the splintering ideological positions of elite political protagonists. The following section explores their respective perspectives on customary law, their formal policies in respect of its mobilisation, and concludes by theorising their impact on legal consciousness.[415]

4.6. PCJSS

Chapter three demonstrated that recognition of Pahari rights to land and territory lay at the intersection of Constitution, legislation and customary provisions, with customary law central to proposals for settling land claims arising from the conflict, and aligned through the CHTPA with the administrative arrangements for ceding regional territorial autonomy.[416] Customary law was mobilised in support of these central elements of PCJSS policy, their joining of the Wagachara

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[414] A Reformist wing of the PCJSS is also gaining political strength in the Rangamati and Khagrachari Circle areas, and its leaders were interviewed during field research. Few were prepared to be open about the reasons for the split in the party, but informal conversations suggest that they objected mainly to the highly centralised and undemocratic leadership of Santu Larma. Their policy positions in relation to the customary system remained very similar to the PCJSS, however, believing it to be the necessary object of external reform. Similar splinters have occurred within the UPDF but again appear driven not by ideological differences but by struggles for power.

[415] This summary of the attitudes toward customary law and legal mobilisation was constructed largely from discussions with Ushatan Talukder MP, Shapti Padhu Tripura, PCJSS Chief Operating Officer, Mangal Kumar Chakma, Chief Press Officer, and Youth leader Trinijon Chakma. A number of other PCJSS activists were interviewed during fieldwork, but their views followed this expression of PCJSS policy.

[416] See chapter three, section 4.4. The CHTPA provided for a Land Commission to resolve outstanding land claims by reference to custom, meaning that customary land allocations would take precedence over government sponsored registrations made in the period of conflict.

Supreme Court case, for example, and their support for the Giptoli Mouza headman in suing the Forest Department. At the time of research however, the Land Commission Amendment Act was still awaiting enactment, HDC elections had not taken place and there had been no political movement on the issues of Bengali settlement. These political setbacks not only rendered ineffective the local mobilisation of customary law to support outstanding issues of land settlement, but contributed to a wider disaffection by some participants with both customary leaders and political representatives.

Nevertheless, the historical connection between customary laws and land settlement were explicitly invoked in conversations with the PCJSS about legal culture. Shapti Tripura conceptualised the originality of the system as being its role in regulating jum cultivation and technology. Customary land laws were important for the protection of the forests in that cultivation cycles were managed so as to steward the natural world rather than displace it. Additionally, he found it difficult to imagine an alternative system for enforcing social norms, customary law was;

'Closely related to the life and culture of the indigenous people, there is an importance of customary leadership, in development, in protection of culture, and in the livelihoods of the indigenous people, in justice, and in our belief systems'. (Shapti Tripura)

Nonetheless, PCJSS leadership clearly distinguished the traditional/customary system in its precolonial form from the 'feudal' system of British invention, Mangal Kumar arguing that '*the feudal system was not democratic so the feudal system and the traditional system are not the same'.* Colonial dominance produced rigid class structures absent from precolonial governance, which in turn spawned grandiose and oppressive behaviours amongst some customary officials.[417] PCJSS

[417] Examples offered included the colonial requirement for all male CHT residents to provide free labour to the chiefs for 8 days a year, and the

leadership confirmed that during the insurgency, the anti-feudal elements of Santi Bahini ideology were directed at addressing these ostensibly British inventions, democratising the customary system, and recovering the unifying elements of its precolonial form.

PCJSS discussants were consistent in their belief that the system needed democratisation, even whilst accepting its vital role in maintaining order and preserving unique indigenous cultures. They recognised the Circle system only insofar as it sustained autonomous regulation of social conduct, and so underscored community independence from the state. When control over the system was transferred to the HDCs, however, reforms would be directed at homogenising legal practices between the customary system, local democratic bodies, and with the prevailing democratic structures of the state.

'The traditional system is traditional, it is an old system ...so opinion should be adjusted according to the democratic system, with the HDC, with the reality of society, the structure of the state, and the reality of this structure of the world...(it) has so many limitations, so we say you must change those things that are not suitable for a democracy'. (Shapti Tripura)

They commonly perceived its main weaknesses to be the hereditary appointment of headmen, a failure to empower women, a lack of democracy and a failure to adhere to human rights doctrines within the system. Its future was communitarian in being located in the immediate and the local, but with its laws and practices moulded and shaped to fit the contemporary social mores. Customary officials at all levels were also perceived as problematic;

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behaviours of chiefs and headmen in requiring acts of supplication, such as taking off shoes when walking past them.

'Many headmen are not aware of their powers or their functions, some are illiterate. In Nakanchari Upazilla they gave lands to outsiders, depriving local people of their rights. The PCJSS is addressing the matter with the Circle chiefs. The Chakma Raja is very cooperative, the Bohmong and Mong Raja are not so cooperative'.(Mangal Kumar Chakma)

The slow progress on CHTPA implementation, and the political activist's perception of low capacity in the customary system appeared to have strained relations between the political parties and the three Circle chiefs. PCJSS leaders also resented that failure of the state to invest in the customary system despite its critical role in maintaining social order in rural settings. Elsewhere in Bangladesh, the state funded village councils (Porishad), but in the CHT the customary system was subject to continuing neglect.[418]

'If you go to the plain land, the Toxillar[419] has an office and a salary of 20000, but the headman receives only 1000 taka, they have no office. It is quite impossible. The customary governance system has an important role to keep stability and protect their culture and heritage'. (Shapti Tripura)

Previously the complexities surrounding the customary system have been alluded to, in that political and customary actors are often one and the same, occupying positions within their respective parties and holding official customary positions. A large number of Chakma headmen were closely associated with the PCJSS,

[418] On the plains the village Porishad was equivalent to a parish council. In Pahari villages, the karbari took on the same role. In this sense the state relied on the customary system to discharge mainstream administrative functions. Similarly, the state remained reliant on customary officials to police the villages, a system very similar to the colonial in the expectation that headmen would apprehend and hand over those suspected of serious criminal offences.

[419] Land Agent.

and even if not, most would take part in activities organised by the headmen's Association, an informal grass roots association of headmen chaired by Shapti Tripura, and heavily sponsored by the PCJSS. Headmen interviewed for this project were for the most part members of the Association, many offering similar views of the customary system insofar as the respective failures of the state to invest in their offices, and the chiefs to provide the necessary support and influence in government. Headmen's Association members expressed common concerns over the apparent inability of the chiefs either to offer a united front to government, or to engage directly with their political concerns.[420]

Amongst headman respondents, however, despite their expressly political affiliations and interests, law was still perceived to be a separate system governed by a normative framework rooted in common community values. Formally, the PCJSS leadership also professed support for the customary system in its entirety, and expressed a commitment to work *with* the customary leadership to democratise the system internally. Further, they supported the initiatives of the Chakma Raja in addressing the issues of women's rights and human rights in the discharge of justice. Nevertheless, the Party maintained a presence in most villages within a highly centralised chain of command, describing their relation to local governance as follows:

'There is a branch of the PCJSS in every village and every Thana. The form is to have a branch structure that has a forum at Thana Level and at Upazilla level. It's not an alternative government, that was before the Peace Accord. After the Peace Accord we formed new organisations both centrally and at village level'. (Mangal Kumar Chakma)

[420] Vocal criticism at the Headman's Conference in 2016 were mainly levelled at the Bohmong and Mong chiefs for failing to engage. The Chakma chief and the Chakma Rani both attended the Conference. Note that in previous conversations with the Mong chief, his refusal to attend related to Chakma dominance of the Conference.

The new village committees, sometimes referred to as peace committees, did not have any formal judicial function and were conceived as local democratic organisations. They were usually supported by a youth committee, attributed with a social and political purpose in engaging constructively with local youth. Trinijon Chakma, the current PCJSS youth leader, described their approach to engagement with the customary legal practice;

'Our policy is always to try to refer cases to the headmen and karbari to resolve. If they do not resolve then it is a failure, then they try to resolve through the headmen and karbari by giving advice in this way. We recognise customary law because our national identity and our traditional systems need to be preserved'. (Trinijon Chakma)

Locally, however, the modus operandi of local PCJSS committees was influenced by the Mouza and village location, local demography, and the capacity and inclinations of local customary officials. Where there were serious concerns about the capacity of customary leaders, these manifested in political interventions in both judicial hearings and community leadership. Further, the Party faced its own problems in maintaining control over local party organisation in the face of the difficult terrain and poor communication links that still characterised the Hill Tracts. Shapti Tripura accepted that conflicts arose between local party operatives and customary functionaries on the ground, but justified a protective role for his cadres.

'Relationship between activists, sometimes (it) is not good, there are so many causes of that. But consider that the PCJSS is acting in the interests of the people... the PCJSS is seen as the leader, (the people) depend on the PCJSS for all matters. If the captain of the army beats a citizen and the citizen goes to the headman, the headman replies that he has no power, because he has no courage. If he goes to the leader of the PCJSS, we would arrange a protest and a rally, so people will relate to the leaders of PCJSS'. (Shapti PadhuTripura)

He noted that the ideal of customary enforcement based on cohesion, equilibrium and consent was highly problematic in a society now more mobile, educated and informed than ever before. The legal culture described by the chief and his headmen appeared both idealistic and highly suspect in this light, insofar as they conceptualised a harmony and completeness to the customary system that appeared illusory in the context of rapid development and continuous post-conflict violence. The realpolitik expressed by the PCJSS, however, encompassed these realities in a view of indigenous legal culture as both historically situated and entirely mutable. Their legal consciousness was expressly political, demonstrating a constant calibration of the strategic efficacy of support for and intervention in the customary system.

4.7. United Peoples Democratic Front (UPDF) [421]

The main regional opposition in Rangamati is the UPDF, which holds power in the northern Sebakkon area bordering its Mong Circle stronghold. Though a democratic force in these areas, the UPDFs fundamental opposition to the Peace Accord, its open refusal to disarm, and its continued participation in sectarian violence has garnered frequent calls for its proscription as terrorist organisation by state and military sources. Its continuing hold on power suggests that opposition to the Peace Accord, or at least despair at its failures, elicits substantial popular support.

UPDF leadership adopted an explicitly Marxist ideological stance in relation to the contemporary relevance of the customary system and were more explicitly

[421] This summary of UPDF policy toward the customary system was drawn from two discussions with Chairman Rabi Sankar Kumar, and from a workshop with customary officials from the Sebakkon area. They were keen to point out that the UPDF grew from the civil society organisation of the Hill Peoples Federation in the 1990s and had never been affiliated with either the JSS or its successor party the PCJSS.

critical of its practices than the PCJSS. According to Chairman Rabi Sankar Kumar;

'Headmen and karbari are part of...feudal institutions. They are outdated, they had a role in the past in maintaining law and order in society, not many people care about them now. They need our help, nobody goes to the karbari court anymore because they cannot enforce their decisions'. (Rabi Sankar Kumar)

The re-assertion of the customary system before the Peace Accord, and the accommodation reached between the Chakma chief and the PCJSS was a *'compromise with feudalism'*. As non-signatories to the Peace Accord they believed this accommodation was not only unnecessary but undesirable in that claims for usufruct rights were ineffectual in the context of the pro-development Bangladeshi state. Rabi Shankar Kumar confronted the paradox of the circle system openly, highlighting the contradictions of customary institutions that were both;

'Protective but ...also representing a lower stage of development. If we had land ownership the Bengalis would not have been able to take our land away. The government thinks that all lands are owned by (them) but we still think of them as community land'. (Rabi Sankar Kumar)

In attributing a culpability to the customary system for the loss of Pahari lands, they conveyed an assessment of communal rights as of lesser value than individual rights, drawing specific attention to the marginalising effect of colonial protections on the Pahari, and conceptualising customary law as a form of arrested development. At the level of strategy at least, the UDPF expressed an outright rejection of the customary system and the desire to supplant it with a more contemporary and accountable structure.

The UPDF also differed from the PCJSS considerably in its internal organisation. They had a leader and central organisation to design and implement policy, one example offered was their recent attempts to increase political

representation of indigenous women, both in the Hill Tracts and in the migrant community of Chittagong where many women worked in the garment industry. Yet the UPDF chose not to emulate the '*cult of personality*' they saw in high profile leaders such as Santu Larma and Sheikh Hasina, and preferred a decentralised model of local party organisation which delegated considerable flexibility to local activists to decide on appropriate local structures. Rabi Sankar Kumar reported that as regards their village committees;

'We have own organisations in villages...in some villages the election (of officials) is almost a festival...Often the villages get together amongst themselves and decide, it's not a formal election, the membership is not imposed by the party...In some areas and cases, the karbari are included in these committees'. (Rabi Sankar Kumar)

Their rejection of the customary system was founded on severe doubts as to the efficacy and reliability of customary law in delivering justice, and, as with the PCJSS, these doubts coalesced around concerns about the honesty and capacity of customary functionaries.

'We are ambiguous about the headmen and karbari – they are responsible for land alienation, we know they take bribes, and they give land to settlers, and there are many cases where they have taken money from settlers'. (Rabi Sankar Kumar)

Nevertheless, they placed local democracy above their ideological position, and still pragmatically incorporated customary functionaries into their local committee system if the villagers felt it appropriate, Their involvement was contingent on the locality, the nature of the karbari and headmen, and local activists' approach to the customary system. Rabi Sankar noted that:

'We would be happier if we didn't have to get involved, if you get involved in disputes you cannot pacify both parties to the case, you have to give a decision in favour of one person ...but we have to, because there is no

alternative, there is no law...so whatever way there is a human rights issue'.

The positions of the two main political parties therefore suggested a marked ideological difference in the extent to which the existing customary legal system was mobilised as a focus of resistance to the state and as a practice of identity. Ostensibly the PCJSS recognised both its pragmatic utility and cultural resonance; the boundaries of the customary system aligned with the Pahari community and the territorial borders of the CHT. They strategically deployed a vision of a precolonial legal culture to support the ideology of Jumma nationalism; customary law was mobilised to support recognition of land rights and the consecration of community difference. Meanwhile, the UPDF rejected wholesale a conceptualisation of local law based on a feudal system, and admitted a preference for creating democratic systems to govern villages. Ideologies aside, however, both party responses suggested a similarly ambiguous and contingent approach to village justice, a disregard for the completeness of the customary system as posited by customary protagonists, and a willingness to incorporate or supplant the customary system if requested or required by shortcomings in the local legal constellations at a village level. Legal mobilisation at highly local village sites appeared explicitly aimed at strengthening local party bases by linking dispute resolution to political power and the use of force. Law was experienced by the PCJSS as a practice of identity, but on the basis that identity itself had been transformed by the conflict. Custom had no place in the legal consciousness of the UPDF leadership, who saw local law as an essential function but one that should be experienced as part of a democratic process, marking a sharp divide between the feudalism of the colonial past, and the possible egalitarianism of a Chakma future.

5. Imperfect Law

This concluding section contains observations on this recantation of elite attitudes toward CHT customary law, drawing on the conceptual lens of critical communitarianism to surmise how legal mobilisation against the state contributes

to practices of identity and legal consciousness. The aspect of legal mobilisation most relevant being the notion that legal discourse can be deployed to cement identities and ideologies, and legal consciousness being the way people participate in the construction of legality, and understand the relevance of law to their lives.

5.1. Legal mobilisation and Identity

The views of external and internal actors appeared to cohere over the core elements of legal culture, many of which were emotive symbols of indigenous identity. The first was the custodianship of communal land rights offered by the customary system, and the articulation between these rights and the territorial integrity of the Hill Tracts. Though invoked in support of a material claim to land, the cultural aspect was still present in the connections made by respondents between communal ownership and Jumma nationalism. The second aspect was less easily definable, but was nonetheless mentioned by most Pahari respondents, and related to the alterity of the customary system, the role it played in regulating Pahari society, and providing a space for the diversity of indigenous nations to flourish. These more nebulous aspects of the customary system were recognisably cultural in being connected to its relatively accessible and informal nature, and communitarian in reflecting a desire for a form of law that was rooted in the immediate and the local of community rather than in the power of the state. Both aspects of legal culture appeared in articulation with the category of indigenous contained in the UNDRIP, suggesting that through connection with external actors and involvement in the wider social movement nationally and globally, the legal culture of the Pahari peoples had been shaped by the transport of ideas between local, national and global sites. The views of elite Pahari representatives appeared to cohere as to the legal mobilisation of customary institutions against the state, in support of broad claims to territory, and even broader understandings of culture.

5.2. Legal Consciousness and Change

Both state and Pahari representatives understood the environment as legally plural in the sense that the customary legal system existed alongside state law. However, the idea of customary law being subordinated within a state hierarchy was more difficult to sustain. Within village locations state law did not impinge on localised dispute resolution and state courts were reported as out of reach to the majority of indigenous citizens. In terms of future development there was a split in opinion over whether access to state law should be improved. The state representative advocated for an extension of sessions courts to serve settlers and to open legal choices to the Pahari, positing law as a possible source of inclusion for the indigenous people. Rights-based organisations, such as BLAST and the UNDP, sought stronger pluralism to ameliorate the patriarchy of customary law. For customary and political leaders, however, greater legal choice was perceived as diluting Pahari autonomy and subverting the identitarian role played by law in underscoring Jumma/Pahari identity.

This introduced a tension into the customary arena which contributed to the reconstruction of customary legal institutions as a mirror opposite to their static, timeless characterisation. This thesis concludes that in order to defend against the encroachment of state law, notions of rights and gender equality were absorbed into customary institutions. The capacity for emic change was integral to the resurgence of custom and its positioning as the foci of resistance to the state by both customary leaders and the PCJSS, and formative of customary legal consciousness amongst the PCJSS and customary actors. The UPDF distinguished their policies towards localised justice by reference to the same concepts, calling for a new and separate system to be created that encapsulated modernity, but still viewed their preferred reconstruction as closely aligned with the struggle for territorial integrity and cultural recognition, There appeared, therefore a relationship between the pressure to increase legal choice and strengthen legal pluralism, and the response of customary actors in terms of theories of change. In effect, the positioning of state law as superior, either by

government representatives or human rights activists caused those with power in customary institutions to address the imperfections in those institutions. The result was a synthesis between the customary system's arbitrated community-focused approach to legal adjudication and a new consciousness of rights.

5.3. Critical communitarianism

In conclusion it appeared that the forces that conjured revitalised custom from the wreckage of conflict and displacement found expression in a legal culture characterised by internal plurality, dynamism and constant reinvention. Resisting pressure from state and development actors to increase Pahari routes to law necessitated internal reform and adaptation to the revitalised customary system. Power struggles between elites appeared to accelerate their respective commitment to internal reform, effecting a redistribution or diffusion of power within the communitarian realm, from hereditary male leaders to women in the case of the chiefs reforms, from customary to democratic institutions in the case of the PCJSS and the social movement, and from hereditary and unaccountable customary custodians to ostensibly democratic village committees in the case of the unofficial reforms hinted at by politician participants. This thesis concludes that power struggles within the Chakma/Pahari had the effect of destabilising traditional elites and decentring power, creating scrutiny of every facet of customary law, inviting institutional reform from below and translating concepts of indigeneity and human rights from national and global discourse to augment law in its localised form.

Communitarian law in the CHT was the cultural foci of resistance to state law, and was mobilised by the elite to sustain the integrity of the communitarian domain, ergo the characteristics of critical communitarianism were present in the broad commonalities reported by research participants. At the same time, the fracturing of Pahari solidary was noticeably present, their perspectives combined to paint, in broad strokes, a legal culture defined by communitarian values which were themselves unstable and often in conflict, and by a constant decentring and distribution of power within community. The next chapter tests these findings in a

closer analysis of legal mobilisation and legal consciousness in village locations in the Rangamati area. From this complex and paradoxical pluralism, it presents an observation of the effects of the mobilisation of customary law as the locus of opposition to the state on legal culture in its most localised manifestation, that of the village court.

Chapter Five. CHT Village Practice

1. Outline

1.1. Diversity and Method

So far, this thesis has used a broad cultural inquiry into attitudes and mobilisation to demonstrate the postcolonial legal form of classical pluralism has created an arena in which a critical communitarianism has developed. Strategies of legal mobilisation by Pahari leaders and influencers have been shown, perhaps paradoxically, to support a structure of the state-in-dominance; precisely because state recognition is understood to strengthen community autonomy. Customary law has been mobilised against state law, and Pahari participants have participated in the construction of a legality that draws from historical narratives, local and universal ideologies and global and national movements. Finally, it has been suggested that multiple and competing legal mobilisations generate a dispersal of power within the boundaries of the Pahari community. This chapter connects these complex narratives to village level legal culture, mobilisation and consciousness, already defined to some extent by their raucous diversity.

This diversity was and is inextricably connected to the hilly topography. From the gradual, radiating pacification of the colonial era to the later military stalemate of the insurgency, the hills themselves framed Pahari experiences of war, politics, justice and development, producing material differences depending on variables of proximity to the centres of political, legal and administrative power. Geography, nationality and culture correlated to some extent in that smaller communities favoured the most inaccessible places, such as the high mountain settlements rather than the valleys and cultivable agrarian lands of the Chakma.[422] In the

[422] Roy, Gain and Society for Environment and Human Development (Dhaka, Bangladesh) (n 10).

previous chapter, it was shown that whether in relation to state strategies to increase access to formal justice, the rights-based reforms of the Chakma raj, or the stated policies of the PCJSS toward customary justice, participants recognised that centrally defined ideologies and imperatives did not always hold at the periphery. Field research confirmed that messages dispersed from elites in the centres of power travelled slowly to their representatives, used circuitous routes and arrived at their destinations diluted, and even transformed by the process of translation.

This variegation in experience created further methodological problems in researching legal mobilisation and consciousness in the CHT. Accounts of law and political activism provided solely by elite community members were, by their own accounts, unlikely to reflect fully ground level legal practice particularly in those areas where communications with the centre were less than reliable. Similarly, experiences of law and justice in or close to the urban centre of Rangamati could not be assumed to represent practice in rural areas. For the researcher, travel to the rural areas was severely restricted by state and military diktat. Whilst these conditions and constraints could not be entirely overcome, this chapter ameliorates by marrying general insights into customary cases with case studies of broadly representative villages, selected to demonstrate the range of Chakma/Pahari experiences, and in the process identifies common elements of those experiences.

Analyses in this chapter first apply concepts of legal mobilisation and consciousness to personal, land and criminal cases related by their adjudicators, and where possible relate these case experiences from the perspectives of those personally involved. In the second part, attention turns to apply concepts of legal mobilisation and consciousness to the wider context of justice in three localities, illustrating the different ways in which community members navigate the complexities of the communitarian legal sphere. The questions posed are, how is customary law mobilised to resist the state and as a practice of identity? What

struggles for power frame the practice of law, and, finally, how do they affect legal consciousness?

2. Village Culture

2.1. Mobilisation and Pluralism

The sub-concept of legal mobilisation not only captures the deployment of law as a cultural resource, but also refers to the way it is utilised by community members, a matter now explored with reference to the views of the headmen and karbari who work within the system.[423] The first part interrogates actual levels of customary utilisation of the customary system, and the possible relationship between the extent to which the Chakma turn to customary law for help, and the multiplying routes to justice in the Hill Tracts.

Customary officials surveyed for this project tempered their claims that customary justice was the *primary* form of dispute resolution in the villages with a pragmatic acknowledgement that it was no longer the *sole* means of settling disputes. It was not possible to quantify this trend precisely due to the informal nature of the customary system; justice was dispensed through informal, community based, oral processes, there was no consistent collation or analysis of customary case data. The majority of headmen and karbari interviewed for this study reported anecdotally that case numbers were decreasing year on year, with most headmen hearing in the region of ten cases per annum. But, despite a perceived reduction in caseloads, it appeared that most headmen and karbari were confident that in village locations, only a very small number of disputes were taken outside the communitarian arena, where that arena was defined to include local political parties willing to dispense informal justice. Headmen believed that in any case most disputes were settled satisfactorily without their input at a karbari/village level where record keeping was more sporadic. A number attributed the reduced

[423] Pg. 64

caseloads to higher levels of development, and more educated, less fractious villagers.

That said, each mauza and village was affected by diverse sets of condition that included demographic factors such as the level of Bengali settlement, physical factors such as proximity to the urban centre of Rangamati, economic factors such as the dominant mode of production, and personal factors such as the capacity and inclination of local headmen, karbari and political activists. These conditions affected local needs for policing and dispute resolution in Pahari areas, and produced highly localised constellations of power and competing systems of local justice from within the communitarian arena. In more urbanised areas elected members were called upon more regularly to settle local disputes, sometimes with the assistance of customary officials and sometimes without.[424] In village Mauzas, however, political activists were most likely to affect customary usage through an unauthorised and often unacknowledged usurpation of or interference with the customary system. Practitioners reported that party activists frequently assumed a role in dispute resolution, sometimes in concert with customary officials but sometimes independently.[425] Indeed, some headmen and karbari felt that the reduction in customary caseload was due to the deterrent effect of the violence of political punishments meted out through informal justice systems. Whatever the balance of power between state, customary and political actors, however, the striking similarity was that despite the apparent state-in-dominance legal hierarchy, the communitarian domain exhibited a strong *internal* plurality through the introduction of political routes to justice.

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[424] Seeking dispute resolution through elected Upazilla Porishad Chairman is a right transplanted to the CHT from the plainlands.

[425] Some headmen thought the increased presence of alternative systems of justice at a local level affected the number of appellate cases. Three headmen respondents were no longer hearing any cases due to the political problems they experienced in their Mouzas, indeed two were unable to return to their villages.

2.2. Legal Process and Culture

Discussions revealed a consistent process that co-opted socially respected elders, and community within the locality to take part in customary hearings. All headmen and karbari participants suggested that after a case was brought to them, usually by way of a written note, a committee or panel would be established that reflected the subject matter and seriousness of the case. Membership of panels included teachers, social workers, farmers, and on occasions the elected members of the local upazilla porishad. The majority of participants were aware of the Chakma chiefs reform directives, all mentioned their attempts to involve women in the decision-making process, and half of the headmen interviewed had appointed women karbari. Headmen and karbari described their customary role as facilitating or negotiating justice based on a broad consensus within the community, rather than being a judge in the sense of a state court. This was frequently referred to as a positive facet of customary justice when compared to the state system; customary justice sought practical solutions that would satisfy both participants and onlookers, rather than decisions that would create winners and losers and stoke tensions within the community. In this light, the appointment of a panel of respected leaders was the first step in gaining a wider consensus for the ultimate decision. Some respondents felt that this more democratic process was itself a transformation, recalling a time when headmen and karbari were powerful enough to make decisions unilaterally. Headmen's power, it appeared, had shifted from an institutional foundation to one based on mutuality and community consent.

Customary law was mobilised as a counterbalance to development, and the process followed reflected the need to reinforce the alterity of the Chakma/Pahari. Participants felt that the development they had experienced after the CHTPA was, on balance, beneficial to their community, citing the expanded transport network, the development of schools and education, access to electricity and the expansion of agricultural technology as the ways in which the lifeworld of the indigenous people had been improved since 1997. The negative effects were felt in

the dissolution of notions of community and culture; the infiltration of Bengali and Indian cinema, fashion and even pornography were identified as affecting the way the youth perceived their own culture. In all responses, cases relating to the personal laws of community predominated and amongst them, the trends were toward dealing with illicit relationships and elopements, marital discord and domestic violence. Custom exercised in this instance was conceived as a clear statement of culture;

'Customary law is good for society, it is based on traditions that started from the beginning of civilisation, it is good for us, it is good for society'.(Manindral Kumar Talukder)

It was in light of these rapid changes that the customary system, above all others, represented a means through which Chakma culture could be reinforced and restated. All customary officials described a process which encouraged public participation. Participants described how they would ensure that the village knew when and where any prosecutions were taking place and how a public venue would be located. Performative elements of the customary process seemed knowingly linked to the need to (re)educate people as to customs and culture.

'The prosecutions happen in public... they are part of the village, they happen in an open place, people can hear and see what is going on. (The case) becomes an example, or inspiration that you shouldn't do this, the headmen give a speech to let people know it should not happen, they make clear it is unacceptable'.(Manindral Kumar Talukder)

2.3. Cases and Consciousness

Cases relating to personal relationships were judged according to the laws of individual communities, but never, it seemed, did these customs displace solutions that were perceived as fair or even pragmatic. A typical case was presented by Binoy Kumar Chakma, and concerned the desire of a young man and his girlfriend to marry against the wishes of their parents. The boy's parents had approached him to stop the marriage. Binoy had checked the background of the

couple and found there was no impediment to them marrying apart from the lack of approval from their parents. At that point he had called the karbari and the girls guardians for a discussion about the marriage. It appeared that the girl's parent was happy for the marriage to proceed, and so the customary role was to convince the boy's parents of the union's desirability. He considered this a good example of customary law in practice; the approach of headmen and karbari was geared toward legitimising relationships in the eyes of the community, and in this case the positive outcome was that the couple remained happily married with two children. The exception was when a woman entered into a relationship with a Bengali. Suronjon Chakma made an explicit link between the marriage of indigenous/Chakma women to a Settler and the alienation of Pahari lands. In this instance, the approach of the customary official would be to end the relationship and re-integrate the woman into Chakma/indigenous society.

Where divorce or marital disputes occurred the precarious position of women within the customary system was underscored further. Four cases of domestic abuse and divorce were cited during research, and in all of those cases the adjudicator sought to protect the relationship by calling for public undertakings not to abuse the spouse from the male party.[426] Procedural reforms being implemented by the Chakma chief were aimed at redressing the patriarchal bias of the customary system by making sure that any case with a woman party included people from her village of origin. However, the virtual consensus revealed over the role of the customary system of maintaining order and equilibrium suggests such procedural adaptations had not disrupted the overwhelming perception of the customary role as sustaining marital harmony above addressing male violence.

This was evidenced in a case where a woman had come to the headman's court to request a divorce due to her husband's drinking and violence, a situation

[426] All of which related to male drinking, an issue that the headmen and karbari were aware of and perceived a role in curbing bacchanalian excess. These matters are explored further in the case studies section.

complicated by her husband's position as a customary karbari. The karbari in question had a problem with alcohol and had severely beaten his wife on more than on occasion. On her first approach, the headmen had suggested she return to her husband but approached the karbari and exhorted him to stop the violence. The woman stated that this intervention had not stopped her husband's behaviours but she had been ashamed of asking for a divorce as society favoured the men. She went again to the headman when she had reached the end of her endurance. At this point, the headman said he would have granted a divorce if the woman had insisted, but he counselled again that she should return, and this time told the karbari that any further violence would end his marriage. The headman described his judgement as successful, the second intervention had stopped the karbari drinking and hitting his wife, and kept the family together. His solution had kept both parties happy, his role was not to destroy anything but to keep the community together. But his sanguinity was not shared by the woman, who told that her husband remained verbally abusive and that she still wanted a divorce. The drive for harmony had neither protected the most vulnerable nor achieved the social harmony that so infused accounts of the customary legal culture offered by its leadership.

Apart from family issues the other areas of formal concern for the customary system related to land, inheritance and public order. Despite the centrality of land to the wider discourse over the relationship between state and minority, the only land cases that could be heard within the customary system related to inheritance and boundary disputes within the indigenous community. In these disputes, the approach differed significantly from a state court in that the solution identified often involved dividing the disputed package of land so that each party received some succour from the law, an approach very different to the absolute alienation of land required by statutory land law. As an example, karbari Ranjit Taunchyangya described a dispute that had arisen in relation to a piece of unoccupied land lying next to an orchard. This had been specified as an inheritance to a Taunchyanga woman, but was being used by a fellow villager for cultivation. A committee of respected elders was formed to visit the land and talk to both parties to the

dispute. Whilst in most boundary disputes Ranjit felt an equal division of land was the correct way to progress, in this case the committee decided that the inheritor would receive the land, but the cultivator should be compensated by the 'legal' owner in cash to recognise his labour and investment. Both parties were happy and the judgement was adhered to because, according to Ranjit, they always valued the opinion of the people, and in this case the judgement was publicly deliberated and perceived as fair by both parties. Kulesh Bikash also flagged the case outcome as successful in that it avoided the case being taken either to appeal or outside of the customary system.

'I always try to bring both parties into agreement, that way it doesn't go to Rajas court, if anybody is not happy, they can seek justice from another source'. (Kulesh Bikash Chakma)

One final example of legal mobilisation at a local level related to the exportation of custom to the state courts given the recent cases recognising its constitutional validity. Headman Hitolar Dewan had instigated action against the Forestry Department over the fate of around 500 acres of land classified as reserved by the state. He had used his customary powers to resettle around 70 landless Chakma families on 100 acres of land which he asserted had been illegally taken by the Forestry Department. His intention was to fight the classification of the land in court, a suit that would, if successful, bring an additional 400 acres of reserved forest under customary control. His first application for the return of 100 acres had been successful, he sought the additional land to discharge what he felt was a moral responsibility to assist the most disadvantaged amongst his community. A similar mobilisation against the Forestry Department had taken place within the Taunchyangya area of Jograbil. Customary land powers mobilised against the state appeared a strategy gaining material support from the PCJSS and adopted by the more active headmen as a route to asserting and extending the physical boundaries of the customary domain.

The last case selected illustrates the peace-keeping role of the customary system and complex relationship between the legal forums available for the resolution of

cases that concern criminality. In this case, a woman had been sexually harassed by a group of men, one of whom returned to her house and assaulted her with a knife. He had then absconded from the village, and the woman's family had filed a formal complaint with the police and demanded his apprehension. The police couldn't find the culprit so imprisoned his father in the hope of ending his self-imposed exile. At this point, the family of the miscreant had approached headman Sujit Dewan, asking that he negotiate with the police. Sujit arranged for the victim's medical expenses to be met by the miscreant's family in the hope that the formal complaint would be withdrawn. Shortly afterwards, he was instructed by the JSS to try the case despite the lack of jurisdiction within the customary system in serious criminal matters. Still, Sujit felt this was an example of good cooperation between the two arms of justice, in that the culprit was so scared of reprisals from the PCJSS that he returned to the village, and the headman was able to demand compensation of 50,000 BDT for the victim whilst the PCJSS ensured that this was paid in full. It appeared that the state police were also aware of the customary/JSS prosecution, and had released his Father from the jail, thereby maintaining the boundaries between the Chakma community and the state

In this case, both the perpetrator of the assault and victim were prepared to talk about the impact of the judgement on them and their families. The victim, visibly distressed when discussing the attack, acknowledged both that compensation had been paid and that there had been no threat to her after the judgement due to the restrictions placed on the perpetrator by the headman and the PCJSS. However, she wanted the perpetrator removed from the village and imprisoned, and felt pressured into accepting a verdict which did not reflect the seriousness of the crime or the effect on her health and life. Further, she had been put under pressure by the family of the perpetrator to withdraw the criminal suit, which she had refused to do. She suffered health problems as a result of the attack and felt that in comparison her attacker had continued unmolested with his life.

For his part, the perpetrator felt that the judgement had been fair; he had admitted his crime and showed remorse and he felt that his previous character had been calibrated in deciding on a punishment. He wished to make clear his regret for the pain he had caused to his victim through actions taken whilst drunk. Although the case had been heard by the headman, the perpetrator perceived the punishment as being a PCJSS decision, and was grateful not to be beaten. At the same time, he stated that the police action had never been formally dropped, meaning that he was effectively confined to the village, because, whilst the police would not venture to Mogbar they would arrest him in Rangamati. His parents commented that the fine had been so large that they had had to sell all of their land to pay it, and that the failure to withdraw the police case had left a long shadow over their son's life.

Maintaining community autonomy appeared the first priority of the PCJSS and received wide support from the village community. The local karbari explained that whilst everyone understood that this case was not customary, they agreed that it was Chakma rather than a police matter. He felt both parties would have been harassed and bribed in a formal case, while in the customary court the focus on equilibrium meant both perpetrator and victim had a chance to recover from the crime. The lines between the summary justice of the PCJSS and the customary court were blurred, however, with the headman musing that whilst he had assumed responsibility for the girl, under customary rules he would have taken more account of her feelings. Instead, maintaining the boundaries of community had taken precedence over the commission of state law, *and* the principles of customary justice which would have been more cognisant of the victims' feelings in determining punishment. Whilst a negotiated solution had been reached to the satisfaction of the various arms of formal and informal legal practitioners, the equilibrium of the village community still appeared disrupted by the continuing ramifications of the assault and the unhappiness of its victim.

2.4. Remedies and Forum Shopping

One of the perceived weaknesses of the customary system revealed by research related to the power of the headmen and karbari to enforce their judgements and the apparent erosion of the collectivity required to maintain order without force. Pragmatic solutions to social, personal and land disputes were only of value if all parties to the case were prepared to accept and implement them. The tools at the disposal of customary officials were limited in this regard, and the remedies that they could suggest were also constrained by the rules base of the system. Public shaming had been integral to the customary system but there appeared a wide recognition that this was now unacceptable and it was rarely practised. Only one example was offered of a punishment where shaming had been intended; this was a case where a young girl had killed herself after being made pregnant by an older man. The punishment was to water a banyan tree for a day, in full view of the village. The response of Manindralal Kumar Talukder was more typical, he noted 'There *are no physical punishments in customary law, the headmen can only fine 25 taka'.* After each prosecution, he continued, they would talk to the guilty party and if he admitted guilt.

'They try to convince them to come to an agreement with the other person. In the case when the person does not agree that he is guilty, we take witnesses, we might then take the case to the formal court'. (Manindralal Chakma)

Forum shopping in the minds of participants was linked to customary failures in enforcement. Manindralal was one of the few headmen who saw formal justice as a viable option for a Pahari, the far more common situation was that the unsuccessful party to a customary action would seek support from the local political parties to give power to their case. In some instances, the customary system was bypassed altogether by parties seeking to gain an advantage by eliciting the support of the armed cadres. How such a course of action ended would depend largely on the local constellation of power, that is the respect that the local customary officials were held in, and the strength of the local party. For

some political activists, these approaches were welcome. Headman and PCJSS activist Ketan Chakma noted that;

'The JSS don't want to do this, the public want the JSS, because the headmen's code is not powerful. The public wants to go to the political parties so the JSS tries to support the headmen...it is a very positive relationship between the political and the customary, with JSS supporting the headmen and karbari'. (Ketan Chakma)

Ketan saw nuances in the relationship between the customary and political sphere; he felt Chakma custom required compromise to guide the settlement of disputes whilst other forms of justice compelled one party to be found guilty. In his area, custom and its methods took priority over other forms of settlement and customary and political officials worked together to uphold the customary system, with the political activists enforcing the headmen's judgements. Karbari Buddha Chakma also noted the positive effect on his village of being able to call on political activists to address social problems, pointing to the decrease in drinking and gambling his partnership with the JSS had bought about. This was not always the case, however, and other headmen saw the involvement of the political parties as degrading the customary system rather than democratising it. Patindralal Chakma felt that

'It is possible that in future this customary system will be diminished because with time people tend to go to political parties for a solution or to other sources... people go to them and they can stick their nose into these disputes'. (Patindralal Chakma)

The main reason why customary judgements were respected was the moral authority of the customary judge, headmen and karbari had to command respect through their actions and attitude toward society.[427] During field research the

[427] This was raised by two women headmen, Jonaki and Kalindi Chakma, who were critical of headmen who used their offices for financial gain, e.g.

suggestion was made that some headmen used their powers to effect land mutations for commercial gain, to the point of alienating land to settlers for the right fee.[428] Even amongst the headmen there were whispers that some of their colleagues were either not competent or dishonest, a factor often attributed to the low capacity within the system and the lack of public reward. PCJSS and UPDF leaders both cited customary corruption as reasons for their becoming involved in the dispensation of local justice. Respondents such as headman Manindralal Chakma, however, drew attention to the lack of moral authority amongst party political law enforcers, who didn't investigate cases, effected harsh punishments and were also suspected of corruption and even collusion with the army. The authority of the headmen and the customary system was set against the degraded practices of local political operators;

'When we practice customary law, we keep our eyes open to everything, when it comes to politics, the left keeps a blind eye on their side, the right wing is keeping their eye only on the right. They are only keeping faith with ideology, being less tolerant on other views and only seeing part of the picture'. (Babatosh Chakma)

Violence was identified as a common problem, one headman noting that remote mauzas were ruled more by armed cadres, who would force customary officials to sign off verdicts. A material example was offered by Santi Bijoy Chakma, who described the case of a couple had been caught and beaten by youths after being accused of an illicit relationship. He had resisted calls from local political activists to allow a public beating to be imposed and had insisted on the imposition of the customary fine of a pig and rooster. Santi Bijoy cited this as another reason why the CHTPA needed to be implemented, the incorporation of the customary

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to mutate land for the benefit of settlers. Moral authority as conceptualised by respondents was

[428] A point also made by Advocate Jewel Dewan, Head of the local branch of the Legal Aid Services Trust.

system into democratic institutions would force the cadres to disarm and disappear, and facilitate a return to the uninhibited practice of customary law. This sentiment was shared by Sujit Dewan, who drew attention again to the difficult geography in the CHT. People in the field did not listen to their commanders at the centre, and were becoming involved in law because the CHTPA had not been fully implemented. There was a causal link between the atmosphere of fear created by the political stasis over the CHTPA and the loss of confidence in customary law amongst the citizenry.

2.5. Culture and Consciousness

In terms of legal culture then, these observations paint a picture of some complexity. Customary institutions were perceived as the primary source of justice, in most cases commanding the respect of the people and perceived as upholding Chakma and Taunchyangya customs. The legal consciousness expressed by customary officials as characteristic of the communitarian domain was based on ideations of community harmony, common interest and accessible processes that chimed with perceptions of precolonial practice. Meanwhile, there was evidence that the Chakma chief's reforms were taking effect, with a high level of awareness of the requirements of gender parity, women's participation in judgements, more women karbari and a definitive shift away from shaming and violence as legal remedies. Interactions between the relatively democratic governance village committees set up by political groups were perceived as positive where they worked in concert with headmen and karbari on issues of development and planning, whilst the youth committees supported customary officials in apprehending miscreants and bringing them to the customary system. In some instances, political activists operated in concert with the customary officials but at times the political route was viewed as a discrete alternative to the customary system. The main reason given for applicants bypassing the customary system was that judgements could be enforced through force, and that further, the first complainant to the political groups would receive a favoured judgement.

The characterisation of the customary system as a bounded completeness was almost entirely displaced by the frequency in which customary officials described its practical application as an ongoing negotiation or navigation between customary principles, morality and political ideologies. Yet the broad conclusion drawn here is that the central premise of critical communitarianism holds true in this account of legal processes in the Hill Tracts. The indigenous communities, in this case the Chakma, mobilised law as practices of their identity, perceiving its role as expressing their identity first as Pahari, in the sense of their law representing a clear cultural alterity to the state, and then, as a Chakma, in the sense of their law expressing their particular national identity. Undoubtedly, the nature and relevance of the colonially anointed system of customary law was highly contested at a local level, where the various demands for democratisation and control were constantly absorbed and synthesised according to highly local contexts. Indeed, each mauza and village was the loci of an ongoing rejection of the state, but also the site of power struggles between different groups and individuals as to ownership of the law.

These struggles did not displace the customary system, however, but represented an evolution of historically anointed customary law to a more broadly defined communitarian law emerging explicitly to augment the struggle of the wider Pahari community to retain its autonomy. Customary law was recognised as integral to the subjective distinctions drawn between state and community, and invested with a moral and emotional resonance lacking in the organs of the state. At the same time, the effectiveness of moral authority alone in maintaining local harmony was perceived as diminishing in the face of the rapid changes occurring in society. The alternative local forums were mainly informal political adjudications and to a lesser extent, elected UP members, but neither route was entirely discrete from the customary system. Instead, local alliances between different sources of power emerged from the clash of ideologies and legal ontologies. At the most local level, law was mobilised to define community and community became the site at which identity was contested, redefined and renewed.

In the next section this broad conclusion is explored further through case studies of three separate sites spanning rural and urban locations. Legal culture is defined through enquiries into the way law is mobilised as a practice of identity, and the way research participants inside and outside the customary system experience and understand law.

3. Locality Case Studies

As the project moves to village justice, it is important again to highlight the research limitations created by post-conflict restrictions on movement, and methods used to address those limitations. For research locations within the boundaries of the Rangamati urban area, multiple visits to sites were possible, allowing a wider range of analysis within the limited time allowed. For village locations, however, visits were clandestine and limited to a maximum of three instances, and for this reason workshops were convened in addition to individual interviews to gain as wide a range of respondents as possible. Questions for both workshop and individual sessions were structured to reflect the wider law-in-context approach employed by Ewick and Silbey; respondents were invited to share their experiences of the social and economic structures of the village, their perceptions of community leadership and local governance, and only after these broad discussions asked to share their experiences of customary law.[429]

Fieldwork for this project was conducted primarily in the Rangamati district, and the villages selected were all within three hours journey of Rangamati town. All were predominantly Chakma or Taunchyangya areas, though Jograbil contained substantial Bengali settlements. The villages studied differed in their political complexion, one PCJSS, one UPDF, and one urban area of greater political plurality. In relation to each model area, a similar structure will be followed, first a profile of the headman and karbari, then discussion of the perceptions of justice in

[429] Patricia Ewick and Susan S Silbey, 'Conformity, Contestation and Resistance: An Account of Legal Consciousness.' (n 199).

the town areas, and finally examples of cases heard in the villages and an analysis of legal mobilisation and consciousness in the particular constellation of power in that area.

3.1. Kaynda, Mouza Number 129

Kaynda mauza was located thirty minutes by boat from Rangamati town. The area covers six villages, and a total population of 507 Chakma families. Residents listed their main livelihoods as jum farming, gardens, teak and fruit cultivation, and fishing. The village had seen many developments since the CHTPA; there were three junior schools, three primary schools and the construction of a high school was about to begin. Infrastructure developments had improved the economic position of the village, there was now a three-kilometre path between the villages and the road, a bridge connecting the villages to each other and water culverts to assist with irrigation.

The headman was Nobodip Chakma, a headman since his Father's death in 1988. In the past, he was very active and took his duties to distribute land, collect tax and prosecute disputes seriously. Nobodip was no longer discharging these functions in the Mouza; he could no longer stay due to political coercion and now lived in Rangamati. Maybe two to three years ago, he became physically unable to lead and now he only collected tax and distributed land. There were six karbari in the mauza, and they were currently trying to appoint a female karbari in accordance with the Rajas' wishes. Nobodip expressed concern about the abilities of his mauza karbari;

'The karbari are the leaders, but they are simple minded, they are not critical minded, if they do solve one problem they make five more'.

His responsibilities for issuing certificates of land ownership and developing the village were shared with the UP Member, who was responsible for distribution of government resources. In terms of village justice, however, Nobodip stated that his community leadership duties and village prosecutions had been superseded by

the political parties, who now formed a village committee for the discharge of local prosecutions:

'The headmen and karbari are not part of the committee. I am feeling fear for telling you this, there are powerful people in the village who are more powerful than the central committee (of the PCJSS). They are now saying that they don't need a headman or karbari, they can do all the judgements themselves.'[430]

When prosecuting cases, most of his judgements had been in family cases, elopements and minor land disputes such as over property boundaries. Headmen were prevented from fining more than 100 taka and sought instead to find a solution that both parties and the rest of the village would adhere to. Now that the political parties were in charge, this community consensus had been irretrievably lost. Nobodip stated that:

'You have to obey the power, you have to obey the political party in the Mouza, if they don't they pay. When the political party hear of something wrong, they will go and use their power. They will fine (the culprits) 2 of 3 lakhs[431]*, in simple cases'.*

Nobodip said he no longer knew what happened in cases tried in his Mouza, though he gave examples of judgements he had made before his withdrawal from this role. In his view, the appropriation by the political parties of the customary system had led to a deterioration in the type of justice meted out in his mauza, and an erosion of customary values.

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[430] He was referring to the relative power of local activists against the central committee vis-à-vis the customary system, given the formal policy of the PCJSS was to support headmen in their discharge of customary duties.

[431] The equivalent of 2 -3 thousand pounds.

'In the customary court, they prosecute the case in accordance with customary laws. They focus on keeping the balance of society, the harmony of society, the social order. But I think the political parties do not do this, they will impose fines. In customary law, there is a right of appeal, in political parties the verdict is the end, and the people have to implement it, if they don't they will be in trouble'.

Three visits to Kaynda mauza were conducted, once to interview the karbari, once with Nobodip for a workshop with a group of karbari and village elders and once for a further workshop with leading members of the local PCJSS, the karbari and two village women.[432] At the outset it is salutary to note that the discomfort felt by the headman over his exclusion both from local leadership and from the justice process was not necessarily reflected in the relationships formed at ground level between the customary system and the local political leadership. Instead a complex and perhaps more functionally effective picture emerged of an expanded communitarian domain on the ground.

Nobodip clarified his reasons for withdrawal from the customary justice system at a later workshop, describing how he had been threatened twice in the commission of a land dispute in one of the villages, and had decided that he could not continue to live or work in the mauza as a result. The case related to a land case in which his signature was required to end the dispute by confirming the ownership of one of the parties. Nobodip was taken to a house by a group of political party activists and forced to sign a pre-written verdict. Nobodip explained;

'If I don't sign they will go into the jungle and make a complaint against me, saying that I don't obey, that I am not for them. It is then a threat for my life. If I sign, I understand that I will be in trouble in future and as the

[432] All the karbari participated in the workshops with and without the headman, and responded differently in his presence.

land dispute is complex, for the sake of my life, I gave my signature, (because it's) better than losing my life'.

The first Kaynda workshop at Bosonto Village, was attended by Nobodip, three of the six karbari of the mauza and two of the Bosonto village elders involved in both customary and political judgements. The karbari confirmed most of the cases they heard were women or family related cases, and that they were unable to prosecute cases such as murder or rape, which were in any case extremely rare. All of the karbari present were literate, and had been actively involved in developing the customary system to reflect the demands of the time, cases had to be submitted in writing and they kept records of their judgement. They were unable to appoint a woman karbari as single woman had to leave the village on marriage and married women tended to be too busy. They were aware of the chief's procedural reforms and strove to involve women on their panels. They collectively agreed that karbari and elders were entitled to judge because;

'They are wise, they prosecute from their wisdom, their different experiences, different solutions, they are wise so the customary law can benefit from their wisdom'.

There was also a level of agreement about their approach to judgement in a customary case; they agreed that a judgement should;

'Mainly focus on the settlement as our role is to keep the peace in society, and if it is just the applying of customary law, there will be no peace, so what is the point of the law?'

For the karbari, their role as guardians of Chakma custom was secondary to their responsibility to re-establish equilibrium in the community in the event of a dispute, and so maintain peace in the village. Despite this rather pragmatic view of custom, their social role in regulating Chakma custom was still important to the village. Before a Chakma marriage, custom demanded that the family trees were discussed in a ceremony called 'gorba hudum', so that the strict customary rules on bloodlines can be enforced. The karbari were responsible for organising this

ceremony, weddings and funerals. These social functions remained very similar to the ways their fathers had practised customary law, but they also felt that custom was not immune to outside influence saying;

'Everything changes with time, so we know that customary law changes but we cannot predict what it will be in future'.

When asked about the level of cases coming through the karbari, they thought that the customary system was more active now than before the Peace Accord. But at this point, the karbari present disagreed about how this period of peace had affected the commission of justice in their respective villages. Amalydan Chakma, the elderly head of Bosonto village, said that he avoided prosecutions in his village. Alongside the customary structure, the PCJSS ran a village committee, and a youth committee. After the CHTPA, the level of interference in the customary system had increased as the army no longer policed the area, whereas before the Santi Bahini panchayat had used customary procedures to dispense justice. Now, villagers would frequently bypass the karbari to take their problems to the village committee as they had armed force to back them up.

Two other Kaynda karbari, Mohubdrala Chakma, and Prema Chakma appeared to have reached a practical and effective accommodation with the local political leadership however. They strongly disagreed with the idea that the customary system was undermined by the involvement of political actors, suggesting instead that in their villages, the customary system was supported by political activists, a position that reflected formal PCJSS policy. They reported that the village committees acted as agencies for their customary judgements, collecting and passing on information to help with dispute resolution. The youth committee worked for them to investigate wrongdoing and helped them to apprehend the culprits if properly instructed to do so by the village committee and the karbari. Political party activists were invited onto the karbari's panels to assist with the judgement, a factor that gave greater weight to their judgements. They strongly disagreed with the headman and with Amalydan Chakma in pointing out, that the PCJSS *'are part of us as well, that they are part of the community'*.

These views were explored in two further workshops, without the headmen present, the first in Aguile village with Amalydan Chakma, two farmers and a businessman who were called regularly to the committee, and one member of the PCJSS village committee. Here, Amalydan placed greater emphasis on the peaceful nature of the village, with the reason for the lack of customary cases shifting to the relative peace of the village.

'It is quite peaceful, barely one case goes to the karbari court, there is no theft so you can leave things around and nobody takes things, so its peaceful. The only prosecutions we do are women related, the moral issues'.

Without the headman present, Amalydan was more open about the alignment of the customary system with the village committee, with a youth committee also being appointed by the PCJSS. He felt that due deference was paid to the karbari by committee members. When asked if people were more likely to obey the village committee, its member Trisingha Chakma retorted;

'It's not like that, it's a committee who help the karbari, the karbari decision is the social decision...if the karbari can't give the decision only then it goes to the party'. (Trinsangho Chakma)

The position of the youth committee in relation to both the customary system and the village committee was also clarified, Rupanto Chakma describing the youth as a workforce that did the work of the village committee and karbari at social occasions, but also;

'They are like the police, if someone is having an illicit relationship they will go and catch them. Or if a couple is fighting they will go and check. They work independently, they catch people, and...will then take a role in the decision and the panel'. (Rupanto Chakma)

It was a role Trinsangho Chakma described as being a 'social police';

'It is really about social values, it is their social duty, so even in city areas, it happens. You don't have to call them, the karbari does not have to order the youth to catch someone'.

They work for the community in ensuring that both social rules and morality are upheld.

The final workshop joined karbari and elders with the local PCJSS activist, Rabindandral Chakma. Though a former member of Santi Bahini and involved in the Gram Panchayats at the time, he was at pains to point out that the village committee was a different body and had a different role. The village committee respected traditions but tried to modernise the laws to reflect social changes. It existed in its own right but always collaborated with customary representatives. The headmen and karbari struggled to get people to obey them and the village committee was a necessary support, he noted;

'Cases are not normally held by the village committee but...they hear the small cases, of drinking, relationships they still prosecute because of the power they get from the party. It's easier for them to implement the verdict, sometimes they prosecute for that reason, but ...there are no complaints from the customary law officers because they are involved.' (Rabindandral Chakma)

The portrait painted by Rabindralal was of a mutual relationship between the customary system and the more powerful political actors in the Kaynda locality. Their power was disbursed to augment the customary system, not to undermine it but to ensure that the disputes were kept inside the village. Rabindralal stated explicitly that the reason for involving the village committee in the dispensation of justice was to make sure villagers did not have to go to the formal courts, where they were harassed financially and verbally. This was not just a pragmatic consideration, but an ideological one; Rabindralal felt that formal law was the law of the peoples from the plains. For the Chakma;

'Customs and culture and tradition is medicine for the soul, they require government curation, the government needs to provide the necessary support, (our) culture is being lost, against the big ones of India and Hollywood...(the) government is not nurturing our culture'.

This case study concludes with an example of a recent case heard in the Kaynda Para Village, related by its karbari Mohubdrala Chakma but heard by the village committee with his full approval.

'This case wasn't in my court, this was in Panchayat Court, but I was involved, I was part of the panel. One man used to do theft, he used to do drinking and drugs. Before, he was fined and threatened with punishment of 20 strokes of a whip and 5000 Taka if he commits to the crime again. He did it again, and he hadn't paid his fine. So, they took his fine from his rice and goods. He was heard again, and told that if he committed again he would receive 40 lashes and 10,000 Taka'.

Mohubdrala felt that the judgement was an example of good justice. The physical punishment had never been meted out, but the threat of violence was a powerful incentive for the miscreant to conform to wider social mores. He stated that:

They threatened him, so now he knows he will get this(beating) if he commits the crime again. The punishment is a prevention of the crime, and that is why it is beautiful.

As a customary official, he had been instrumental in this case and in the decision to use a threat of violence in both the previous and present case. In his view, his role as karbari was to maintain and preserve both the peace of the village, and its autonomy; reducing the need to call on the state was a key part of his role. As a customary official, however, he could not invoke violence without a level of integration between the customary office and the PCJSS. At village level this integration was negotiated, consensual and complementary as participants in both customary and political institutions shared a common view of the legal culture as being a means of excluding the state from the locality. Within the boundaries of

community, the different ontologies of customary and political were in a process of constant iteration. The consensual basis of the historically grounded customary system was both subverted and reinforced by political activists. In the village it appeared that community members were actively participating in the construction of a legality drawing on both historicised custom and political policy, thus developing a legal consciousness synthesised from an amalgam of both.

3.2. Sebakkon Mouza Number 1, Naniochari Village

The headman of Sebakkon mauza is Mrinul Kanti Dewan, one of the most senior of the Rangamati headmen having been in post since 1962. He was already considering his retirement and expected his highly qualified daughter to inherit the headman position in Sebakkon, fulfilling his dream of female empowerment. There were twenty villages in Sebakkon mauza and sixteen karbari, including the six female karbari appointed under the Rajas scheme. Most of the land was grove land, and the limited paddy was regularly submerged when the water rose annually on Kaptai lake. Mrinal Kanti had witnessed impressive developments in the area, Sebakkon had one high school, four government junior high schools and eight primary schools, all villages had connecting roads, and within the mauza they had a community health clinic and a family planning clinic. The local economy was stronger and more stable than when he started as headman, and he had established an agricultural office in the Mouza. Mrinal felt that the scale of these developments was partly attributable to his interactions with local government, he had worked for the RHDC from 1989. He had also been elected as UP Chairman, and though this position was now taken by Priti Moy Chakma of the UPDF, they continued to work closely together on improving their area. The mauza did not yet have a connection to mains electricity, however, and he felt frustrated at what he felt to be a personal failure to raise the bribe necessary for the power company to bring forward the electrification of Sebakkon.

Sebakkon is part of an area under the full control of the UPDF, the political party frequently attributed with acts of sectarian violence in the CHT. Mrinal identified Priti Moy Chakma and himself as the most powerful leaders in the Sebakkon

mauza. Though the UPDF openly called for the replacement of the customary system by democratic village governance, Mrinal Kanti reported a good working relationship with local armed cadres. Lately, however, there had been problems with the local UPDF committees usurping the karbari, and in some villages, their usurpation was absolute, breaching the rapprochement he had reached with the UPDF under which prosecutions were heard jointly by party acolytes and customary officials. He explained that:

'The conflict is that the village committee is prosecuting cases, but they are not using the karbari or headmen's office, they are partial and if they know someone they are favouring them, (the headmen and karbari) are being dishonoured they are slowly going away from the cases…the UPDF have guns so they can do what they want'.

This impasse had led to the number of customary cases declining over time because the political parties were doing all of the prosecutions. According to Mrinul Kanti there was a huge difference in the punishments;

'When they fine they are doing it by themselves, they are giving verdicts to whip the guilty parties, they are outcasting (sic) families, they have no guidelines. I can only fine 25 Taka at most, and during my 55 years as a headman I have never ever touched anyone, also we don't do any outcasting or social shaming'.

Despite their role in the delivery of justice, Mrinal felt that customary law was still an important feature of life in the villages of Sebakkon.

'Customary law plays a good role in the village and people have respect for the customary law, and they are still giving tax to the headmen, the Raja and the government. In terms of peace and order, customary law is still, there, at present the political parties are taking some of it, like the prosecutions, but other than that it is there'.

The situation described by Mrinal Kanti Dewan was investigated more closely in relation to the lakeside village of Naniochari, within Sebakkon. To this end, a meeting was held with karbari Kurnashish Khisa, who combined his customary role with his role as assistant chairman of the UPDF convened village committee, and Tapan Chakma, the secretary of the Naniochari village committee. Kurnashish had inherited the karbari office from his father, had been directly involved in the village committee for three years, and was also an active member of the UPDF. The Naniochari situation was striking in that the customary system appeared to have merged almost completely with the structures created by the UPDF. Most village business was conducted through the village committee, which comprised eleven members, of which two were women. Members were selected at an open meeting of the villagers at which the merits of each possible candidate were discussed, Kurnashish emphasised that appointments were the '*decision of the whole village*'. The committee was chaired by an elder of the village, and customary headmen, karbari and UP Councillors. were seen as advisors to the committee. The role of the village committee, however, appeared very similar to the self-described role of the karbari. Kurnashish reported that

'According to village society, when people get married they help, they have a role in solving problems, any problem in village society they solve...Sometimes the Bangladesh government takes the decision to increase the water level, and if the village people are troubled, they always protest against this activity, to the Deputy Commissioner'.(Kurnashish Khisa)

Further, the karbari was a member of the village committee and always assisted with justice matters and advised on decisions. The village committee did not have any women members but Kurnashish encouraged them to become involved. He stated that:

'We are always trying to create opportunities for women, in economic life and in social life, we have a cooperative for weaving, they are supporting this indigenous Jumma craft'.

The village also had a youth committee which he described as a democratic youth forum that promoted social and religious work. The following case, reported by Kurnashish Chakma, encapsulated how the village committee and youth committee worked in relation to dispute resolution.

'A village girl and a man were lovers, they had a three-year relationship. They have illegally had physical relations, and the girl became pregnant. Everyone knew about the pregnancy, and after the baby, the man didn't want to marry the female. The village committee took the decision that they should marry, because it was illegal. This was a secret relationship, they tried to find out who was the father. Two females were involved in the village committee so they found out from the woman who the father was... When they were sure, he had to marry her. Also, he had to receive punishment, they demanded some money. Now are they are married, and have two children, they are happy'. (Kurnashish Chakma)

The method of adjudication was a village committee meeting, with the karbari acting as advisor, and the adjudication very similar to those meted out by headmen and karbari operating on their own. The only possible distinction was in the fine as punishment, but as both headmen and karbari often offered compensation as part of their judgement, even this did not distinguish UPDF judgement significantly from a customary intervention.

This merging of customary traditions, political governance and local administration seemed to have been accomplished with little tension at the level of the village, despite the headman's discomfort at the lack of customary involvement elsewhere in the mauza. The karbari occupied a dual role, was conversant with customary law but accepted the armed cadres as supportive of peace and harmony in the village. He continued to pay homage to the Circle chief as traditional leader, and even appeared to see a parallel appellate system available to his village under these arrangements. Kurnashish noted that if the outcome was unsatisfactory, parties could take the case either to the Raja's court or to the UPDF, both of whom could give a final judgement. This seemed to reflect the distrust of the

headmen's office apparent amongst the UPDF leadership; though accusations were not levelled explicitly at Mrinal Kanti, Tapan Chakma stated that some headmen had betrayed the indigenous people by transferring land to Bengalis for profit. Both political and customary justice were clearly identified as a way to hold cases within the Chakma community and prevent the derogation of land to outside parties, and political and customary actors were inseparably bound by the overriding joint enterprise of preventing the transfer of indigenous land to Bengali settlers.

In terms of legal mobilisation, therefore, it appeared that the synthesised institutions at village level were directed to the overriding priority of maintaining the boundaries of community against the state. An augmented form of customary law was practised even though the UPDF leadership explicitly rejected the supposedly 'feudal' customary system. Further, in terms of legal consciousness, the actors surveyed still followed broadly customary processes, included and honoured the local karbari and recognised the alterity of the system as a significant community strength. The immediate political conflict, therefore, diluted but did not displace the consciousness of the Pahari/Chakma as defined by culture as well as material interests in land or even by divergent political ideology. Research again suggested that the legal culture formed at a local level by the intersection of the customary and political sphere was characterised by an inherent dynamism, as evidenced by the constant renegotiation of the meaning of customary within the complex and sometimes violent politics of the hills.

3.3. Jograbil Mouza Number 104

The next case study moves to the urban location of Jograbil mauza located on the north-western flank of the Rangamati city area, and covering the diverse Assambusti suburb and four of the adjoining Taunchangya dominated villages. After partition, a number of displaced Assamese Hindus made their home on free land next to Rangamati, the name of the Assambusti suburb means '*slums of the Assamese*'. Over the years new settlers joined the Assamese Homi community until it was also was home to large groups of Chakma, Taunchyanga and Marma

peoples and smaller groups of Rakhine, Lushai, Garo, Santal, and Tripura as well as ethnically Bengali Hindu and Buddhist families. All these groups recognise the Chakma leadership of the customary system and, with the exception of the Bengalis, identified with the label of indigenous.[433] Jograbil Mouza is defined as a municipal area, and has a population of around 10-12000 families. Its rural suburbs are now joined to Assambusti by a bridge, and due to their proximity to the town most lands are in private ownership and most residents are service holders and businessmen.

Some Bengali Muslim families were '*Purumbusti*', or early settlers who arrived in Rangamati before independence and assimilated relatively easily into this mixed neighbourhood. Others were the hated new settlers who arrived either through the transmigration policy or through illegal settlements after the Peace Accord was signed. Illegal settlement continued to create tension in Assambusti, with visible evidence of land alienation observed in the large number of precarious dwellings at the lake fringes. Headman Surojan told how rules on customary land transfer were frequently circumvented through invocation of religious protections of sacred Islamic premises; settlers would initially designate land as a mosque and thus sacred from interference, after which numerous families arrived to stake out their homes within the 'mosque' territory. The partisan apathy of the army made it impossible for customary functionaries in intervene, rendering Assambusti an area characterised by inter-community tensions and occasional outbreaks of violence. Later settlers had not integrated into the existing, indigenous-identifying community, and the previously harmonious relationship of the indigenous communities with their Purumbusti neighbours was a casualty of their unwelcome presence. The Purumbusti were radicalised by connection with the

[433] 'The Homi felt more endangered than the Chakma. 'We came during the second world war, from the Assam Rifles, the name of the indigenous group dialect, and songs is Ohomian (Homi). We lost our language in this place.' (Kamal Kumar Assam)

settlers and empowered by the change in local demography brought about by transmigration.

Surojan Dewan had been the headman of Jograbil mauza for five years. There were six areas within the mauza, five villages and the Assambusti suburb, and six karbari positions. He was committed to finding women karbari to join his team, but had not yet found the right people. Surojan defined his role as tax collector and social leader, facilitating land mutations, resolving local disputes, and prosecuting minor incidents. Surojan strongly self-identified as an indigenous person and was familiar with ILO 169 and the UNDRIP after visiting Australia as a guest of the UNDP.

The arrangements for local justice appeared complex. Jograbil was in a municipal area, so there was a para municipal council and a municipal women's council. Women's cases were sometimes referred to the municipal council, whilst some cases went directly to the para, and some to the karbari and headman. In Assambusti, there was also a youth committee, and youth wings of the PCJSS, and the two mainstream political parties, the Chattra League of the AL and the Chattra Dhol of the Bangladesh National Party. The PCJSS youth committee did not join prosecutions but supported the headman in social events. In Jograbil, diversity was not perceived as problematic, Surojan saw his role as negotiating a path between the different branches of formal government, and the various political parties. He estimated that some months he received one or two cases from the community or karbari, and sometimes none at all.

The Assambusti suburb was the most culturally diverse of Jograbil mauza, but some of the resident communities were very small. Surojan sought representation from their communities when hearing cases so that they could be decided in accordance with that communities' customs. In Assambusti, it was normal for the communities identifying as indigenous to mingle and inter-marry, though it was still considered unacceptable for marriages to occur between the new Muslim settlers and indigenous people. The strict customary laws followed in the villages were adapting to reflect this diversity. Surojan felt that as Chakma people were

the majority, some other communities were now following Chakma customs in law, marriage and other festivals, rather than maintaining their own cultures. Further, the closely related Marma and Rakhine communities were also merging their cultures.

'We have Chakma, we have Marmas, but they are not maintaining their own cultures, the Chakmas are picking up Marma, Rakhine cultures... Tripura girls marry the Assam boys, it is happening (but) it is not a problem in our society, in this community'

When discussing legal cases, Surojan felt that the many indigenous and immigrant communities of Jograbil preferred the customary system to other options because of its speed and accessibility, noting that:

'If they go the local police or the courts, they will have to pay money and it is also a complicated system, takes a long time and the people get harassed by the government people when they are in court'.

To illustrate the justice process in Jograbil, Surojan selected a case typical of Assambusti in that it captured the diverse demographic and the use of the customary system as an antidote to the social fragmentation generated by urban development.

'Around 9 or 10 months ago, there was a boy whose father was Chakma, and mother was Tripura. He had a love affair with a Chakma girl, and he brought her home and kept her in his home. The girl's parents didn't agree so they brought it to the community. There was a panel of elders, a woman' councillor...seven members of the committee. They talked and investigated...the girl was below eighteen...and also the boy also was a drinker, they know that he drinks and takes weed, ganga. So, the committee decided that the girl should be handed over to her guardians, and after two months they saw that the boy was arrested for possession of

Yabba.[434] Now the girl is studying, and they are applauding the decision of the headman, if you would have decided to let them marry the girls' life would have been destroyed. The hearing was held in the house of the parashabo female councillor. There was a crowd present as observers, not to participate, the hearing is public knowledge because... this is a very close community, so people get to know by talking'.

Surojan Dewan appeared to negotiate the complicated political and social landscape with relative ease. Although knowledgeable about Chakma law, he had crafted a way of being 'headman' that was less based on Chakma identification, and more on his skills in representing the multiple minority communities that had made Assambusti home. Surojan consciously sought to develop concepts of community based on the relatively recent 'indigenous' category, and appeared to use local administrative and political structures to underscore that unity.

Surojan was identified him as an influential local leader by his karbari but shared this mantle with the leaders of other minority communities, elected officials and political parties. One colleague was Larma Lushai, chair of the village committee in Assambusti, a member of the PCJSS and a leading member of the Lushai community. He had previously been an officer in the Bangladeshi police but had taken up politics and community work on his retirement, because he felt the rights of indigenous people were not respected. Larma described the village committee as having a dual role in his view;

'To protest against the government, and to make people conscious of their rights about their land and their culture. And the law, legality. We are living here, so many indigenous groups, we can't always practice our customs, our cultures our traditions, so it is our duty to try and raise awareness of people of their customs.' (Larma Lushai)

[434] An amphetamine type drug common in Bangladesh

There are so many different communities in the area that the promotion of culture was conducted under the canopy of indigeneity, to the point that the Assambusti community was defined by its diversity;

'Though we are so many different indigenous groups, living in this small area, we try to promote their own culture, own customs, own festivals, own religions, everything, and we also get together, we don't discriminate against any indigenous group, we try to stay together, with a bond, this is our duty, to maintain, promote and help to organise how to practice those customs and religious and cultural festivals. That is why the community loves us'.

According to Larma, the village committee worked together with the headman and karbari, they organised social events together, and worked to overcome social problems together. Both Larma Lushai and his deputy Kamal Kumar Assam described the town committee as having a role as the village police, despite state police being active. Larma explained that the state police got involved in communal clashes but not in indigenous business. The boundary between the state and the communitarian was maintained by mutual consent, with the police attending only when invited to do so by members of the community, or when an inter-community dispute threatened public order. Kamal Kumar stated that their committee tried, first to solve problems within the community by negotiation and consent, and this meant trying to avoid public officials even if they were ethnically indigenous. Referring to the HDCs and Regional Council, he explained that indigenous representatives of the mainstream parties, the Awami League and BNP, were appointed by the government and worked for them, rather than for the indigenous communities. The local porishad councillor, Baching Marma, had no such affiliation, and had run for public office as an independent to try and address the bias towards Bengali people in the Rangamati porishad(town council).

The villages adjoining Assambusti were once isolated from the urban conurbation of Rangamati, but were now connected by road and bridge. According to the

karbari interviewed, there was no communal land left in the area, all of it having been parcelled up for individual sale as land prices in the villages escalated exponentially. Two of the four Jograbil villages were Chakma and two were dominated by the Taunchyanga people. The following analysis of legal practice is from a Taunchyanga Village in Jograbil. Karbari Kolphoronjon Taunchyanga describing a plural role that involved the headman, village elders, local PCJSS representatives and porishad members. He felt that it made no difference which route to justice a villager might choose, as all these functionaries would always make decisions together and work in concert to prevent people from taking disputes to the formal justice system.

'(Customary law) is important because cases can be solved at a village level. If we go to a court we have to spend a lot of time. They take money for the prosecutions in a formal court, in the customary court they don't need to spend money. Another reason is language...we are not understood if they go to formal court. In the Customary court this doesn't happen so it is better... people accept his judgements'. (Kolphoronjon Taunchyanga)

A further account of this highly consensual mixing of customary with political justice was given by one of the residents of Taunchyanga para. Uday Taunchyanga had brought his own land dispute to the local PCJSS committee, because his father had been a PCJSS leader when younger. His father was now sick, and the family needed money for his treatment, so decided to sell some lands that had been allocated to them after the Kaptai displacement, but never worked by them. Though they had land documents from the 1962 displacement, the boundaries had been drawn against impermanent markers such as Banyan trees and houses leaving much room for dispute. Further, the lands allocated were now being worked by the local karbari, who disputed their ownership and right to sale. They had taken the case straight to the PCJSS because they were in dispute with the same customary official who should have been responsible for clarifying the boundaries and recommending the sale to the headman.

'I went to the JSS committee and they formed a committee and the committee asked both parties to agree. The hearing was held in Jograbil, so that the committee people could take the villagers opinion. The PCJSS made a panel including Surojan Dewan(headman), and Elti Ma Chakma(elder). The committee decision was to divide the land so that the karbari had one parcel. Both parties gave their opinion, I had left the place for many years, and the karbari had taken care of this land, so with the division of the land both of us were happy'.(Uday Taunchyanga)

The PCJSS committee appears to have reached a solution through a compromise highly reminiscent of customary justice, using a process also typical of the collaborative approach favoured by customary officials, and ostensibly led by the local headman. In contrast with the rural areas of Kaynda and Sebakkon, their involvement did not change either the process, or the outcome, suggesting a quite different relationship existing between the cosmopolitan headman and political activists of urban Rangamati. Indeed, their adjudication of a case in which the parties were a customary official and a political activist appeared a scrupulously impartial and effective merger of the customary and political spheres.

This section presented three case studies that broadly illustrated the diversity of local customary arrangements, but also suggested a similarity emerging from customary institutions co-mingling with other forms of dispute resolution. The balance of power changed in each location depending on social and economic circumstance, proximity to the urban centre, and the personal capacity and inclination of state, customary and political actors. Regardless, sharp divisions in ideology observed in elite perspectives of the system appeared to make little difference to the pragmatic accommodations reached in local practice. So, for example, in Kaynda mauza, though the headmen had absented himself from judgements due to fear of political involvement, at the karbari/village level the customary system remained the primary form of adjudication with the support of the PCJSS, indeed the mutuality of their arrangements were an exemplification of their formal political support for the customary system. In Sebakkon, despite the

UPDF's ideological rejection of the feudal customary system, the working arrangement in the villages incorporated customary mores and laws into an ostensibly democratic system with the apparent support of customary officials. Finally, in Jograbil, a strong customary leader worked across state institutions, political parties and nations, integrated external influences into the customary system and using the performative elements of the system to instil solidarity into the diverse demographic. In Jograbil also, perhaps due to the external threat presented by settlers, differences between community laws were dissolving, and diverse national cultures fusing into a more generic and homogenous Pahari/indigenous identity. The concluding section of this chapter asks how these findings might inform understandings of legal culture in the CHT.

4. Critical Communitarianism and Village Law

Previous chapters traced how the CHT customary legal system was created from an amalgam of colonial Statute and pre-existing social practices, and re-assumed a centrality to the Pahari/Chakma only after the post-partition interregnums of displacement and conflict. On the level of strategy this act of return' was not universally supported amongst the Chakma-dominated political activists, and even within those supporting CHTPA implementation, elite theories of internal change appeared fragmentary and at times in direct opposition. This chapter delved deeper into the mobilisation of law at a local level to present evidence of the effect of the apparent dissonance and splintering of elite ideologies first, on local mobilisations and second, on the legal consciousness emerging as a result.

The Chakma/Pahari customary system has been formally subordinated to the state since the colonial era, however, village practices suggested the legal mobilisation of customary institutions was expressly against the state in being designed to forestall any loss of legal autonomy. A tentative conclusion can be offered from these observations; law was universally utilised as an act of resistance to state hegemony. Whilst the postcolonial legal form was structured with the state-in-dominance, even borrowing directly from colonial legislation and its racialised hierarchies, communities expressly mobilised the customary system to

serve contemporary practices of Pahari identity and continued to create law according to narratives of their own making.

The villages prima facie demonstrated a strong *internal* plurality, with potential legal choices multiplying through the extension of formal state courts and government avenues, and informal avenues such as development committees and political parties. Certainly, there were examples given of forum shopping between customary and informal dispute resolution mechanisms, with the political parties thought by some to be preferable to customary justice in being able to enforce judgments through violence or threat. Yet the broad picture emerging from the case study locations was that newer legal orders more frequently worked in concert with customary law, expanding its domain, balancing the power of customary officials and causing rapid transformations in legal consciousness. The overriding loyalty of customary and political actors appeared to be to community, so that even locally, and in the most diverse locations, law was mobilised to reinforce the boundaries of the Pahari community in its broadest sense.

In this way, a customary system with its roots in a colonially imposed, quasi-feudal hierarchy was substantially democratised by the existence of potentially competing avenues to justice. Where customary system institutions dominated, as in Kaynda they changed in practical, material aspects, for example, the composition of panels was enlarged to include both state and non-state actors, and their perspectives infused customary judgements with political ideology. Where the political cadres dominated, as in Sebakkon, customary actors were absorbed into democratic structures and political ideologies were softened and diffused by their involvement. A notion of community, drawn widely to include all Pahari peoples, not only *contained* different routes to justice, it acted upon them, extending the reach of the customary system, and in the Jograbil case study even homogenising the laws of different nations to serve a broader, contemporary political identity. Law was mobilised to reinforce notions of community, and the common legal consciousness appeared to be a construction of legality synthesised from the

political ideology of Jumma nationalism, colonial regulation and indigenous identity.

More subtle transformations were also evident, suggesting that legal consciousness was changing in line with different forms of legal mobilisation and in reflection of the febrile debate within the wider social autonomy movement. Customary, state and political actors all, for example, pledged some degree of commitment to gender targeted reforms to balance the precarious position of women within Chakma/Pahari law. Changes in legal consciousness were apparent in the sense of male participants identifying and implementing changes to discriminatory cultural practices. There appeared a genuine commitment to increasing women's involvement, and in most areas, women were involved in customary judgements. Further, there was an understanding expressed by all involved that some customary practices breached human rights provisions and reforms were claimed insofar as public shaming, boycotting and physical punishments were concerned. At the same time, and in direct conflict with these global values, the threat of political violence was used both to maintain community boundaries and to enforce judgements, infusing some of these reconstituted communitarian arenas with real fear, and at times subverting the reforming agenda of the customary leadership with the tacit consent of political leaders. In this respect, political mobilisation of customary law in support of autonomy had oppressive consequences, forcing the maintenance of legal autonomy above the welfare of participants.

Despite the shadow of oppression, this chapter concludes the fragmentation of leadership perspectives frequently transformed each village arena into a forum for discourse, reform and at times of violent contestation. Silbey defined legal consciousness as;

'Participation in the construction of legality, where legality refers to the meanings, sources of authority and cultural practices that are commonly recognised as legal regardless of who employs them and to what ends'.[435]

Through cases and village case studies, this chapter has demonstrated that the recognition of '*what is legal*' in the CHT remains an open question, with the customary system, once a relatively fixed, almost feudal hierarchy, now at the apex of a community itself in the process of transformation. The presence of a reforming leader, the process of rapid and at times aggressive development and admittance of a different ideology of law through political activism now all contribute to the construction of a legal consciousness that hybridises a strong conception of community, with an awareness of the mutability of culture.

This chapter concludes by defining legal consciousness in the CHT by reference to its internal plurality and the consequent democratisation of the construction of legality that placed the nature of communitarian legality itself as the foci of community. The many competing narratives and complex alliances encountered during field research contributed to a decentring or dispersal of power within the community, and potentially enabled a dynamic synthesis between conflicting ideologies of law. This conclusion neither denies the violence that attends, at times, to this synthesis, nor the possibility that such violence could equally reinforce existing hierarchies. It flags, nonetheless, the potentiality of such internal plurality on the distribution of power, and to some extent on the nature of Pahari identity itself.

The final conclusion in relation to legal consciousness refers to the idea of law in the popular imagination, the fine and difficult distinction between legal culture and culture itself that attends to much of the theoretical debate about the cultural turn in law. In the village workshops and in wider research, legality was most

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[435] Patricia Ewick and Susan S Silbey, '*Conformity, Contestation and Resistance: An Account of Legal Consciousness.*' (n 199). Pg. 475

frequently perceived to reside in the customary system. Amongst those directly involved in the commission of judgements, customary justice was seen as superior in being arbitrated, community orientated, and based on the achievement of agreement, with the headmen and karbari more frequently defined as neutral facilitators of a wider agreement. The interjection of political activists, on the other hand, was perceived to be violent and often partial. Yet the case studies in this chapter suggest that there is a persistent element of alterity in legal consciousness which might be identified as the tendency toward harmony, even in areas where political activists were fully or partially in control, and even when those activists professed an anti-customary, anti-feudal, stance. Though legal consciousness had changed through the expansion of the domain, at its core lay notions of legality that remained rooted a different legal sensibility to state law, and in a wider Pahari culture retaining a conscious alterity to the state.

The next chapter offers a contrast in turning to the practice of customary law within a relatively stable Chakma community in Tripura state, India, who are now also reforming the customary system to consolidate their formal recognition as a Scheduled Tribe under the Sixth Schedule of the Indian Constitution.

Chapter Six. A Culture of perfection

1. Legal Culture in Contrast

1.1. Summary

This thesis is framed by the assumption that the narratives that locate the practice of communitarian law in South Asia lie in the historical and extant forces that create community as a (relatively) stable political form, and the contemporary interaction of community with the state. So far it has explored the legal culture of the Chakma in the CHT, arguing that the iteration of an inconsistent, fragmented state and a destabilised, precarious community produced a communitarian legal culture characterised by dynamism, hybridity, and the diffusion of power between and away from elites. In short, the struggle for recognition of the customary system within a hostile state has transformed the system itself. The task of this chapter is to highlight the unusually febrile legal culture of the CHT by contrasting its practice in an area of relative stability in northern Tripura. Using the same sub-concepts of legal mobilisation and legal consciousness, it argues that, paradoxically, despite the apparent advantage in the Chakma being constitutionally recognised as a Scheduled Tribe, community in Tripura appears to harbour an oppressively conservative legal culture within its boundaries. Further, whilst power within the customary arena is concentrated in a small elite, customary law is the sole recourse only of the most socially and economically marginalised amongst the community. Both factors consequently diminish the relevance of communitarian law to those with the financial resources to seek remedy outside the boundaries of the customary system.

The structure of the chapter broadly follows the previous analysis of legal culture in the Hill Tracts in deploying legal culture and its sub-concepts to establish the core components of critical communitarianism. The first section introduces and distinguishes the historical and legal context of Tripura state, and discusses the practical limitations encountered during field research to ensure the findings are

understood as a contrast rather than a direct comparison. The second part of this chapter explores attitudes to law and legal mobilisation amongst the leadership of the Chakma customary system, whilst the final section turns toward village practices to establish the legal consciousness emerging from the practice of communitarian law. The chapter concludes by drawing together these analyses to suggest the existence of an iteration of '*critical communitarianism*' that has oppressive and contradictory consequences for its members.

1.2. Methodology and Difference

The considerable differences arising between the legal cultures of geographically proximate Chakma communities in the CHT and the Kanchanpur valley form the main object of this chapter. Though the same research techniques, that is qualitative interviews and analysis and participant observation were employed to collect data in Tripura state, the scope and direction of the project diverged unexpectedly in the two locations selected. In the CHT severe restrictions on movement and the presence of army surveillance meant that village excursions were problematic and necessarily conducted sporadically, at times when the army were less vigilant. Nevertheless, a rich dataset was collected from a wide range of political and civil society actors. In Tripura, there were few restrictions on travel, but research was constrained by the way the boundaries of the customary system had been drawn explicitly by customary elites to exclude activities deemed political and to mark the customary system as the repository of culture alone. Though some research participants were both politically active and involved in the customary legal system, they insisted that their activism did not affect their role and responsibility to adjudicate. Further, the customary leadership actively prevented external contact with the more politicised member of the Chakma community, for example, an invitation to attend the CPIM Tripura Women's Committee from a prominent Chakma member was withdrawn following intervention from the erstwhile head of the customary system.

These interventions, in the relatively short two-month period of research ensured that field data from Tripura was slanted more towards the internal practice of

customary law and the significance of legal culture to a particular iteration of Chakma identity, making a direct comparison of datasets problematic. However, it is suggested this is, in itself, begs questions as to the reasons why customary law in Tripura has been reconstructed in such an exclusionary manner, and what effects are observable in the legal practices produced within the boundaries of the Chakma community. These questions were framed and explored during research, and will be discussed in more detail in the concluding remarks of this chapter. At this early point, however, as regards methodology it seemed timely to note that the apparent differences discovered were perhaps reinforced or exacerbated by the unavoidable differences in the scope of research. And, for this reason, the term contrast is deployed in recognition of the less than complete alignment of datasets.

The next section identifies the nature and origins of the differences observed in legal culture, first by exploring the meaning of the posited 'stability' of the Chakma in the context of the rumbling disorder still characterising the polity of northeast India, and then by reference to the constitutional protections provided by the Sixth Schedule.

2. Stability in Disorder

2.1. Othering the Hills

As in the CHT, the Assamese hills were balkanised from the plains of colonial India in the 1873 inner lines regulations, and remained outside the purview of the state in successive rounds of ostensibly protective legislation. When the Simon Commission was convened in 1927 to examine partition issues in relation to the northeast, its recommendation was for the area to remain as a British protectorate when independence was granted, a view promoted first by local colonial administrators citing the irreconcilable culture between the two, and second by

tribal representatives who foretold their marginalisation in wider India.[436] Indeed, in the years approaching partition, three competing visions of the future government of the hills territories emerged; the first as fully integrated into the newly independent Indian state, the second as reserved British Territories until developed enough to integrate with the Indian state, and finally, as an entirely independent territory.[437] Ultimately, the geographical and political difficulties of detaching the hill areas from Assam, and political opposition to continued British rule led to the integration of the northeast hills into newly independent India.

Partition did little to end this sense of isolation; indeed the hill territories were barely connected geographically to India with access reduced to a narrow sliver of fourteen kilometres of land by the partitioning of East Pakistan.[438] Integration was immediately and continuously problematic, the historic and legal disjuncture between government of the plains and hills, contributing to '*a certain alienation, a feeling of otherness that subsequently gave rise to a culture of violent separatism*'.[439] These ever multiplying regional claims to exceptionalism have proved the most enduring legacy of partition on the eastern borders of India, defining the relationship between the nation-state and the hill communities as a constant iteration of claims for inclusion and claims for autonomy conducted both through violent insurrection and political manoeuvring. Post-independence, the Indian government quelled insurgencies with great brutality using their special powers under the Armed Forces (Special Powers Act) 1958 (AFSPA),[440] but

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[436] Subir Bhaumik, *Troubled Periphery: The Crisis of India's North East.* (n 15).Pg. 9

[437] Ibid. Pg. 12

[438] Subir Bhaumik, *Troubled Periphery; The Crisis of India's North East* (n 15)

[439]Ibid.

[440] AFSPA gives power to the national government to protect the state from unrest and disturbances, and is a direct descendant of the emergency powers established by the British colonial government to quell disturbances caused by the Quit India movement. The 1958 Act gives

usually followed violent suppression with acts of statecraft that ceded various levels of political autonomy to dissident minorities, and levered control of the militias through dividing their ranks. Multifarious struggles for autonomy and recognition have thus cleaved the former state of Greater Assam into the new, ethnically aligned states of Meghalaya, Manipur, Nagaland, and Mizoram.[441]

Tripura is differentiated from the former Assamese territories by its history as an independent principality until its eventual secession into the state of India in 1949.[442] With only 2% of the state bordering India, and 98% bordering Bangladesh and Myanmar, Tripura is one of the least developed and most isolated states of the Indian union.[443] Ethnic conflict is a dominant feature of the political landscape in Tripura and also relates to the state's geographical proximity and historical integration with Bengal. Though Bengalis settled in Tripura well before colonisation, the roots of its extant conflict lay in the more recent mass migrations of Bengali Hindus following both the 1965 Indo-Pakistan war, and the Bangladeshi war of independence. On Tripura state's northern borders, a mainly Kokborok led insurgency found traction in disquiet over the upsurge in Bengali settlement and their increasing political dominance. Northern Tripura experienced waves of insurgent activity from the late 1960's until the mid-2000's, first under the auspices of the Tripura National Volunteers, and from 1978

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national government power to intervene in what was Assam and Manipur states. Ibid.

[441] Ibid. Bhaumik states that at least 134 militias were known to operate in the north east.

[442] Pannalal Majumber, *The Chakmas of Tripura* (Tripura state Tribal Cultural Institute and Museum 1997).

[443] Ray, S K, *India's North East and the Travails of Tripura* (2003), Minerva Associates (Publications) PVT Ltd, Pg. 23

through the communist led All Tripura Tiger Force (ATTF) and the anti-communist National Liberation Force of Tripura (NFLT).[444]

The same forces of land alienation and displacement evident in the CHT drove the Kokborok led rebellion, but the Kokborok had no legal basis for recovering their territory, due largely to the historic hostility of their own rulers to the practice of swidden agriculture. Though absent of direct British rule, Tripura was effectively encircled and controlled by the powerful colonial authorities of Bengal and Assam. Many of the pressures existing in the CHT were also factors in the steady reduction of dependence on jum before Partition, that is the reduction of land through forest reservation, the territorial annexation of much of the plainland territories held by the Manikya dynasty in the precolonial era, and the greater tax yield from plough cultivation.[445] Far from resisting strategies of conversion, however, Tripura tribal rulers mirrored the activities of CHT colonial authorities in their strategies to reduce reliance on jum; from 1888 they reserved land in the Tribal Reserve Area and the jhumia resettlement colony scheme to encourage cultivation.[446] As a result, by 1931 there was clear evidence that tribal communities across Tripura were increasingly engaged in non-agricultural occupations, and jum was losing its centrality as the mode of production.[447] Post partition, familiar issues of land alienation and displacement eroded the territory and majority power of the Kokborok speaking tribal majority.[448] Land commons were never legally recognised, and land reforms introduced in the Tripura Land Revenue and Land

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[444] Subir Bhaumik, *Troubled Periphery; The Crisis of India's North East* (n 15)

[445] Malabika Dasgupta, '*Jhumias of Tripura*' (1986) 21 Economic and Political Weekly 1955.

[446] Ibid.

[447] Ibid.

[448] Walter Fernandes, 'Tribal Commons and Conflicts in Manipur and Tripura in Northeast India' (2012) <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7287/1283.pdf?sequence=1>.

Reform Act 1960 only enshrined a legal entitlement to *individual* land registered with the state.[449] This led to further land alienation amongst tribal communities still reliant on the commons, due to their relative lack of knowledge of the registration system. Then, in the 1970s, the construction of the Dumbur Dam submerged over 23,000 square kilometres of mainly tribal Kokborok land, forcing many of its residents back into subsistence farming.[450]

Historically, Tripura's ruling Manikya dynasty not only promoted immigration as a means of augmenting their wealth and their power, but explicitly encouraged the import of cultured and educated Bengali people as a development strategy. During the colonial era, Bengalis occupied administrative and judicial positions in the Manikya government, with incentives including the grant of permanent Talukdar rights to migrant middle class Bengalis moving into the state.[451] The Manikya Princes were intellectually infatuated with the Bengalis, adopting Bengali language as their national language in the 19th century and in the early part of the 20th century inviting the Bengali cultural icons to reside at their Agartala Palace.[452] Post partition, this cultural affinity with Bengal attracted huge numbers of displaced Bengali Hindus from Muslim Pakistan, eventually outnumbering the tribal majority in the state.[453] Population shift and land alienation appeared once more to stoke the flames of insurgency in the northeast.

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[449] Ibid.

[450] Ibid.

[451] Ibid Pg. 95

[452] For a brief discussion of the patronage of the arts, including Tagore by the Manikya princes Sen, Sumangal, *Art & Culture in Tripura Past Glory and Future Vision* (http://indianfolklore.org/journals/index.php/Ish/article/viewFile/464/537)

[453] By 2011, Scheduled Tribes formed only 31% of the population of Tripura, of which the Chakma were the 4th most populous. http://censusindia.gov.in/Tables_Published/SCST/dh_st_tripura.pdf

In the midst of this disorder it might appear counter-intuitive to position the Tripura Chakma as a 'stable' community, but the term is utilised knowingly to invite contrast both with their tribal brethren in Tripura and their Chakma brethren in the CHT. Though the Tripuri and Chakma communities maintained friendly relations for two centuries in the face of rapid Bengali settlement, the involvement of Chakma people in the Tripura tribal rebellion was negligible. The Kanchanpur valley was geographically buffered from the main sites of conflict in the southern and western areas of Tripura state, and the Chakma community numerically too small even within the theatre of tribal politics to challenge Kokborok dominance. Both the ATTF and the NFLT were active in the states' northern hills, but research participants recalled only two provisioning raids on Chakma villages in nearly 30 years of insurgency.

For the Chakma, land commons were almost entirely eroded before partition, and at the time of fieldwork jumming was the preserve only of the poorest and most marginalised minority of Kanchanpur Chakma. Having experienced none of the sudden displacements of the Kokborok, however, research participants did not consider access to land commons as an issue for their community. Indeed, during fieldwork, it was not uncommon to hear Kanchanpur Chakma echo the Tripura Maharajas in their positive descriptions of Bengali settlers bringing 'civilisation' and 'development' to Kanchanpur. For reasons of history and geography, therefore, the Tripura Chakma avoided both the homogenising effect of British regulation on their law, and the chaotic and conflict-ridden environment that still characterises both the CHT region of Bangladesh, the neighbouring states of Assam and Mizoram, and adjoining areas of Tripura state itself. In the tumult of insurgency that engulfed the former hill territories on both sides of the Pakistan/India border after partition, the Kanchanpur valley appeared as a calm eye of a particularly violent storm.

Stability has been invoked in this thesis to describe the avoidance of armed conflict with the state by the Kanchanpur Chakma, and the relationship of relative equanimity with other tribal groups in Tripura state. Notwithstanding, the forces

driving insurgency and revolt elsewhere in the hills provided an important context for the study of communitarian law in suggesting a parallel causality for the importance attributed to the customary system in Tripura. When the borders were drawn around the CHT, Indian Chakma were denied the demographic concentration necessary to claim territorial autonomy in India. The relatively small concentration of Chakma and their geographical isolation have simultaneously insulated them from direct conflict but also heightened their marginalisation in both state and tribal political arenas insofar as resource allocation and political power were concerned. In this light, the heightened focus on cultural homogeneity and legal autonomy might be seen as the polarisation of cultural identity exercised as an everyday resistance.[454]

2.2. The Sixth Schedule of the Indian Constitution

The nature of state and Constitution in India differed significantly from that of Pakistan, understandably perhaps given the size and diversity of the Indian polity. In India, institutional structures were federal in nature, with substantial devolution of state power to developed regional governments.[455] This structural difference was underscored by the powerful provisions contained in the Indian Constitution as to the protection and promotion of the rights of both 'backward classes', broadly the Dalit caste, and tribal groups, known now as 'Scheduled Tribes' as defined by the Sixth Schedule of the Indian Constitution.[456] The Sixth

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[454] James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Nachdr, Yale Univ. Press 2000). Scott argued that resistance takes many forms, and that small acts or everyday resistance were commonplace amongst the powerless.

[455] Jyotirindra Dasgupta, India's federal design and multicultural national construction, in Atul Kohli (ed.). *The Success of India's Democracy* (Cambridge University Press 2001).

[456] It has been suggested that influential interventions of British anthropologist Verrer Elwin ultimately persuaded Jarwarhal Nehru to maintain special provisions for Assam and North East Frontier Agency in order to protect the unique cultures of the hill peoples. Ramachandra

Schedule of the Indian Constitution now provides for a limited form of self-governance by the tribal communities of Assam, Meghalaya, Manipur, Arunachal Pradesh, Mizoram and Tripura.

Beteille recounted how the consecration of 'tribe' as a constitutional term complicated an already contested anthropological understanding of non-state communities, arguing that the only similarity between those communities falling under the Sixth Schedule was their exteriority to the Hindu Caste system.[457] In this manner, the category of 'tribe' in an India context held a particular legal meaning ascribed by the Sixth Schedule, but at once echoed their subordination within a civilisational hierarchy carefully crafted and legally enshrined by the British. Yet the constitutional juxtaposition of tribal recognition and redistributive justice has created resource incentives for the recognition of culture, and, according to Kapila, a tendency on the part of the Indian state to recognise ever more categories of difference in pursuit of unity and its redistributive ends.[458] As a result, the number of Scheduled Tribes has increased exponentially both in numerical terms and as a proportion of the total population since 1947, and spawned a burgeoning number of minority communities who are self-governing to varying degrees.

The 'otherness' argued by Bhaumik as driving the splintering ethnicities and provincial state formation in northeast India, and the resource advantage conferred by constitutional recognition of tribal status appeared closely entwined.[459] However, notwithstanding the alignment of cultural recognition

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Guha, '*Savaging the Civilized: Verrier Elwin and the Tribal Question in Late Colonial India*' 31 Economic and Political Weekly 2375.

[457] Andre Beteille, 'The Concept of Tribe with Special Reference to India.' (n 58)

[458] Kriti Kapila, 'The Measure of a Tribe: The Cultural Politics of Constitutional Reclassification in North India' (2008) 14 Journal of the Royal Anthropological Institute 117. Pg. 129

[459] Bhaumik, (n 15)

with resource distribution in the Sixth Schedule, the spatial separation maintained by its provisions has proved stubbornly coterminous with under-development and under-investment.[460] The material advantages conferred by the Schedule on the tribe have proved inadequate to the task of redressing the gross social inequalities that existed between the marginalised hill communities and the elite Hindu castes at the time of partition.[461] As a result, the bounded autonomy offered by the Indian state has done little to quell local desires for greater independence. Indeed, Chandra argued the Sixth Schedule only imperfectly contained a paradox in which Scheduled Tribes were simultaneously infantilised through protection and excluded from development, fanning unbearable tensions in the north east that threatened to destabilise the Indian state.[462] The much later and still ambivalent conversion of the state of Bangladesh to a similar path suggests, however, that the forced assimilation of communities produced and stabilised through the politics of colonial difference was also ineffective in facilitating the integration of communities historically defined by their alterity to the state.

2.3. The Mechanics of Recognition

Recognition of tribal identity under section one of the Sixth Schedule confers a limited right to self-government;

'An elected autonomous district council, with legislative and judicial powers, can be constituted under the Sixth Schedule. The council is empowered to make laws on land, water, forest, village or town administration, marriage, divorce and social customs.[463]

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[460] Chandra, (n 253)

[461] Beteille, (n 58)

[462] Chandra (n 253)

[463] Mukul, *Tribal Areas Transition to Self-Governance* (1997) Economic and Political Weekly, 3 May 1997

Once established, an Autonomous District Council (ADC) can decide whether state legislation applies to their area of administrative control, though the Sixth Schedule provides that recognition of tribal laws must be consistent with the rest of the Indian Constitution. Further provisions create a material advantage to communities who achieve Sixth Schedule recognition; government jobs and university places are reserved for the Scheduled Tribes. A Scheduled Tribe can submit their customary code to the state High Court, so that it becomes part of the legal framework of the state and will be used to adjudicate mainly on personal laws.[464] Under the Sixth Schedule a formal written customary code is necessary if customary law is to have legal standing in the state system.

Recognition through the Sixth Schedule is not a neutral process but one that has a significant material effect on the practice of customary law. Just as the stratifying legislative framework of the Sixth Schedule serves, arguably, to construct a 'primitive' identity amongst the communities of the northeast, so the process of legal codification produces a form of customary law that must sit within a legal hierarchy in which the state ultimately defines and controls the very nature of the law. Such recognition accentuates the distinction between law and process suggested in the earlier part of this dissertation as uncharacteristic of customary law. Codification of an oral system fixes laws that have previously been fluid, and requires the judicial elements of governance to be isolated from the all-encompassing social rules and norms of village life.[465] Further, during codification each indigenous community must consider reform of the law insofar as

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[464] Section 4 sets out the rights of Scheduled tribes in relation to customary law and village courts. P Chakraborty, *Fifth & Sixth Schedules to the Constitution of India: Updated and Annotated* (Capital Law House 2005).

[465] For a discussion of the constitutive effect of codification see '*What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950* A N Allot Journal of African Law, Vol. 28 No 1/2 The Construction and Transformation of African Customary Law (1984) pp 56-71

consistency with the Constitution is required. The Sixth Schedule is thus constitutive of law on a subjective, psychological level, and in a material sense.

The Tripura Tribal Autonomous District Council(TTADC) convened in 1992 to administer all of the Tribal areas of Tripura state which together comprise around 68% of its territory and about 30% of its population.[466] Seats on the Council are divided between tribal communities, with the Chakma community holding three seats out of thirty based on their relative population.[467] Despite the continuing unrest in Tripura state, the TTADC was considered a relatively successful example of tribal government under the Sixth Schedule insofar as it heralded the transfer of lands back to tribal groups and developed educational and economic opportunities for them. In the 2015 elections the Communist Party of India – Marxist (CPIM) won all seats.

Tribal areas in Tripura are exempt from the Panchayati Raj provisions of the 73rd Amendment to the Indian Constitution due to the arrangements for autonomous rule afforded under the Sixth Schedule. The provisions consolidated institutionalised democratic village government and set out a structure for its delivery, which included requirements for village democracy, the delivery of local justice and women's representation. Tribal areas in Tripura have elected village councils with appeals possible to the Special Body, in this case the TTADC. The Panchayat structures being introduced by the Tripura Chakma mirror these provisions, and will, if absorbed into the formal structures of the TTADC, secure additional resources for village government. Chakma law was already formally recognised insofar as tribal cases are referred from the Tripura High Court to the

[466]Pannalal Majumber, *The Chakmas of Tripura* (Tripura State Tribal Cultural Institute and Museum 1997).

[467] Ibid. The precise breakdown of elected seats is 25 to tribal communities, and 3 to Dalit representatives. Two seats are reserved for appointed representatives of tribal communities.

customary system in matters of personal law. Codification will enable the High Court to apply customary laws directly.

2.4. The Migrants' Story

Both Beteille and Kapila emphasised that many communities which do not conform to the autochthonic understanding of tribe now receive Sixth Schedule recognition. The Kanchanpur Chakma are one such group, proudly avowing their migrant status and eschewing the indigenous/Adivasi identity that frames much political discourse in the CHT. Chakma oral history suggests that around 1760 the first wave of Chakma immigrants settled in the Gomoti valley of northern Tripura, and then won favour by supporting the reigning Maharaja Krishna Manikya in subduing raids by the Mizo groups of the Eastern hills.[468] After Gomoti, the Chakma established further settlements in the northern Kanchanpur and Pechartal areas, with a steady stream of Chakma drawn to the rich lands of northern Tripura. Most contemporary Kanchanpur Chakma trace their occupancy to pre-1947 migrations.[469]

The Chakma now form the fourth largest tribal community in Tripura, after the indigenous Kokborok speaking Tripura community, the Jamatia, and fellow migrants, the Reang.[470] Their numbers have increased significantly since partition again due to the proximity of Tripura to Bangladesh, and the considerable population transfers caused by the shocks of displacement and war in the CHT. In the state capital of Agartala, the earliest post partition migrants, led by exiled

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[468] Pannalal Majumber, *The Chakmas of Tripura* (Tripura state Tribal Cultural Institute and Museum 1997).

[469] Oral accounts confirm that the Chakma settlements of Kanchanpur are exclusively pre-partition. In one village meeting the headman stated that all he knew of his origin was that his Father was born in the village and had lived to be 100 years old.

[470] The 2011 census suggested the population of Chakma at around 80,000 against 592,255 Tripura/Kokborok amongst the tribal groups.

Chakma leader Snehar Kumar Chakma, remained strongly attached to the CHT and campaigned ceaselessly for its secession to India.[471] During the insurgency, the porous southern border with Bangladesh provided a safe haven for Chakma fleeing government persecution in their CHT homeland, with as many as 250,000 Chakma occupying the five large refugee camps in the Silichar region at the height of the conflict in the 1980s.[472] Though agreement on repatriation was reached in the early part of the 21st century, many of these Chakma, some born and reaching adulthood as refugees in India, melted into the existing Tripura borderland communities to swell the southern Chakma population. [473] These divergent historical trajectories leave the southern Tripura intimately connected through kinship and political solidarity with the Chakma of Bangladesh, and distinguished from earlier Chakma migrants to Kanchanpur. Whilst declaring solidarity with their CHT brethren, the Kanchanpur Chakma had little material connection to their now distant homeland.

The Tripura Chakma had a reputation for a strong cohesive intra-state network and a passionate attachment to their language, culture and values.[474] Within the State of Tripura, however, the differences between the precolonial and post-

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[471] Discussion with Gautam Chakma, 9 June 2016, Snehar Kumar's son, and a political scientist at the University of Tripura.

[472] Singh, n 21).

[473] PK Debbarma and Sudhir Jacob George, *The Chakma Refugees in Tripura* (South Asian Publishers 1993). Most of the Chakma refugees returned to find their lands in Bangladesh alienated to new Bengali settlers, and their claims for restitution form part of the ongoing struggle for full implementation of the Peace Accord. Shapan Adnan, *Migration, Land Alienation, and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh* (n 41).

[474] Discussed with academic, activist and researcher Mrinal Kanti Chakma in in Kolkata on 4 December 2015. His views were based on his experience of working with Tripura Chakma representatives in the Indian Chakma National Congress and the Kolkata Chakma Students Association.

colonial era settlements of the northern and southern Chakma affected perceptions of the way Chakma law was deployed. The Kanchanpur Chakma referred to their Southern brethren as 'Jiratiwa', a mildly derogatory term that referenced their tendency to move frequently between India and Bangladesh, using the border to avoid any inconvenience conferred by membership of a particular state. In the practice of law, the Jiratiwa were said to follow Chakma laws superficially, whilst the Kanchanpur based customary functionaries maintained 'pure' Chakma cultural values as central to their community life. Whilst solidarity with the CHT Chakma was often vividly expressed, the effect of the CHT war on the purity of these traditions was frequently referenced. This understanding of a particularly vivid and historicised iteration of Chakma law distinguished Kanchanpur denizens even from other Chakma groups within Tripura state.

To summarise, the Kanchanpur Chakma are posited in this thesis as a group who have experienced a level of historic continuity and social stability unusual in the northeast of India, and the CHT. They are avowedly migrants and reject the indigenous identity that formed a major element of political discourse in the CHT, and which also drove the legal mobilisation of social movements in Bangladesh behind a particular iteration of Chakma/Pahari law. They do not claim access to land commons as they have not suffered significantly from land alienation in the post-partition period. They were, however, politically and socially marginalised in both state and tribal governments due to the small size of their population and their concentration in the relatively remote Kanchanpur area. In the next section, these broad conditions frame analysis of the mobilisation of Chakma customary law in Tripura, tracing the progress of its resurgence to this marginalisation and theorising its effects on the distribution of power within the Chakma community and the legal consciousness produced.

3. Custom Returned in Tripura

Previous chapters used the sub-concept of legal mobilisation to locate legal discourse as an element of strategies designed to cement identities and ideologies,

and thus to understand the deployment of law as a cultural resource.[475] The overarching concept of critical communitarianism was also invoked to illuminate the interdependency of communitarian and state law, whether that relationship be one of opposition to the state, or for the state. In relation to the CHT Chakma, 'critical communitarianism' offered an apt frame to illuminate the development of the customary system in articulation with state violence, and the effect of that violence on legal culture. This thesis concluded that in the CHT, conflict produced a legal consciousness characterised by an inherent dynamism and democratising tendency. The next section raises similar questions in relation to the Tripura Chakma, namely, how far was the Chakma customary system in Tripura mobilised as 'act of return' and thus an element of strategy? How does the legal culture and consciousness found in the customary system contribute to the practice of Chakma identity in Tripura? And, finally, how does mobilisation and consciousness affect the dispersal of power within the Chakma community in the context of the Sixth Schedule?

3.1. Mobilising for Perfection

To answer these questions, attitudes to law expressed by the customary leadership in Tripura were collected and analysed to understand how and why customary law was mobilised by the Tripura Chakma, and the legal consciousness produced by this mobilisation. Again, the sub-concept of legal mobilisation is deployed in this section to refer to the way legal discourse transforms into strategies that cement identities and ideologies and becomes a practice of identity, whilst legal consciousness refers to *'the way individuals experience and understand the law and its relevance to their lives.'*[476]

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[475] Sally Engle Merry, (n 195)

[476] Merry (n 195). Pg. 64

In Tripura, the driving force behind the mobilisation of customary law was found to be immediately distinguishable from the CHT, in that voluntary and consensual revitalisation of customary law observed was a mobilisation conducted *for the state*, rather than in opposition to it. In 2016 the customary system was in the throes of major institutional reforms, originally triggered by a request from the TTADC through Tripura Chakma leader Niranjan Chakma for the Chakma community to seek recognition of their customary code under section 4 of the Sixth Schedule. It transpired that the various levels of Panchayat government which at the time were actively considering a potential draft Tripura Chakma Customary Code were also relatively recent institutional innovations. Indeed before 1997, there was no Panchayat hierarchy, no leader of the Tripura Chakmas, and no appellate system. The account offered by Niranjan Chakma for the reasons for wholesale reform of the system was that a direct request had been made to him as a government official to lead the revitalisation of the Chakma customary system so that it was consistent with the wider Panchayat system enshrined in the 73th amendment of the Constitution.[477] Apart from this tenuous link to the exterior world of the TTADC, the pressure to reconstitute and reform the customary system appeared to be entirely generated from within the Chakma community itself.

As the Tripura Chakma attempted to strengthen their legal and cultural institutions in order to gain formal recognition from the Indian government, their reconstruction of Chakma law reflected an oft quoted attempt to find the 'true law' or at least the closest approximation permitted by Sixth Schedule recognition. Until relatively recently, village law was practised with minimal hierarchy and formality through the informal village karbari, who adjudicated disputes, organised social functions and acted as the local spokesman of the Chakma

[477] This amendment enshrined Panchayat government across all areas except those governed by ADC in Tribal Areas, and was followed by the Panchayats (Extension To The Scheduled Areas) Act, 1996, (PESA) which extended it to Schedule Five communities.

villagers. Participants recalled that if the karbari was unable to resolve a dispute, villages in close proximity provided an informal appeal system, meaning that even the dispute resolution system was absent of an institutional hierarchy, being always, even on appeal, a mediation by peers. For some village level participants this iteration of the Chakma system was regarded as truly traditional as it had been passed from generation to generation as the vehicle through which Chakma law was dispensed. In terms of scope it was mainly concerned with personal laws, social disputes and the social work functions of the karbari in assisting those who were destitute and in need of assistance, and appeared to be perceived largely as the preserve of the villages.[478] For others, however, the zeal for reform was motivated by distaste for the conduct and practices of the headmen and their failure to maintain and apply Chakma social laws consistently before the reformed panchayat structure had been introduced. They recounted the partiality of headmen who favoured relatives in adjudications, and the corrupt practice of retaining fines imposed for wrongdoing for personal use. Over time, this lucrative malpractice incentivised the levy of higher than necessary fines, further reducing the moral authority of the village headmen and causing the customary system to fall into disrepute. Revitalised customary law addressed the perceived degeneration of customary offices by introducing an explicit element of formality and hierarchical scrutiny into what had been an informal and extremely flat structure.

The reforms initiated before the millennium were focussed on the development of a new institutional framework for the customary system and on a written Chakma Customary Code to be administered through the new hierarchy. Niranjan Chakma worked with Chakma representatives to build a model structure for the

[478] None of the sites visited during fieldwork were dependent on jum agriculture and the karbari had no role in allocating land for cultivation. In Kanchanpur Town, there appeared little need for dispute resolution, but the customary system was still cited as important to the social rituals and festivals of the Chakma.

conduct of customary law. A four-level structure had been agreed at the state-wide Chakma customary conference in 2012, and implemented across Tripura in the years following. The outcome was a new institutional framework which referenced the model of panchayat governance of wider India in comprising a four level hierarchy consisting of the karbari court(village level), the Chagala Court(area level), the Suleane Court(valley level), and the Rayja Parisad Court(state level).[479] In the new institutional framework, the higher level Panchayats were charged with defining and administering Chakma law, providing an appellate function to village Panchayats, and overseeing social activities. At the same time, the mode of customary appointment at all levels of the Panchayat structure shifted from hereditary to selective.

By 2015, the panchayat structure was well established, but the Chakma Code had not been agreed by the community or recognised by the state. A further state-wide conference was held in 2015, at which representatives from Tripura were joined by Chakma dignitaries from Mizoram, Assam and Arunachal Pradesh. The Tripura Chakma intended to adopt the existing recognised Mizoram Chakma Code notwithstanding some minor differences over the role of religion, with the president favouring an entirely secular foundation to the Tripura Chakma Code, so as to emphasize its law-ness. At the time of writing, the Tripura Chakma Code was awaiting submission to the Tripura High Court pending resolution of these issues.

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[479] The Tripura Panchayat Act was introduced to implement the 74th Amendment to the Constitution, which enshrined Panchayats as the required mode of local government. This amendment did not apply to Scheduled Areas, due to the autonomous arrangements already in place for local government in designated tribal areas. The Panchayats Act appeared to set a standard for recognition, however, when it came to formal incorporation of a community code by the state Courts. The effect of recognition will be to make the customary system the primary adjudicator or personal law cases amongst the Chakma community, with the state Courts being an appellate body.

The governing panchayats appeared to provide space for the development of Chakma cultural identity, drawing on tropes of power through harmony, and reinforcing the spiritual unity of the Chakma nation despite their cruel division by state and nation-state borders. In this sense at least, it appeared that the Tripura customary system had been revitalised as the foci of culture, and a practice of tribal identity. At the same time, the identity practised through the customary law seemed entirely at odds with highly variegated, politicised, fractious and adaptive Chakma/Pahari of Bangladesh. The Kanchanpur Chakma harnessed their marginalisation toward an essentialised cultural nationalism, evident in the deployment the conception of Chakma society as 'perfect'. The six-monthly meeting of the Gandachara Chagala Panchayat in July 2016 focussed on building community solidarity through emphasis of the social and cultural aspects of Chakma traditions.[480] At the beginning of the meeting the Chakma flag was raised, whilst delegates chanted:

'The souls of whole nations are found in the village
Chakma villages should be perfect
Chakma nation should be perfect'

The programme included performance of Chakma songs, poetry, plans for Bizou celebrations and a celebration of the pinon-hadi, the traditional costume of Chakma women. Chakma identity was strongly aligned to village life, and village life to a concept of perfect order, and example of the *'exaggerated Chakma nationalism'* Roy associated with a community under severe external threat.[481]

By mobilising as perfectly ordered, the president and functionaries repeatedly represented customary legal practice as static, timeless, and above further reform or intervention, distinguishing their mobilisation as a practice of identity from the

[480] The Panchayat was attended by approximately ninety people, of which around ten were women.

[481] Roy (n 329) describes the nationalism of both the CHT and Tripura as '*accented expressions of creativity around an idealised indigenous national ethos*'.

foment of the CHT. As long as customary law was mobilised to sustain the perfect order of the Chakma community, this perfection necessitated a high level of conformity to the social mores of the Chakma as defined by the senior members of the Panchayat system, who were all male elders of the community. The concept of perfection thus appeared to reinforce an ultimately conservative iteration of Chakma identity, whilst the confinement of customary law to the social rather than political sphere underscored the localised power of the Panchayats in the regulation of village life and militated against a productive engagement with external influences. The Panchayat leadership appeared to align Chakma customary law with an introverted and essentialised nationalism, the ideation of customary law being a practice of identity that reinforced the separation of the Chakma from other tribal groups and transformed their marginalised position into an element of that identity.

3.2. Consciousness and Identity

The focus on customary leadership in the preceding section suggested that in Tripura, the communitarian arena was isolated, the practice of law introspective and self-referential, and legal mobilisation instigated as a practice of a highly essentialised Chakma identity. In the following section the effects of its mobilisation '*for the state*', that is as an augmentation of formal recognition under the Sixth Schedule, is explored in relation to the legal consciousness expressed by the customary leadership.

Amongst the highly literary and culturally aware leadership of the Kanchanpur Chakma, law was part of a rich oral heritage that stretched back to the days in which the Chakma had no government and employed customary laws to regulate the boundaries and behaviour of their community. The first common sphere of consciousness related to the preservation of the unique Chakma legal culture. Again, in sharp contrast to the CHT, Chakma culture and its legal manifestation were closely aligned with portable symbols of community identity, and with a ruleset that would allow the strict delineation of community without reference to territorial occupation. These views were expressed frequently and passionately;

'Even as we migrated to various places our forefathers did not lose our knowledge (the law) creates awareness among the people of the importance of our traditions...gives unity, and creates a feeling of brotherhood amongst the Chakma'. (Prodip Kumar Chakma)

Law was perceived as an essential component of a Chakma identity that referenced a migrant past and created the strong sense of belonging that people need to survive such frequent uprooting. It provided one of the only remaining strands of symbolic unity across the now disparate groups of Chakma that populated Bangladesh and India, but also marked Chakma distinctiveness and community boundaries within the crowded arena of Tripura's tribal politics. In Tripura, despite their relative stability and avoidance of direct conflict, discussions of Chakma identity were frequently couched in themes of the loss and suffering caused by the division of the Chakma nation through migration and conflict. The Chakma were a most unfortunate nation in their history, but were united again in their common practice of community law;

'The Chakma are mixing with other communities, they are losing their identity, they are losing their culture, so this customary law is very important'. (Kinmohan Chakma)

Identity practices were therefore aligned with a strong sense of marginalisation, forcefully expressed in frustrations at the long delay in Chakma law being recognised as part of the state legal canon. Those Chakma who did not participate in or follow the law undermined the unity of the Chakma, and were even attributed with making it possible for the state government to drag their feet over formal recognition of their Code.

The most elegant exemplifications of law intertwined the practice of Chakma identity with the role of law in maintaining order within the community. In the absence of state regulation, the Chakma had developed their own language, culture, script, and laws that allowed them to settle disputes peaceably. Customary law;

'Maintains peace and security in society and controls the behaviour of the villagers...it is one of his most important duties to maintain unity among all of the villagers living here.' (Nirmol Chakma)

Internal order was necessary to preserve external unity and was integral to the previously discussed notions of Chakma identity and the idea of the village as a perfectly harmonious organism. The frequent reversion to the idea of law and custom representing order against chaos confirmed a lack of penetration of the formal system of law into the Chakma village communities, and the practical necessity of the customary system in the absence of formal policing. In even the most serious criminal matters such as rape and murder there was little appetite to invite police involvement; at village level the customary system was seen as the right arena for all transgressions of social codes to be solved. For the village state law did not penetrate their social world, and Chakma law formed the only bulwark against the disorder of the external world. In personal law, however, there appeared a much more pragmatic mobilisation of the system, at least amongst the more urbanised Chakma. For this group, expressions of the law as perfection were undermined by the easy avoidance of its tenets. One member of the customary leadership described how his daughter had transgressed in marrying an Indian Hindu, a matter regularised by the payment of a fine to the local customary council. In Kanchanpur Town, where most of the Chakma interviewed were service holders and businessmen, the social function of the customary system was to the fore, with the resolution of disputes rarely necessary and the imposition of personal laws highly negotiable.

The idea of customary law holding chaos at bay was commonly perceived and expressly linked both to the historic identity of the Chakma as a self-governing community and to widespread understandings of disorder at the boundaries of the Chakma community. Kanchanpur was no longer isolated from the external world; it was physically connected to the state capital of Agartala and to Assam, and its people had experienced both positive and negative effects of its closer integration

into markets and state.[482] The ruling Marxists in the TTADC and Tripura state Assembly had successfully improved access to education and literacy, but were held responsible for an unequal distribution of government resources and the consequent epidemic of unemployment and underdevelopment affecting much of the northern areas of Tripura. In one village, participants reported that drug use was endemic, a consequence of high unemployment and relatively easy access to the cheap opiates transported through Tripura from China and Myanmar. There, Chakma law as a potent symbol of order and identity and its unifying role was underpinned by a more practical utilisation of customary powers to address drug misuse and gambling through campaigns and direct interventions. The local Chakma youth committee, an offshoot of the customary office of headman had launched an awareness campaign for youths about the dangers of drugs, and actively intervened to stop illegal gambling sessions that took place in the adjoining fields. In the light of this rapid and potentially destructive social change, youth leaders asserted that;

'The law brings unity amongst the Chakma and helps us to take decisions unanimously for the welfare and development of society... without this system there will be chaos in society, there will be no peace and tranquillity' (Subham Chakma)

This widespread discernment of law as maintaining harmony in the face of the real threats of dissolution was accompanied by a simultaneous appreciation of the economic benefits that accrued to the Chakma as the wealth of the region increased. In this respect, state recognition of Chakma law was again explicitly connected with the need to assert a strong Chakma presence within the arena of tribal and state politics. Social unity was seen as a vital corollary to this presence, reinforcing the idea of the Chakma as a nation, with one voice. Within the

[482] Less than 50 years ago the Kanchanpur Valley was still only accessible by boat. There are now roads to the Capital and to Assam, and a rail link running within 20 kilometres.

community, however, there was also an appreciation of emerging class differentials that increasingly appeared to divide the Chakma into village and town, educated and illiterate, service holder and subsistence farmer. The customary system was perceived as a way of negotiating these schisms, binding the Chakma with cultural and social markers that transcend emerging class/caste division. Customary law provided a social adhesive that transcended boundaries and maintained a particularly Chakma sense of history.

It's for the better in a sense, when the developed community has come, we have adopted many things, business and education, in my (village) we have kept a sense of community, the Panchayat is in control, so that everything goes equal for all and everybody lives peacefully' (Anil Chakma)

This perception of Chakma law emphasised its social nature, its ability to transcend the boundaries of geography and class in drawing the numerous diaspora Chakmas home to perform social rituals. It was also perhaps the most limited concept of Chakma law, espoused by an active CPIM member who described Chakma law solely as a social system; customary practices created an island of rural tranquillity and a sense of belonging for his community that all Chakma could subscribe to whether they remained in Kanchanpur or not.

In the poorest, most marginalised Chakma groups, the customary system had an additional and much more material relevance to the Chakma; it was mobilised to provide elementary welfare to those unable to care for themselves.[483] Lack of Chakma representation at state and TTAC level meant that resources for

[483] Anil and colleagues explained that in areas where jum was the main source of livelihoods it was practice for the karbari to collect small amounts of cash monthly to be committed to social welfare of the most vulnerable.

development were channelled to the more powerful Bengali and Tripura communities.

'Earlier we had the political powers. We had an MLA[484] just for the Chakma community, but the government has made different constituencies so that now there is only one MLA. There is no other community or organisation that looks after our interests (the customary system) is the only one that helps and protects and us and allows us to move forward as a community'. (Basunti Chakma)

In the absence of political power, the newly centralised customary system created the impression at least of a solid, undivided community and looked after the interests of the most excluded Chakma people through a communitarian pooling of resources in the absence of state redistribution.

The mobilisation of law as emblematic of a distinct Chakma identity in tribal politics, the invocation of perfection to describe the community, and the consciousness of law as a means of maintaining order and harmony combined to create one final and highly significant distinction from the CHT. Together, these movements effected an accentuation of the boundaries between the Chakma and other tribal communities, thus reinforcing difference and extinguishing the possibility of a consciousness arising beyond the limited communitarian realm of the Chakma tribe. In the CHT, consider how, at the intersection of state and community, a connection between land commons, territorial autonomy and community was forged in the colonial era that shaped the resurgence of customary law as a symbol of community in the post-colony. Then, consider how a legal consciousness that moved beyond the Chakma community to the powerful if unstable notion of a wider *Pahari* community emerged from the homogenisation of land regulation of the commons. In Tripura, in stark contrast, it appeared that the working of the Sixth Schedule exaggerated the differentiation between tribal

[484] Member of the Legislative Assembly

nations and created a perceived competition for state resources. Further the customary system re-formed through state recognition looked inward and backward to a de-historicised and static iteration of Chakma law.

3.3. Mobilisation and Participation

The level of legal mobilisation linked directly to participation in the customary system, and the method of selection for leadership positions within the customary system. Recognition of customary law by the High Court firmly located it within a state centric legal hierarchy, and thus necessitated adjustments to its institutional foundation and laws to align with the Constitution. Customary institutional structures had to mirror those of a formal constitutional Panchayat in having an elected membership of which at least a third of incumbents should be women.[485] Insofar as the Chakma Code was concerned, the laws themselves had to reflect constitutional provisions on gender equality and also reflect the rights conferred on citizens by the Indian Constitution. The notion of perfection jarred uncomfortably with an overarching structural framework that by its nature necessitated change.

In discussions with the customary leadership, this paradox was simultaneously acknowledged and dismissed as unrealistic in the context of Chakma society in Tripura due to the lack of suitably qualified candidates for customary office. Insofar as Panchayat membership was concerned, a process of selection occurred at the Panchayat meetings, where members were proposed and seconded but it appeared that once proposed, those present universally endorsed candidates. At the level of the karbari, although elections were required, in practice some villages continued to select the karbari with hereditary entitlement. This meant that at the

[485] Although neither the 74th Amendment to the Indian Constitution related to Village Panchayats, nor the Tripura Panchayats Act 1996 did not apply directly to areas under the TTADC, the form was adopted to align customary reforms with the constitution.

time of research, half of the karbari interviewed, whether they had been subjected to a selective process or not, were also the hereditary descendants of the previous karbari.

Privately, it was made clear that the process of selection for higher level positions was dominated by the erstwhile leadership of the customary system, who would identify potential candidates from the community prior to Panchayat meetings, discuss the appointment with them and vet their suitability. This micro-management of the selection process appeared to originate in concerns about the capacity of some individuals to hold customary office. In striking contrast to the CHT, and in spite of the gender provisions in the Tripura Panchayat Act, the customary system in Tripura was entirely male dominated. There were no female members in the higher-level Panchayat, and no female karbari. The reasons for this imbalance were attributed by male customary functionaries to the lack of capable women, and the unwillingness of most women to give time to activities outside the home.[486] These problems were encapsulated by the head of the customary system, Niranjan Chakma encapsulated these problems;

'We too are trying to modernise, to absorb the principles of the modern world. Women used to be prohibited from attending village councils now they are not. We are trying to persuade women to become more involved but it is difficult'. (Niranjan Chakma)

Privately, however, women discussants described customary institutions as hostile to women. The process of selection was described as favouring men, with participants reporting that women had been prevented from expressing their views in Panchayat meetings and were never selected by the leadership. One workshop participant described a situation where an unqualified and unwilling woman had been selected for membership of a panchayat while a qualified, willing

[486] Comments ranged from the need for women to undertaken household and childcare duties to the 'laziness' of Chakma women.

and opinionated woman had been ignored. This was indirectly confirmed by President Niranjan Chakma, who felt that some women would disrupt the system with their views. Thus, the systemic introversion and the mobilisation of customary law to deliver harmony sustained the balance of power in favour of the older male founders of the reformed system.

Women's participation in the customary system appeared more common in villages. The process described for dispute resolution resembled more the informal and participative process found in the CHT. Hearings were held in public and featured a panel of an odd number of villagers, the size depending on the seriousness of the matter. Karbari Nirmol Chakma recounted that all villagers had a right to participate in customary judgements, and had the right to express their views in hearings. In his village one third of all members were women, and if the appointed president of the village committee were a man then Nirmol would ensure that the vice president would always be a woman. His colleague Anil Kumar reported a similar level of involvement and described a process where women's issues were always discussed with women as part of the judging process. He also noted the tendency of women activists to prefer to exercise power in the political arena.

Despite the overwhelming patriarchy of customary institutions, and particular criticism of the continued acceptance of polyandry in Chakma law, the same women critics described a role for the customary system in creating gender parity in the villages. This was because many karbari attached importance to education and promoted education equally between boys and girls.

'Improvements must be won by changing the behaviour of the women, by educating the women and giving instruction on the importance of the society and knowledge to them about the importance of getting involved. Some of the karbari are trying hard to get the women involved the customary legal system'. (Chitra Milaka Chakma)

The village level panchayats still offered rural women a role in public life and recourse to justice that was not hitherto available to women in the most disadvantaged sections of the community. This suggested again the possibility of curious inversion, that the recent revival of customary law might involve the imposition of an oppressive hierarchy on a relatively egalitarian customary practice, as a direct result of the process of recognition.

3.4. Mobilisation and Politics

The absolute distinction drawn between customary institutions and the political arena was also noteworthy in its sharp contrast with the CHT, where customary institutions barely contained power struggles, and culture itself was highly politicised. In Tripura, participants uniformly regarded the Panchayat system as entirely independent from the main sources of formal power in the state, that is the Tripura state Assembly, where there is only one elected Chakma MLA, and the TTADC, where there are three elected Chakma members. Explicitly party-political positions were not tolerated within the customary system, and the direction of Niranjan Chakma and the most senior members of the local Panchayats was that the custom and politics did not mix. Some customary officials participated in wider state politics but could not express party-political views within the system, Anil Chakma reiterated the position that *'the panchayat system is politically neutral, a member belonging to any party can take part but when he does he is only a Chakma'.* Those research participants willing to talk about their political activism appeared acutely aware of the Chakmas marginalised position as a minority group in both state and tribal governments. Despite their prevailing discontent with the relative lack of political power, however, these material concerns did not permeate customary forums. The much earlier divorce of the customary sphere from resource allocation, that is its disaggregation from the allocation of jum land, had extinguished the connection between customary law and the regulation of Chakma economic life. This bifurcation of custom from resources appeared to play out in the contemporary division of the social from the political.

Of the customary officials who shared their political views, all were members and activists within the CPIM, and their attitudes toward customary law provided some insight into its subordinated position within the political and legal arenas of Tripura state. The party was seen as the source of development, progress and power, and their involvement in politics motivated by a desire to advance the progressive aims of the Chakma community within the Tripura polity. Development and progress were perceived as positive for the Chakma community, in terms of communication and transportation, education and economic wellbeing, but negative side effects were also noted. The customary system was conceptualised as a counterbalance to progress, the source of stability and continuity in the face of change. Perfection, it seemed, was a soothing antidote to the economic and political maelstrom that surrounded and permeated Chakma society in Kanchanpur. The result was a system as rich in symbolism as it was lacking in power; the mobilisation of Chakma law reinforced community identity, but at the same time underscored the subordinate position occupied by Chakma nation.

In conclusion, it appears that the mobilisation of customary law has been *for the state*, in being generated within the Chakma community under the auspices of the state's constitutional provision for autonomous tribal government. Although legal mobilisation occurred in conditions of economic and political marginalisation, the effects of engagement with the state generated an elite legal consciousness reflecting a highly essentialised and conservative iteration of customary law. Harmony and order were invoked as elements of Chakma identity, and legal culture appeared introspective and redolent of an idealised Chakma past. The limited transformations through custom appeared located at ground level, in the villages, where the pre-reform system had operated as a relatively egalitarian and informal system of regulation. The mobilisation of customary institutions in Tripura to meet the requirements of recognition on state terms appeared to have the paradoxical effect of imposing a conservative, patriarchal hierarchy, ossifying the practice of Chakma law, and reducing even the possibility of solidarity emerging between the Chakma and other tribal groups.

4. Legal Culture in the villages

The next section tests whether this initial hypothesis as to the nature of legal mobilisation and its effects on legal consciousness holds true in the practice of Chakma law in the villages. It deploys the sub-concept of legal mobilisation once more to understand how people turn to the law for help, and how legal practice is informed by the identity practices of its leadership. In the first part, the process, case type and remedies of the customary system are described and analysed, and in the second, legal mobilisation and consciousness of system participants is illuminated through an analysis of customary cases and participant observation of a village Panchayat.

4.1. Process, Cases and Remedies

The process described by the various functionaries and participants interviewed was fairly similar; a case was usually triggered by a request to the headman to investigate, usually a letter was required and occasionally a small payment would be taken by the village headman. The headman would first form a committee of an odd number of villagers, five or seven or eleven according to village size. The hearing would be in a public place, anywhere the villagers could assemble to watch, and the participation of the villagers in the hearing was encouraged. The applicant was first asked to state their case followed by the respondent. They were allowed to call witnesses, but in the absence of witnesses, the Chakma custom of oath taking was invoked. The villagers could question the respondent to the claim and could also offer their opinions to the committee. After the parties and witnesses had been heard, the committee would retreat to discuss the case and a communal decision would be taken. The karbari would then deliver the

judgement, usually recorded in writing, and describe the sanction that had been decided on.[487]

Amongst the karbari there was also a consistent account of a reduction in customary cases, directly attributed to the rise in literacy and the increase of service holders in the area.

'The number of cases is reducing because the literacy rate is increasing among the Chakma and another reason is that a new customary system has been developed in the Chakma community so that people fear they will get many kinds of punishment if they do any kind of anti-social activities'. (Bhubon Mohar Chakma)

Though the Chakma were becoming more rather than less peaceful, fear still appeared to play a large part in any adjudication by the village courts. This form of communitarianism seemed reliant not on consensus but on an exercise of power by the karbari, even if the source of that power was his ability to martial the support of the wider community.

The customary system was also described as the means through which social order was maintained, a function that extended beyond the personal to cases of assault, theft and communal disputes. At the village level the police accepted the jurisdiction of the customary panchayats in all cases, with the exception of murder. A miscreant would only be referred to the state jurisdiction if they had refused to accept or respond to the decision taken by the village panchayat. The relationship between the state police and the customary system was perceived to be a

[487] The process was described in the Santipur, Gandachara, Silichari, and Kanchanpur discussions, as well as by Nirmol Chakma, Chandra Sur Chakma, Gunu Ban karbari, Gopul Chakma. The descriptions were similar in most respects, although some karbari said there were cases and decisions that they might consider on their own. Before the reforms to the system it was more common for karbari to act on their own without participation in the wider system.

consensual one, in that both the Chakma and the police agreed that matters internal to the Chakma community should be resolved by the customary system. At the margins of the system were cases which breached community boundaries, where karbari would use their powers to support the police. Customary officials also played a role in regulating inter-community disputes;

'If there is communal violence and a quarrel between Chakma and non-Chakma they decide the cases with other tribes if possible, and if not, we refer to the police or court system. If any boy of another tribe gets involved with a Chakma girl illegally then the boy has to pay a fine of 1500 to 5000 rupees'. (Santi Raton Chakma)

In these instances, the customary system expanded to include a regulatory function beyond the boundaries of the Chakma community. The various customary systems were mobilised to contain inter-tribal disputes within tribal governance and to ensure that tensions were diffused without recourse to the state. The acceptance of equivalence between the customary systems of the Chakma and other tribal communities allowed customary offices to be utilised in defusing and containing communal disputes.[488] But, at the same time, the drive to formalise Chakma law was seen as elevating their Chakma law above those of minority communities who use highly informal and unrecognised systems of community adjudication.

Of the disputes described and observed the majority related to family, marriage and relationship breakdown. All research participants confirmed that personal law formed the largest body of cases in Chakma law. In Tripura, Chakma law was frequently linked to the maintenance of Chakma identity by ensuring that the

[488] Equivalence in terms of engaging on a community by community basis, customary duties in Nomen Para, for example, negotiating if necessary with the Reang who occupied part of the territory. From the Chakma leadership, however, the Reang were often termed a backward or primitive community.

bloodlines are maintained and that property, albeit individually owned, was retained within the Chakma community. The proposed written Chakma Code, mirrored the Mizoram Code that regulates marriages, and child custody, divorce and inheritance. The only land cases heard fell more within the category of dispute resolution, relating to boundary disputes between Chakma/tribal neighbours for example.

Judgements were always designed to restore the unity of the Chakma after the disequilibrium of a transgression.

'If any party is given punishment then after that the karbari will also try to end enmity at the meeting, so that the relationship between the parties becomes closer. I want everyone to be satisfied by the judgement, and all the people who attend the meeting to consider it to be just'. (Niranjan Chakma)

Fines were the only remedies available and these were limited to 3000 rupees. A Panchayat ruling required all fines to be used for community benefit, in order to restore the honour of customary office after the extortions of some karbari had brought the system into disrepute. Prior to reform of the system, Niranjan Chakma explained it was common, for harsh physical punishments to be meted out, but educated people had suggested that such punishments were unacceptable. Social boycotting had previously been a common practice, which involved a transgressor being denied any sustenance, assistance or social standing in his community.

'In the Chakma community there is no prison, no jail, and this is one type of prison that we can put the convicted person into, he cannot have any type of communication, he will not get any communication, his whole family is included in the boycott'. (Gopul Chakma)

After a boycott was imposed, a transgressor could restore their social position through contrition or the payment of a fine. A boycott was described as punitive and restorative in effecting change in the behaviour of the person through the

most powerful sanction possible, but was perceived reducing in effectiveness as so many people left their villages to work in Agartala. Now, the Chakma state-wide panchayat had explicitly banned boycotts due to its inconsistency with the requirements of the Indian Constitution.

'We talked to some educated people, from India and they said that we should not do this as it was a breach of our constitution, the right to speak freely and the right to move freely. There are eight fundamental rights in our constitution and we cannot be in breach of them'. (Niranjan Chakma)

The final forms of remedy referenced were the imposition of a religious sanction or the acceptance of a religious penance. This was a controversial area given the complete disjuncture between law and Buddhism reported by Niranjan Chakma. It was not uncommon, however, for headmen and karbari to describe a religious meditation as suitable penance.

With judicial panchayats only infrequently convened it was not possible to observe a wide variety of customary cases in progress, so headmen and community members were asked to share their experiences of village justice through their recollections of recent Panchayat cases. Where possible participants in the cases were interviewed. This enabled a comparison between existing practice and the aspirations of the panchayat leadership, and revealed a disjuncture between aspirations of its leadership and the experience of law on the ground. Moreover, this disjuncture between ideal and practice was neither concealed nor denied, but accepted as an inevitable consequence of the need to present to external parties as being cognizant of constitutional provisions. Regardless of the Constitution, the village remained Chakma territory, a space in which any measures necessary to maintain perfect order were justified. Legal practice appeared as yet unaffected by formal recognition, and unapologetically immersed in a customary consciousness that largely predated it.

4.2. Personal Law

In personal law cases the methods applied to resolving the disputes were described as more closely approximating a mediation in which the aim was to maintain peace and harmony in the community. In relation to marriages the karbari played a vital social role in organising and funding the marriage ceremony, and a judicial role in making sure that marriages were conducted in accordance with Chakma law. Marriage was used to regularise illicit relationships where possible, a role consistent with the forms of marriage permitted under Chakma traditional law. One case described a situation where a young woman had run away to her boyfriend's house, and after mediation both sets of parents agreed to the marriage. The karbari imposed a nominal fine for the transgression, but the most important aspect was considered to be the formal sanction of the relationship by the community. In more controversial circumstances their judgements must satisfy not only the parties to the disputes, but also the community witnessing and participating in the hearing. In another, the performative nature of the hearing seemed to have direct import on the apportionment of guilt and the sanctions imposed. Villagers described a case related to an affair between two married people, who had been caught together by the villagers. At the panchayat they were found guilty, and both were fined for committing anti-social activities, and their partners, at their request, were given the opportunity to forgive or divorce them. If divorce was chosen, their property, including children would be divided with the greater share going to the man, unless he was considered solely responsible for the marriage breakdown. In this case they were forgiven. After the judgement, their respective partners were given an opportunity to speak, and they asked that the adulterers apologise to them publicly in front of the panchayat and village. Public judgements such as this were seen as deterrents to future wrongdoing as the punishments were visible and known across the community. Law was mobilised to achieve harmony and to impose an internalised discipline.

All of the cases recounted were personal cases, and the selected examples illustrate how a legal mobilisation to preserve unity, and a legal consciousness founded on a concept of perfect order reinforced and preserved the status quo. In two cases, one described and one observed, social boycott were employed against women who sought divorce through the customary route. In the first case, of divorce in Ula Talukder Para, the husband of a Chakma woman seeking a divorce through the formal courts bought his case to the Panchayat. The wife was called to the Panchayat but failed to attend and a social boycott was imposed. The woman filed a divorce petition in the formal court, but it was referred back to the customary system due to the Scheduled Tribe status of the Chakma.[489] The woman's divorce was granted but she was sanctioned for not obeying the summons of the customary leader and found guilty of making a false complaint. The boycott imposed by karbari Jamil Singh Dewan meant that;

'The woman is not allowed to mix with the Chakma community because she did not obey our rules and regulations. When she dies the Chakma community will not participate. She will have to move physically out of the village and will not be given any shelter in Chakma community or villages. The woman is not allowed to remain in the area where the Chakma live, she must stay with other communities'. (Anil Kumar Chakma)

Both the karbari and community members were present when he recalled the case and felt that the woman's absolute repudiation of Panchayat authority made a social boycott the only viable option, regardless of its prohibition as a remedy. The woman's recourse to state law to realise her equal rights as an Indian citizen led to the absolute denial of her identity as a Chakma.

[489] The Chakma already have the right to govern themselves by their own law as a Scheduled Tribe, the submission of a written code merely clarifies the content of that law and allows the formal courts to apply it directly.

The second example of the precarious position of woman within the customary system was observed in the Santipur Panchayat. It featured a case brought by a husband whose wife had deserted him to live again with her parents. Sixteen men and two women attended the hearing. The husband as complainant stated his wife had escaped their marital home and was now refusing to return from her father's house. As part of the reading of the complaint, the panchayat was told it was her third marriage, and the child that she carried to the hearing was not her husbands, but the son of her second husband, a Bengali. In response, the wife stated her husband had beaten her twice and whispered about her to her in-laws, torn her clothes off, shouted at her and roamed naked in the house. Whilst she did not want to separate from her husband, she could not live with him in his brother's house, where she felt she would be abused. She asked for an undertaking from her husband that he would not maltreat her again. Her husband responded that his wife wore jeans rather than traditional dress, and refused to have sex with him, which was why he beat her. Even though his wife had been married to two men before him he did not want a divorce, he simply wanted his wife to stay with him.

In a fractious meeting of over three hours, the young woman was constantly questioned and exhorted to return to her husband by successive members of the Panchayat, including the two women present at the hearing. During the course of the meeting she became increasingly angry and distressed, frequently crying and once hitting her young child repeatedly through her obvious frustration. Throughout the hearing she made clear that she considered herself to be at physical risk should she be required to return to the house. Still, the Panchayat unanimously found that the woman was guilty of mistreating her husband and ordered her to return home, adding that if she escaped after the Panchayat meeting her husband would have no responsibility in the future. The verdict was endorsed by the women members, who argued that a woman's duty is to satisfy her husband, to be considerate of his needs and to understand his limitations. No undertaking was sought from the husband in respect of the beatings, though the Panchayat stated action would be considered if she was beaten again. Still, the wife refused to return to her marital home and with her child was effectively

ejected from the protection of her parents and the Chakma community as a result of the Panchayats judgement.

Conversations with panchayat participants after the case revealed the ways in which the pursuit of perfect order harshly punishes the non-conformist, particularly if they are women. One panchayat member explained that the decision illustrated why panchayat was important to keep unity among the people. Headmen would always encourage unity and cooperation, but also had to create a fear of punishment among the villagers to reinforce order. In this case, there was no need for discussion or reflection because the community were able to base their decision on her poor character, as shown by her previous marriages with two men and her refusal to make a life with her third. A woman participant in the hearing argued her presence was necessary to ensure bad women were punished properly, and that the Panchayat must always consider the character of a person both in the past and in the present. The judgement was not just of behaviour but of this woman's previous character, her failure to satisfy her husband and to wear her traditional dress. Both women considered the Panchayat decision a fair judgement, which bound all villagers and parties to the hearing. The case represents a stark representation of the clash of legal ontologies, a real person was on trial rather than an abstraction, and the criteria for judgement was the perfect order of Chakma society.

This panchayat was attended by the head of the customary system, Niranjan Chakma, and heard by the senior official valley panchayat, suggesting that continuing use of social boycott, in spite of the drive for recognition, was not a question of delayed implementation, or of non-compliance with the ambitions of the leadership. Rather, social boycott as punishment was clearly sanctioned by the leadership and justified on the basis of the young woman's bad character. Thus, whilst the Chakma community looked outward and valued the appearance of modernity when engaging with the state, in terms of legal mobilisation and consciousness, Chakma law reflected a highly insular and particular iteration of Chakma identity. Chakma law brooked no dissent and placed unity and

cohesiveness above the supposed influences of state law and constitution. These observations fuel the conclusion of this thesis, ergo that the absolute but highly limited legal autonomy provided under the Sixth Schedule encouraged introversion, and caused the concentration of power in a particular section of the Chakma community.

4.3. Land and Formal Law

Section 2.4 attributed the decline of jum agriculture in Tripura to the encirclement of the Tripura principality by the British and the attendant policies of the Manikya princes, arguing that the rapid adoption of settled agriculture reduced the customary role land administration to marginal significance. During fieldwork this was evidenced by the low prevalence of cases recalled in relation to resource management, but one case was offered to demonstrate the intersection of state and customary courts. The vendor of a land package excited a complaint to the Panchayat by asking for the land to be returned to him after 20 years. When the vendor refused to participate in the Panchayat he was boycotted from Chakma society, and the case continued to be heard in the Tripura High Court. The outcome was the vendor's imprisonment for fraud due to the falsification of land documents to the court. This was said to exemplify the advantages of customary law, in that the drive to settle to the satisfaction of both parties would have engendered a division of the property regardless of right or wrong, and both parties would have claimed a partial victory. But it appeared that for this plaintiff at least, the possibility of an absolute solution, or the complete alienation of property to his ownership appeared more attractive regardless of the risks attached to a formal adjudication. With regard to land, the shared ethos of the customary system was not consistent with the transfer of private lands even between members of the same community.

4.4. Disorder

Resort to the state police and criminal courts was considered highly irregular, and the Panchayat appeared essential to the dispensation of community-based justice

and maintenance of order within the community. This role was consequent to recognition as a Scheduled Tribe, which carried with it an expectation that the Chakma policed themselves, and referred to state functionaries only in the most serious crimes or when a crime transgressed community boundaries. In relation to cases of social disorder, it appeared that the non-state system, though autonomous, would support state intervention where another community committee a crime against the Chakma. Within the Chakma community, however, there appeared a strong tendency to close around the matter, especially in the more remote areas. In the Kanchanpur area, state police would not interfere in a case as long as the Panchayat was managing it, even when serious criminal activity was suspected. Cases suggested that within villages, the harsh punishments ostensibly prohibited from customary practice remained integral to village justice, as demonstrated by this 2016 case, in which three villages had attempted robbery of a neighbour's house, and had sexually assaulted a woman in the process. They were apprehended and a Panchayat convened.

'On that day the three persons were made naked and had one brick tied to their penis. The villagers were made into two straight lines and the convicted person had to move along the middle of the line, they were kicked by the villagers and finally they had to return the money to the owner and pay a fine to the panchayat'. (Nirmol Chakma)

This was perhaps the most extreme case recounted in terms of criminal transgression, and was widely known within local communities as a recent example of good justice. Judgement and punishment were highly performative in subjecting the miscreants to extreme and populist violence and humiliation. Such punishments were rare, but though ostensibly banned under the reformed customary system, they were strongly supported by customary officials and villagers as the best means of maintaining peace and harmony within the community. The Panchayat solved the problem, prevented a re-occurrence of a serious crime, and just as importantly allowed the miscreants to be re-integrated into society. Its relevance to the village was in translating the ideal of unity and

harmony into a lived reality, the villagers and victims participating in the construction of an alternative legality, with the punishment designed as a shared experience and a communal bond.

5. Conclusion

In the summer of 2016, the Kanchanpur Chakma prepared to commemorate the 17th August as a '*black day*', in the lexicon of Chakma history and culture. The day when Radcliffe's partition was announced was the point at which the Chakma were rent asunder, their numerical concentration and therefore their power dispersed across different nation-states.[490] In highlighting the consequences of partition, customary leaders hoped to draw attention to the role played by partition in dividing them into insignificant numerical minorities. For all this activity, however, the mourning of Radcliffe's decision appeared a symbolic act, unaccompanied by any strategy of resistance or indeed any attempt to build solidarity with other Chakma groups across state borders. Rather, it appeared the marginalised Chakma preferred instead to turn away from their brethren and look inward to survive. Introversion and insularity infused the legal culture of the Kanchanpur Chakma, and provided an extraordinarily potent contrast with the CHT in Bangladesh. To conclude this chapter, the most salient points are drawn from fieldwork to ground the final conclusions of this thesis.

The relationship of the Kanchanpur Chakma to the state was governed by the provisions of the Sixth Schedule of the Constitution, with its highly specific provisions as to the benefits accruing through recognition. As a minority within the tribal groups of Tripura, the Kanchanpur Chakma were marginalised in both

[490] https://nenow.in/north-east-news/chakmas-tripura-observe-black-day-protest-inclusion-cht-undivided-pakistan.html. Since India abandoned its geo-political ambitions in relation to the Hill Tracts the secessionist position has all but disappeared from the manifestos of all the main parties in the CHT, with only the UPDF expressing any desire for an arrangement with India. Ahmed, (n 38)

state and tribal political arenas. However, as a Scheduled Tribe, the Chakma had exercised their constitutional right to legal autonomy under Section 4 of the Sixth Schedule, and were in the process of augmenting existing customary institutions in preparation for full recognition of their written code. Whilst recognition enshrined a degree of autonomy from the state system in relation to personal and social regulation, it also formally subsumed both institutions and code into the state hierarchy. This state-endorsed autonomy was evidenced in fieldwork by the way in which formal policing of Chakma villages was apparently delegated almost entirely to customary institutions. This suggested a situation of 'classical' pluralism, insofar as recognition defined and placed the customary system within a state-centred hierarchy of law. In contrast to the CHT, however, the subordination of community to state was sought after and welcomed by customary leaders, with state recognition seen as augmenting the power of the Chakma *against other tribal communities.*

In Tripura, the motivation for revitalising the customary system was not a counter-hegemonic strategy. Customary resurgence was driven by a highly insular ethno-nationalism, by an elite who valorised state recognition as a means of establishing hegemonic power over their own community and to gain favourable against other tribal groups. Further, it appeared the historical de-coupling of customary law, land administration, and territorial ambitions in Tripura drastically reduced its political relevance, confining practices to the social world of the village. In the battle for material resources, real power lay outside the confines of the customary system in the political arenas of state and tribal politics. Whilst recognition under terms dictated by the state had not necessarily caused the reduction of the customary system to a cultural artefact, it had underscored its marginalisation.

Consequently, unlike the CHT, the borders of the customary legal system in Tripura exhibited little porosity, with leaders seeking actively to prevent external influence from encroaching on the customary domain. Chakma customary law was conceptualised by its leaders and adjudicators as pure and unsullied by

political or civil society activism. Though constitutional recognition presupposed the alignment of customary institutions with the statutory panchayat system, and required improvements in women's participation and the removal of physical or psychological punishment, in Tripura even these limited reforms were pushed to the margins of customary legal practice. Thus, the process of recognition appeared to harden the boundaries between customary and state law, whilst the perceived perfection of the Chakma village militated against the kind of ground level legal transformations observed in the CHT. Law was mobilised as an identity practice in support of an imaginary and essentialised Chakma culture, and the legal consciousness developed through participation in legality seemed to underscore that identity.

To conclude, in the relatively stable Kanchanpur Chakma community, untouched by the resistance movements either of the CHT or Tripura, unwilling to align with the international movement for indigenous people, and enamoured with the limited recognition the Sixth Schedule conferred, customary leadership mobilised law in support of a conservative interpretation of law and society. The legal consciousness emerging from their accounts reflected a community identity infused with tropes of harmony, order and perfection, even where the forces of disorder and the unruly consequences of social integration impinged upon this ideation of Chakma society. Further, the pursuit of perfection created an environment where internal dissent could be construed as a 'fault', and where the most powerless and marginalised of the community were denied influence and compassion.

The next and final chapter of this thesis compares the legal cultures of the Chakma systems of the CHT and Tripura state, and conclusions presented as to the presence of critical communitarianism can be ascribed to one or both locations, and its meaning to the politics of recognition in Bangladesh and India.

Chapter Seven. The Location of Resistance

1. Thesis Overview

1.1. The Ultimate Paradox

Running through each chapter and argument of this thesis has been the proposition that conflict between a state and a community is more likely to empower a community than formal constitutional recognition, at least when the terms of recognition have been wholly determined by the state. At the outset, this was posed as the ultimate paradox, in that potentially an oppressed community could be empowered through the infliction of sustained violence, and an ostensibly empowered community could be marginalised through the process of recognition. The primary conclusion of this thesis is to confirm this premise. With legal culture, or specifically the concept of 'critical communitarianism' illuminating field research, it is possible to suggest their troubled engagement with the illiberal state of Bangladesh produced a more egalitarian, porous, dialogic, liberal legal culture that mirrored democratisation caused by war, displacement and its aftermath. This thesis has confirmed that the iteration of community with state since the colonial era has had productive consequences, and that in the broadest possible terms, the cumulative effect of conditions of conflict has been the (still continuing) transformation of an erstwhile hierarchical, patriarchal customary system into a site of inter-community dialogue, political discourse, wide participation in legal cultures and socially engineered change. This conclusion is underscored by the contrast with Tripura Chakma, where the process of formal recognition has cemented dubious traditions and produced a conservative and oppressive legal culture.

Theoretically valid as this statement is, there is no way of calibrating the democratising benefits of this transformation with the many painful transitions that initiated it. Suffice to say, the costs for the Chakma and the wider Pahari community have, and continue to be, considerable. A substantial but

undocumented number of Pahari people died in the course of the insurgency, and another 70,000 mainly Chakma families spent nearly two decades in foreign exile.[491] The incidence of gender violence was also significant, with mass rapes and kidnappings being used as a weapon of war.[492] Since the formal cessation of hostilities, outbursts of communal violence and isolated displacement have frequently disrupted the fragile peace, and internecine political violence has claimed hundreds of lives since the CHTPA was signed.[493] And, amidst this rumbling disorder, and despite grudging Supreme Court recognition of customary jurisdiction - in effect their constitutional rights to common land – Bengali settlement of the Hill Tracts continues, often illegally and always with the full protection of the Army.[494]

Beyond the admittedly discomfiting confirmation of this broad premise, however, field research offered insight into the granular effects of conflict and disorder on the culture and practice of customary or communitarian law. Theoretically, this thesis has extended the utility of the legal culture school by the appropriation of

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[491] The numbers of casualties are difficult to ascertain. Mey suggested that 10,000 people were killed in 1981 alone. Amnesty International carried out a series of reports during the 1980s documenting single atrocities. Levene argued that the cumulative effect of militarisation was the genocide of the Pahari people. Mark Levene, '*The Chittagong Hill Tracts: A Case Study in the Political Economy of "Creeping Genocide"*.' (1999) 20 Third World Quarterly 339. Janneke Arens, *'Winning Hearts and Minds - Foreign Aid and Militarization in the Chittagong Hill Tracts'* (1997) 32, Economic and Political Weekly 1811. *The Chittagong Hill Tracts Commission, 'Life Is Not Ours'* (International Work Group for Indigenous Affairs 1991). Wolfgang Mey, *Genocide in the Chittagong Hill Tracts* (1984).

[492] Ibid.

[493] The latest rift, caused by a split in the UPDF has claimed around 70 lives. https://www.dhakatribune.com/opinion/special/2018/07/17/the-rift-in-the-hills

[494] A recent example of the continued violence by settlers can be viewed here, https://www.dhakatribune.com/bangladesh/2017/09/18/20-years-peace-accord-indigenous-bangladeshis-still-attacked-land/

critical communitarianism as a means of theorising communities as the foci of resistance and the site of alternative legal meaning. Further, this concluding chapter suggests lessons can be learnt from the light shed on the *mechanics* of these transformations in the CHT, and concomitantly on the ways in which formal state recognition can limit or even extinguish the transformational potential of the communitarian domain. In this detail, insights are found into the way change is generated in communities and their legal systems that could potentially inform the ways communities themselves approach the practice of law, and also influence development interventions in the customary sphere that occur in both peaceable and post conflict contexts.

This concluding chapter first summarises the thesis, and then uses the core concepts of legal mobilisation and legal consciousness to present comparative conclusions as to the nature of legal culture in the two locations studied. Finally, it reconstructs the legal cultures of the CHT and Tripura Chakma in accordance with the concept of critical communitarianism, arguing that dynamic and contested environment of the CHT creates a communitarian arena in which legal culture is formed by a febrile dialogues and contestations that represent the democratisation of community since the formal cessation of hostilities. Concomitantly, it suggests that in Tripura, the stated perfection of the communitarian realm is an oppressive force, requiring the most marginalised to choose between belonging and agency. For the more empowered community members, the customary system holds only an emotional resonance while they pursue true power in party or tribal politics.

2. Thesis summary

2.1. Summary of Theory and Concepts

The theoretical exposition in chapter two recounted how the foundations of contemporary liberal and Marxist political theory were lodged in the twin concepts of the self-possessed and politically equal individual, and in the normative superiority of the progressive state. This thesis chose a communitarian

approach to analysing law that understood the notion of community as a neutral unit of social organisation, formed in a postcolonial context by narratives of oppression and marginalisation. Its location was in the former hill territories of colonial India, a region where hill communities were legally valorised in the colonial era, assuming a stable political form characterised by their anteriority both to capital and the state. Using postcolonial readings of Marx, communities were identified as anterior locations with a potential for resistance formed on the bonds of the immediate and local communitarian context. The discussion of legal pluralism explored the close alignment of the communitarian domain with legal practice insofar as tribal communities were concerned. With this established, the erection of state borders was identified as an opportunity to contrast the legal cultures of one nation, the Chakma, now divided through Partition into two stubbornly autonomous communities. Through a deconstruction of the legally plural environment in the CHT and in the Indian State of Tripura, the web of influences and intrigues that produced, sustained and transformed the communities of the hills was explored.

As a preamble to the conclusion it is helpful to refer again to the conceptual frame guiding this exploration. Legal culture was selected precisely because its analytical tools directly connected the narratives surrounding legal practice and the legal ontology produced by those narratives. Whilst accepting that communities were the focus of power relations, this thesis sought instead to explore communities as sites of legal meaning. Fitzpatrick suggested that:

'If law continually becomes itself and is sustained in its responsiveness to exteriority, there must nonetheless be a positioned place where this responsiveness can be made determinate'.[495]

[495] Fitzpatrick, Peter (2005). '*The damned word': culture and its (in)compatibility with law'.* Law, Culture & the Humanities 1 (1), 2-13.

The 'positioned place' in the locations under scrutiny was the immediacy of a community territorialised through colonial intervention and transformed through divergent experiences of de-colonisation, within an overarching framework of a postcolonial legal form of legal pluralism. Practices that were not previously defined as legal became so through this engagement, and in the post-partition era were further shaped by the violent intrusions of the state into the hitherto protected world of the Pahari/Chakma.

2.2. Summary of Historical Context

Chapter three offered a historicised reading of Chakma history and the relationship between the expanded concept of the 'Pahari' community and the customary legal system. First, it analysed the colonial jurisprudence that engendered the legal division of the northeast hills from plainland India, positing Maine's politically influential theorisation of tribes ruled by ossified tradition, or 'status' rather than 'contract', as the driving force behind the balkanisation of the territories and peoples of the region. The Chittagong Hill Tracts Regulation 1900 secured the excluded status of the CHT region, but also had the paradoxical effect of producing a community that had not existed before, bound to a particular territory and legally homogenised at least insofar as the common property frontier was concerned. In the second part, decolonisation was shown to erode colonial structures as the centralised and majoritarian state in various guises sought to assimilate the hill territories into its technologies. The early phases of a Chakma-led insurgency against the state sought autonomy and an end to the 'feudal' system of customary governance. The imperfect and divisive Peace Accord in 1997 redrew the customary domain as the site of a struggle for power and resources; utilising the CHT Regulations 1900 provided the only tenuous route to constitutional recognition for the now much oppressed and marginalised hill peoples within a majoritarian state of Bangladesh.

In comparison, chapter six showed the history of the Tripura Chakma had been of relative isolation from the state. Though jum farming was the originary mode of production, rulers of the principality were more successful in introducing plough

cultivation, the practice of jum was pushed to the margins, and land commons were reduced to insignificance. On secession into the Republic of India, Tripura state became subject to the national Constitution, and the Chakma achieved recognition as a Scheduled Tribe in 1976. The Chakma customary system had run along the lines of informal panchayats, until the recent campaign to systematise and codify laws to gain formal recognition of Chakma legal institutions at the Tripura High Court.

2.3. Summary of Research Data

Field research was largely focussed on the Chakma community in the CHT region of Bangladesh, an area where the Chakma dominated the *'imagined community'* of the Pahari/Jumma.[496] The research questions posed sought first to understand the power relations and cultural and political narratives surrounding the customary/communitarian system in the CHT, and then to identify the legal culture produced in a postcolonial and post conflict environment of such complexity.

In relation to the Hill Tracts, the narratives that surrounded the communitarian legal arena were shown to have emerged from a painful history of resistance to state dominance in the postcolonial era. Chapter four started with an internal state perspective on legal pluralism in the CHT, suggesting that a Janus-like position of public and material support for the customary system co-existed with an apparent longer-term ennui. Field data confirmed the customary legal institutions defined in the CHT Regulations were re-appropriated during the peace process by both political activists and customary leaders, in order to garner material advantage or '*extra power*' in negotiations with the state and to a hegemonise the by-then divided Pahari. Thus, in addition to the pragmatic or strategic deployment of customary law to gain constitutional legitimacy for the

[496] Anderson, (n 88). Van Schendel, '(n 63)

Pahari cause, the customary system was deployed as a symbol of the artfully constructed Jumma nationalism, and as a signifier of indigenous/Adivasi identity.

Beyond this stated solidarity, it was clear that the Peace Accord was a source of division within sections of the Chakma/ Pahari leadership, and in any case had only ever been negotiated with one political party and its Chakma leadership. Further, the ideology of Jumma nationalism had always contained an inherent and unavoidable antagonism between the Chakma-generated idea of a single, Jumma community and the de facto social diversity that had been contained within the colonial regulations and re-emerged constantly to destabilise Pahari solidarity. Field research suggested these tensions within the Pahari community caused a splintering of both Pahari and Chakma elite, infusing the communitarian legal arena with some of the tensions of the wider polity, and contributing to the internal plurality to the communitarian legal arena.

Chapter four also analysed qualitative data gathered from those at the borders of the community, suggesting that the boundaries of the customary system were necessarily porous. The struggle for autonomy and against the state relied on support from a much wider alliance of civil society and development activists in Bangladesh and beyond. This thesis suggested that Bengali supporters divined in the Adivasi-led resistance a potent of a more inclusive, less oppressive iteration of Bangladeshi statehood. Thus, the social movement that grew around the Pahari struggle infused discourse with a broader language of both indigeneity and human rights. One of many paradoxes and contradictions of the project emerged in that activists mobilised customary law in support of claims for autonomy and land restitution, but also sought to increase legal choices and strengthen legal pluralism, thus potentially weakening customary institutions and the strong identitarian aspects of its practice. In conclusion, it appeared that this broad alliance had strategic reason to perpetuate the continuity myth of the customary system since its resurgence was closely connected to a particular representation of Pahari cultural alterity, but beyond this assertion of a common identity, perspectives on the form and jurisdiction of customary institutions differed

considerably. Further, a proportion of Pahari political leaders, notably the UPDF, still rejected customary institutions as feudal relics.

Chapter five presented case study evidence suggesting that leadership divisions had the effect of transforming customary law at village level into an arena characterised by dialogue and discourse. In the studied locations, the desire to maintain the borders of community overrode the differences in legal culture and consciousness perceived amongst political, customary and civil society activists. The resort to alternative dispute resolutions was far less noticeable than the impact of discourse on legal mobilisation and legal consciousness *within* the erstwhile customary system. Customary law was mobilised against the state, to maintain the boundaries of the Pahari community, and to reinforce the identity of the Chakma respondents as Pahari or indigenous. However, within each immediate and local setting, participants synthesised customary and political justice into workable systems that borrowed from global, national and local concepts of law.

In terms of ground level practice, practitioners and villages appeared to absorb and synthesise the multiplicity of perspectives and influences that had appeared to fracture and dissipate the solidarity of the leadership. The liberating and transformative consequence of this plurality was the diffusion of power within the customary system, the various competing perspectives giving rise to various local 'struggles' in a Foucauldian sense, with positive effects of widening participation, increasing the level of local discourse over legal meaning and remedies, and the absorption of transformative influences of human rights and indigeneity. At the same time, limited instances were uncovered where the urgency of maintaining the borders of community caused an oppressive closure; the individual predicaments of some Pahari citizens was subordinated to the broader strategy of maintaining community boundaries. A fuller exploration of this phenomenon was limited by the difficult fieldwork conditions, insofar as village legal practices could not be directly or widely observed.

Chapter six sought to contrast these findings with the operation of the customary system in Tripura state, India, where the Chakma had experienced conditions of relative stability since their migration, at least in the sense that Kanchanpur had avoided the swirling rebellions of India's northeast. Though absent of direct conflict, however, the surrounding maelstrom in the postcolonial northeast framed the interaction of the small Chakma community with the state, producing a prevailing sense of marginalisation and threat. Custom was resurgent in Tripura because the Chakma, a Scheduled Tribe since 1976, sought to formalise the status of their law under the constitutional mechanisms for recognition contained in the Sixth Schedule of the Constitution of India.

The resurgence of custom had been instigated by the cultural leaders of the Chakma community, and though driven by an essentialised Chakma nationalism, was absent of any clear political strategy. A largely elderly male leadership construed the precolonial rural societies of the Chakma as 'perfection'. In terms of legal consciousness this was observed as causing a hierarchical, ossified and static iteration of Chakma law, and exaggerating the differences between the Chakma and other tribal communities. Further, it appeared that within the customary arena, power was concentrated in male elders, the 'harmony ideology' so central to their legal culture resulting in an oppressive requirement to conform or leave. Situations were observed where the most vulnerable of the community, namely women and children, were placed in situations of great jeopardy.

3. Critical Communitarianism

The core concept of 'critical communitarianism' utilised tools developed by legal culture theorists to theorise non-state communities as both the sites of power struggles and of legal meaning. Its innovation was to place the communitarian domain firmly within the context of state/society relations in order to understand the complex connections between the legal practices of non-state communities and the social relations that frame them. Critical communitarianism in effects saw state law as an integral element of communal cultures. It was defined in chapter two as positioning communities as;

'The cultural foci of mobilization for, or resistance to, state law in the political context of state-society relations. It dwells on legal cultures as practices of those identities that have become embodied in legal consciousness and that have been generated through state-society relations as well as struggles for power'. [497]

This perspective placed community at the centre of a rich analysis of legal culture, privileging the insights of community members into way law was strategically deployed, and utilising practical examples of communitarian law to explore legal consciousness. Studying the Chakma community in two locations presented an opportunity to compare legal mobilisation in very different contexts and to enquire into the ways various interested community members had participated in the construction of legality. The conclusion will first analyse the comparative findings in terms of the political context of state/society relations, legal mobilisation and legal consciousness, before attempting to reassemble these constructs in the guise of critical communitarianism.

3.1. Mobilisation and Recognition

Legal mobilisation was defined as encompassing the way in which individuals and groups turned to the law for help, and the ways in which social movements deployed law as a cultural resource. This section summarises conclusions on the nature and impact of legal mobilisation of customary law in pursuit of state recognition, and the ways in which people turn to the law for help at a village level.

The political context of state/society relations in both research locations was of an unstable constitutionalism caused by the colonial legacy of racial and ethnic division. Resistance to state law, or otherwise, on the part of the community was inextricably linked to whether or how the state chose to recognise minority rights and the form of that recognition. In chapter two the politics of difference was

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[497] Barzilai (n 5) Pg. 1

discussed with reference to its application in liberal states, and its role in extending and enriching concepts of equal rights by incorporating identity facets drawn from communitarian fields.[498] This was critiqued as assuming that equal rights presented a neutral space in which community cultures could be negotiated in dialogic practices, when in reality the frame of dialogue was determined by the state.[499] In this thesis, the partiality of the state was laid bare in that state/community relations were still explicitly recognised as backward communities in both locations. However, recognition on terms that reflected colonial tropes was found to have paradoxical consequences.

This was because, semantics aside, the legal and constitutional frameworks that framed state/society relations were highly divergent; Bangladesh consistently pursued violently assimilationist policies, ostensibly privileging equal rights in their constitution whilst denying the historic marginalisation of the hill territory communities. In India, the opposite was true in that state recognition was minutely specified in constitutional provisions that mirrored the protective legislation of the inner lines. Whilst the shared language of colonialism in both constitutions reflected the historic marginalisation of tribal communities across the northeast, the type of recognition possible within the respective constitutional frameworks differed considerably, as did the type of recognition sought.

Connolly's typography of recognition distinguished the frame of state/society relations insofar as recognition is concerned.[500] She identified four types of recognition of non-state justice systems(NSJS) as reflecting broadly the range of approaches observable in different national contexts. The first model was of total abolition of NSJS and their absorption into state law, second, was the complete

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[498] Chapter two, section 2.1

[499] Chapter two, section 2.2

[500] Connolly B, '*Non-state Justice Systems and the state: Proposals for a Recognition Typography'* (2005) 38 Connecticut Law Review239

incorporation of NSJS into state law, the third was a limited incorporation into state law which involved the delegation of legal jurisdiction within a framework of state control, and finally, the no incorporation models which ceded sovereignty or granted a more limited sovereignty that allowed an NSJS to operate alongside the state system without interference. These notions helpfully illuminate the propositions of this thesis as regards the legal framing of conflict in Bangladesh.

It concludes that the conflict strewn history of the Chakma in Bangladesh was reflected in a dissonance between the type of recognition sought and the type of recognition offered by the state. Until very recently, Bangladesh recognised customary law only insofar as its jurisdiction was confined to the personal and social domain. Recognition of customary structures on the same terms as plainland Bangladesh would involve a total or partial incorporation of customary law into the state law framework, and the total subordination of the system to the state.[501] However, the Chakma sought recognition on terms that more closely resembled the no incorporation or avoidance model of the First Nations in the Americas. Broadly, the combination of the Chakma/Pahari political strategy of seeking autonomous rule, and the legal mobilisation of customary jurisdiction over land and resources amounted to a situation akin to the delegation of sovereignty, even though residual power in the CHT Regulations was reserved to the state. This was unpalatable to many factions within the illiberal, fragmented, and centralised state in Bangladesh, and was one reason behind the continued stasis in implementing CHTPA provisions. The more recent assertion of customary

[501] Ibid. Connolly uses the example of Salish in Bangladesh of a fully incorporated system in that it completely replaces the state. See also Golub S, 'Non-state Justice Systems in Bangladesh and the Philippines (University of California, Berkeley 2003) <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/GolubNonstateJusticeSystems.pdf>

jurisdiction in the Supreme Court of Bangladesh represented a small but significant step toward legal recognition of the Chakma on their own terms.

Further, set against the fragmented elite positions observed *within* the Chakma community of Bangladesh, the terms of recognition appeared to broker agreement and create grounds for community mobilisation against the state. Thus, the legal mobilisation of the CHT Regulation established the Pahari, not the Chakma, as the cultural foci of resistance. The struggle for recognition of the Pahari reinforced a community identity first raised into being through the homogenisation of law and land commons under British rule, and then revitalised in the imaginary of Jumma nationalism. The terms of recognition chosen by political and customary leaders reinforced these elements of identity. Even the colonial tropes of homogenised backward tribes had the effect of dissolving the boundaries between the fractious Pahari nations to reinforce their identity as a community. The features that distinguished state/society relations were firstly, the fact that there were no terms or processes manufactured by the state to determine the limits of recognition, and secondly, that legal mobilisation against the state was an act of agency by the Chakma/Pahari. These factors had the effect of mitigating the risks of essentialism that had been identified as accompanying processes of recognition set out in section 2.2 of chapter two.

The State of India had constitutionalised the protections of the colonial era in the provisions of the Sixth Schedule, offering a form of recognition that would effect a full incorporation of communitarian law into the state. The Tripura Chakma were recognised as a Scheduled Tribe in 1976, and were members of the tribal council, the TTADC since its inception in 1985. Even before the recent mobilisation of customary law, their migratory history, and the early erasure of jum as a source of livelihood had denuded the customary system of its centrality to resource allocation, confining it to the social rather than political sphere. The Kanchanpur Chakma had embarked upon the task of achieving state endorsement of the Chakma Panchayat structure on terms entirely determined by structures of state recognition. The process through which recognition was sought was instigated

and led by the Chakma to engage with a distant and disinterested state, and their motivation appeared primarily a desire to accentuate their difference from other tribal groups and gain extra resources through their assumption of formal jurisdiction over village affairs. The Chakma sought state support for their advancement in tribal politics through the recognition process, and their ire was therefore not directed at removing state influence, or addressing state power, but at other tribal communities, Primarily, their legal mobilisation for recognition was an identity practice that reinforced the insular and divisive nationalism observed during fieldwork.

The conclusion is that the search for recognition in Bangladesh has an empowering effect, despite being unfinished, and still prey to the whims of political and military branches of the state. First, with the state offering little succour to communities and no interpellating framework for recognition of their laws, the Chakma/Pahari have defined the terms of recognition and worked to coerce or persuade the state into recognising them. Second, the dissonance between state and community created dialogic encounters, both between community representatives and the state and within the community itself, that have reinforced or strengthened the solidarity of the Chakma against the state even as fragmentation of subject positions occur within the community. Extending and deepening the politicisation of the Chakma/Pahari had indirectly drawn a wider audience to and participation in debates over the hill communities future. Power, through discourse has dispersed beyond the elite to multiple sites or constellations.

The opposite was true in Tripura. The process of recognition provided a means for a small community elite to reshape the customary system in their image, and extend their hegemony over the wider community. Rather than inspiring discourse, constitutional recognition appeared an act of closure, immuring the already insular Chakma from the contested realm of tribal politics, and avoiding the dialogue that might change the law by using recognition to reinforce the boundaries between the customary system from the political world.

3.2. Mobilisation and Resistance

The next question, then, is whether this community in the Hill Tracts could be identified as the cultural foci of resistance to state law? This element of critical communitarianism references the strategic mobilisation of communitarian law as an anti-hegemonic strategy or an act of strategic essentialism.[502]

The answer, clearly, is that despite the deployment of derogatory tribal metaphors as a means of defending the borders of community, the legal mobilisation of the CHT Regulation placed the Pahari community as the '*cultural foci of resistance to state law*'.[503] Recognition was sought precisely to secure the wider Pahari community from further oppression and encroachment by the state, and drew on colonial statute to reinforce the solidarity and thus the strength of the Pahari. The ends, which were to achieve as close to sovereign domain over the CHT territory as possible, justified the means, which was the public facing acceptance of pejorative and essentialising labels. These labels, in relation to discourse within the community, had already been superseded by the nationalism of the Jumma, and the assumption of indigenous identity by the political and customary leadership.

At the same time, the external presentation of a unified Pahari position to the Supreme Court and to the government could not conceal the continued dissipation of solidary within the Chakma community and the wider Pahari. This illusory solidarity appeared to produce a customary arena in which culture and law were subjected to constant revision through the synthesis of competing sources of dispute resolution, and dialogue and contestation between participants. Despite a legal mobilisation phrased in colonial language, plurality within community

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[502] Spivak, (n 120) Pg. 66

[503] Barzilai (n 5) Pg. 1

prevented any essentialised notions of either community or law emerging from within its boundaries.

In answer to the same question in Tripura, the answer must be that legal mobilisation of the customary domain naturalised narratives of oppression within the Chakma community. An essentialised and insular nationalism exhibited during fieldwork constantly referenced imaginary tropes of bucolic perfection, whilst the practice of customary governance and law reinforced these tropes by demanding exit from the community if norms were transgressed. Perfection required dissonant voices to be silenced, which in practice meant that those seeking political power or tending toward social change sought to exercise in the political sphere. The Chakma mobilised law *for* the state, rather than resisting its advance. Rather it was the cultural foci of resistance to the hegemony of other tribal communities.

3.3. Mobilisation in the Villages

Coulthard suggested that essentialised notions of culture could be deployed to '*transcend not reinforce oppressive structures and practices*. This proposition is now considered in relation to legal mobilisation in the villages.[504]

This thesis showed that though the Chakma-led PCJSS dominate regional politics they have, since the early days of the insurgency, struggled to achieve hegemony over the smaller nations and even over sections of their own people. Yet the state only engaged the PCJSS/Chakma insurgents; as a result, the CHTPA exacerbated divisions within the Pahari, and caused the bipolar conflict of state and community to evolve into a decentred internecine war of continuous low-level violence. Political representation was fragmented, with competition for control of village areas between the PCJSS and UPDF leading to spasmodic confrontations. A further dissonance was notable in the differences between the

[504] Coulthard, (n 102) Pg. 103.

leadership's theories of change. The Chakma chief viewed the customary system as complete in that the structures and institutions were believed to be sustainable and capable of emic change. Etic change was resisted. Political leaders from both main parties believed democratisation was necessary. The PCJSS asserted support for customary functionaries whilst intervening directly in judgements where they felt necessary whilst the UPDF were unapologetic in their drive to supplant the hereditary system with a technocratic alternative. This context framed the practice of customary law in the villages visited for field research.

The surprising conclusion as to local legal mobilisation in the CHT is that, rather than the presence of political sources of dispute resolution weakening the customary system, the opposite appeared true. Customary laws were mobilised to maintain order and return equilibrium in the event of social or personal issues arising in the villages. In each village location, different constellations of power had emerged in which customary and political justice worked in concert. Political representatives supported customary leaders to resolve disputes and to preserve elements of the historic, hereditary harmony focussed customary system within an expanded communitarian domain. This appeared the case even in UPDF areas, where, despite the scepticism of leaders as to the utility of customary law, Sebakkon political representatives understood it as emblematic of identity and still paid tribute to customary functionaries.

Thus, the way in which state law infused legal culture in the communitarian domain was twofold. First, the overwhelming and unifying objective of all parties to customary judgements was to retain jurisdiction over customary cases within the Pahari community. This overriding consideration caused the dissonance in elite perspectives to become the subject of discourse and dialogue in local arenas around how best to contain and solve issues as they arose locally. This also had the effect of changing the customary arena, with, for example, an alien violence as remedies seeping into some areas to prevent a drift toward state law and its superior enforcement mechanisms. The effect of such dialogic justice was also to increase participation in law by previously excluded groups, with mobilisations

occurring in respect to women's participation as functionaries, and panel members. Each village, it seemed, contained a microcosm of the contestations so evident at an elite level, but each village mobilised law to resolve dissonance over legal meaning in order to protect the legal culture of the Pahari. The conclusion is that the presence of discourse and the role played by customary law in providing a dialogic forum ensured, first, that this process of creative exchange infused the legal culture of the Pahari with a dynamism and mutability that belied its colonial origins, and contributed to the development of a Pahari identity as empowered and autonomous. Second, it suggested that the mobilisation of customary law to synthesise dissonant perspectives and solve problems within the boundaries of community created a legal practice that placed oppressive practices outside the norm.

In Tripura, the opposite was true. Though state legal culture as expressed in the Constitution of India expressly addressed gender discrimination, gender representation and the necessity of removing cruelty from punishment, the Tripura Chakma appeared immured to external influence by the provisions of recognition. The performative elements of legal mobilisation, suggested that customary law was used as a harsh deterrent to villagers, and more generally acted to sustain the insularity of the Chakma against other tribal communities.

3.4. Legal Consciousness

In relation to legal consciousness, the question structuring this aspect of research asked what defined legal consciousness within the Chakma communitarian legal system? Legal consciousness was defined earlier in this thesis as participation in the construction of legality, or more simply the way that individuals experience and understand the law. Chapters five and six used legal consciousness as an analytical tool, through which the law could be located within the pattern of social practices observed and described in village settings.

In relation to Bangladesh, chapter five concluded that the expansion of the customary legal domain could be observed through the legal consciousness of

those seeking help from the law, more precisely in their definition of informal political routes to dispute resolution as legal, and in the active involvement of a wider range of participants in the customary arena itself. At the same time, village case studies suggested that the ideologies of local political activists did not completely supplant customary values, nor did the violence latent in their system of adjudication displace the more common legal consciousness based on harmonious settlement and arbitration.

Rather, legal consciousness appeared infused with a wide range of sources and influences reflective of the porous boundaries of the customary system. Whilst legal consciousness was more commonly formed around customary institutions and values, the rapid changes in the wider culture of the Pahari affected the way in which those institutions were perceived and utilised. Customary law and its institutions were seen as imperfect, incomplete, 'weak' in the sense of being unable to enforce judgement, and both requiring of change and reform and open to those changes. At the same time, customary law was commonly perceived to be *of the community*, kinder, tolerant of human weaknesses and capable of achieving consensus. The link between jum agriculture, the right to land, and culture itself was universally perceived and understood. In the village case studies, legal consciousness was the 'positioned place' in which the internal plurality observed earlier in this concluding chapter was synthesised, and customary law the practice of an identity that was as open, mutable and fluid as culture itself.

In contrast, the notion of perfection pervaded the legal consciousness of customary practitioners in Tripura. The revitalised customary system had been constructed around the technocratic requirements of Sixth Schedule recognition, at least insofar as the shift towards a formal hierarchy and a written code were concerned. The harsh nature of customary justice was observed both amongst male elders and female participants; legal consciousness was formed around a notion of law's primary role being the maintenance of a high standard of Chakma conduct, with the consequences of breach being expulsion from the community. The reason appeared to be that customary social practices were defined by a small

and highly particular subset of Chakma leaders, who institutionalised legal meaning from essentialised historical tropes. This thesis concludes that the process of Sixth Schedule recognition privileged male, educated and elder members of the Chakma community, and afforded them great power in determining at what point further legal meaning should be constrained. This elite and unrepresentative minority fetishised village harmony to the point of oppressiveness, harmony and order were consciously invoked to restore order even if the consequence of that restoration was palpable harm to those participating in justice.

3.5. Critical Communitarianism

This thesis concludes that critical communitarianism has proved a powerful lens through which the role of law in defining community identity and generating resistance can be observed.[505] It has guided an interrogation of legal practices of two communities of the same nation, exposed their differences and offered a means of establishing why those differences might arise. The remaining question is to ask whether a condition of critical communitarianism has been established in these locations.

The answer in respect of Bangladesh is affirmative. The Pahari community proved to be the cultural foci of mobilisation of resistance to state law, in a political context where customary law has been mobilised expressly to achieve constitutional recognition. This elite mobilisation of law reinforced the identity of the Pahari as one community attached to their territory and thus to the idea of land commons in defiance of the state. This mobilisation explicitly rejected a recognition based solely on cultural grounds and insisted on the rights to land and resources denied and ignored since Partition. Pahari identity was shown to be conflicted at a strategic level, but highly mutable at a local level. In village

[505] Barzilai, (n 5)

locations, law was mobilised in support of legal autonomy and law was experienced as an identity practice. At the same time, community members were in the process of constructing a legality that referenced both the political and cultural spheres, they adapted law to suit the new society, democratising its practice and not only resisting the state but providing an example of how difference could be negotiated across communities.

In Tripura, however, it seemed the mobilisation of customary institutions to meet the requirements of the Sixth Schedule was not an act of resistance but an act of supplication. Recognition was sought not to repel state law but to place Chakma law more fully within its structures. Law was mobilised to reinforce the position of the Chakma community within the crowded arena of tribal politics, and to impose a restrictive and highly conservative iteration of law on the rural population. The preconditions of critical communitarianism were not met.

4. Conclusion

The original contribution of this thesis has been to engage with the paradigm of recognition through the prism of critical communitarianism, explicating the intricate connections between exterior resistance to state dominance, and the interior world of community. It has demonstrated the politicisation of communitarian law has transformational effects on legal culture, empowering its participants to construct a legality as dynamic and mutable as their highly labile culture. The comparative aspects of this project have highlighted the stark contrast between communities of the same nation, both using law as a practice of identity, but one mobilising to engender community solidarity against the state and in support of resource claims, and one mobilising for the state to gain advantage over other communities. The invocation of critical communitarianism to illuminate state/community relations has confirmed the core hypothesis, which was mooted as the paradox of state violence producing vibrant and dynamic communities, state recognition producing essentialised identity and accentuating the exclusion of already marginalised communities. At the outset, it was suggested that if proven, this hypothesis could offer original insights into the mechanics of

legal transformation of practical relevance and the paradigm of recognition, and these insights are outlined below.

4.1. Post Conflict Implications

Over the last five years, Bangladesh generally and the CHT in particular has experienced a rapid deterioration in their prevailing conditions. In Bangladesh, Islamist violence has become increasingly common and the government increasingly illiberal as a result. In the CHT, the army has consolidated its control over the area on the pretext of stemming the internecine violence between Pahari groups. Meanwhile, the Indian northeast remains disordered in the sense of being the location of multiple rebellions against the Indian state, as well as communal disputes between the many tribal communities, many of which are in competition for state resources and political power. Though these conditions encase the Kanchanpur Chakma, their involvement is limited, ironically, by their small numbers and lack of power. The two Chakma communities studied in this project have experienced de-colonisation quite differently despite their close geographical proximity and shared precolonial history.

These contrasting conditions enabled a comparison that suggested that in Bangladesh, a toxic post-conflict relationship between state and community affected legal culture in two ways. First, it exaggerated the boundaries between state and community, diminishing the appeal of formal alternatives and turning attention to internal reforms of customary law to meet the demands of changes in culture. Second, it opened the customary arena to influence from armed cadres, a factor that had surprisingly little effect on the day to day dispute resolution of insofar as personnel are concerned, but introduced violence into erstwhile harmonious processes. Finally, it transformed the customary arena into both a site of resistance and a site of dialogue. Customary law has been shown to be a means of repelling the state, but also a means of healing the divisions caused by previous and current contestations.

Specifically referring to a post conflict environment, Isser suggested that customary justice systems were;

'An enduring and influential component of the justice landscape as a whole and that policymakers and practitioners who ignore or seek to undermine them are doomed to fail'.[506]

In the same article, she noted the difficulty of engaging with customary justice systems in the aftermath of war, when situations are complicated by the legal conflicts and population displacements that inevitably follow. Nonetheless, there was a tendency to see informal or customary justice as a major element of post conflict nation building. This thesis adds to that literature by highlighting the potential risks of focussing on customary systems in a post conflict setting without accounting for the transformational effect of conflict on communitarian hierarchies and legal practice. This thesis has demonstrated that though Chakma/Pahari customary law was ostensibly built around the colonial system, ground level practice admits multiple actors into the system, and further, provides evidence that the arbitrative elements of customary justice have been eroded by the presence of armed cadres. This suggests reform or state-building programmes in similar situations should treat ostensibly customary systems critically, and seek an expansive, open, and locally situated definition of communitarian law when planning interventions.

4.2. Development

This expansion of the customary domain to a broader communitarian circle also suggests that past development strategies in the CHT have been misguided in focussing entirely on customary leaders when seeking to empower communities through law. In recent years it has become more common in development not only

[506] Isser D (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (United States Institute of Peace Press 2011). Pg. 326

to acknowledge the power of non-state law but to engage it to deliver legal empowerment. This was the case in the CHT from 2010 -2013 when the capacity building cluster of the UNDP-CHTDF project invested part of its €20 million programme in funding logistic support and training to headmen through the Circle Offices. Particular concerns over the precarious position of women in the system ensured that training encompassed customary law, land responsibilities and gender parity. Over subsequent years, all headmen and karbari received training at least once, whilst the Circle offices benefited from investment in technology, staff and advisors.

This research has demonstrated the failure to engage with political actors will have undermined this investment. During fieldwork, no area was immune from political influence, with some areas being controlled by politicians rather than customary functionaries, and others where the balance of power was held resolutely in political hands. The UNDP, however, shied away from engagement with political activists, partly due to a fear of state censure and partly through a poor understanding of the ubiquity of political involvement. This thesis has demonstrated a considerable breach emerging between the external facing presentation of the customary system as unified and traditional, only for that presentation to dissipate when witnessing and discussing village justice. Again, the lesson for development organisations is to engage constructively with ground level practice as part of the planning of interventions.

4.3. The Paradox of Recognition

Finally, this thesis returns to its core premise, the ultimate paradox that the customary system in the CHT appeared to be an empowered and empowering institution precisely because it was the subject of such fevered attention at both strategic and local levels. Conflict had led to the rebirth of the customary arena as a sphere of dialogue in which community tensions and external adaptations could be synthesised. The terms of this dialogue were not set exclusively by the state but emerged from the community itself through a synthesis of competing perceptions. Meanwhile, established process of recognition in India contributed to the

essentialised identity presented by the Tripura Chakma, and appeared to underscore and legitimise illiberal legal practices in the community. This was in spite of specific constitutional measures that required consistency between the rights-basis enshrined in the First Schedule and protections for tribal communities in the Sixth. This process seemed to relate to the concentration of power in the hands of a small and elderly community elite, and the strongly exclusive nationalism that engaged concepts of perfection to order Chakma village life. The result was an oppressive variant of legal culture, which used customary provisions to enforce strict standards of behaviour by way of harsh punishments. Concomitantly, the discursive and contested CHT communitarian arena exhibited a dynamic culture and contained participants with strongly held views on the necessity of change, particularly in relation to gender parity.

This thesis concludes that the processes of recognition are indirectly responsible for this divergence in the nature of communication between state and community, and the porosity of the borders of the communitarian system. In Bangladesh, the Chakma/Pahari have been the object of state hostility of such brutality that this has inevitably affected the political consciousness of the community. Further, the oppressive force of the state caused the customary legal domain to be receptive to external influence, through global discourse such as human rights and indigeneity and more local influencers through liberal social movements. It was not recognition per se that caused such a dynamic legal culture to emerge from conflict, rather this thesis concludes it is conflict itself that disperses power and creates intra-community dialogue through the process of dispute resolution. In stark contrast, however, the Sixth Schedule betrays its colonial roots in fixing legal cultures and empowering self-appointed elites over the citizenry.

Though this conclusion relates to a contrast between illiberal Bangladesh and ostensibly liberal India, it has implications the politics of recognition in other locations. Whilst this thesis cannot resolve those questions, it can at least draw attention to their utility. In Bangladesh conflict, contestation and dialogue resulted from the oppressive and tragic history of conflict in the region, and from

the constant questioning produced by persistent attacks by state on community. In contrast, the Sixth Schedule seemed to immure the Kanchanpur Chakma from discourse, from solidarity with other tribal groups, and from immersion in ideas that might engender change from within. In conclusion, it is suggested that the extent and speed of change in Bangladesh related to a rapid politicisation and radicalisation that enforced the boundaries of community and increased their porosity. Constitutional recognition in India reduced the pace of change to that commensurate with the elderly elite custodians of law and produced a form of nationalism that places the Chakma lifeworld firmly in precolonial mores.

The primary purposes of recognition in northeast India appeared to be the containment and pacification of communities now deemed a risk to the state, despite that apparently liberal roots of the Sixth Schedule. It is perhaps no surprise that in post-conflict conditions, certain branches of the Bangladeshi state are seeking a similar constitutional rapprochement. Yet the dangers, alluded to by Coulthard in his rejection of the politics of difference is that constitutional recognition forms yet another cipher for colonisation and effects a removal of troublesome communities from the political mainstream. In Tripura, this conclusion seems all too palpable, and the ultimate paradox is confirmed by their oppressive practices.

5. Two Cases

This thesis ends as it started, with a final short exploration of two cases, both inviting questions and suggesting alternative potentialities in the possible future trajectories of the customary systems of the Chakmas in Bangladesh and India respectively.

In Khagrachari on 29th December 2016, headman Ok Yu Sein heard a land dispute between two brothers who had inherited land from their Father with that instruction that it be divided equally. The applicant was a subsistence farmer who had complained about the division of the land because, although he had agreed the division at the time of his Father's death, he had not realised that his brother

had drawn the dividing line so as to include a valuable Segun(teak) tree he had planted as a sapling and which would hold a high cash worth on maturity. His younger brother, a service holder and wealthy man, argued that their Father's will had been properly drawn up and witnessed, and that his brother had agreed to the split of the land at the time and thus had no legal right to the land in either state or customary law. The case turned on whether the documented division should be upheld, or whether customary recognition could be afforded to the justice of the poor Brother's claim. Ok Yu Sein found unreservedly for the younger brother, stating that given the papers were properly constructed and the older brother had signed them, the customary system had no locus to interfere with this formal transfer. On questioning both the successful defender of the division and the headman arbitrator, both shared the view that the only important factor was the documents, properly signed by both brothers, which showed the demise of land. Yet privately Ok Yu Sein mused that the younger brother was wealthy enough not to need the cash receipt from the tree, and bemoaned his own lack of power to offer a suitably customary solution. This would have involved, at the very least, a division of the cash receipt, and the arbitration that ensued might well have led to an even more generous settlement that reflected the poverty of the petitioner. In the face of the formally documented land demise, however, mediation would not work as the younger brother could seek settlement at a formal court or with a Councillor. Though technically a customary case, the boundaries of the system had been maintained by accepting the legal imperatives of formal law.

The second concerned an elopement in Tripura and the customary penalties imposed on the love-struck couple, one a Chakma and one a Mizo, the tribal group holding power in Mizoram state. Niha Chakma and her husband Richard Puia had met at college in Agartala, and, facing opposition to their mixed marriage, eloped together after their studies had finished. Persuaded to return by Niha's parents, a fine of 10,000 rupees was imposed on the couple for absconding together, and as Richard was not a Chakma, Niha's family paid the substantial fine when they arrived back in Kanchanpur. Anil Chakma, the headman responsible for the case described it as successful, in that the couple were married,

Richard had converted to be a Chakma and a Buddhist and that with the payment of the fine, Niha's place within the Chakma community was affirmed. Niha's grandmother confessed she had instigated the Panchayat involvement to ensure her granddaughter was not expelled from the Chakma community, and was now happy to welcome Richard into her family as a Chakma.

Nevertheless, a private interview with Richard and Niha revealed a rather different view of the Panchayat and the role of customary justice. They were happy with their marriage as had intended to stay together, and happy to indulge Niha's parents and grandparents insofar as the Panchayat was concerned. But they had never engaged directly with the customary Panchayat and would not have paid the fine personally. Richard laughed at the idea of a conversion to Buddhism or to being a Chakma. He had agreed to be Chakma in Tripura to please the family, and would continue to be a Mizo in his home state of Mizoram, where there would be another Mizo ceremony for his family when they eventually settled there. Society was freer in Mizoram, and Niha would be able to wear any clothes that she was comfortable in rather than traditional Chakma dress. As for the Panchayat, this young couple both felt they had succumbed the Panchayat ruling to appease their parents but were clear that the limits of its jurisdiction lay not only in the physical boundaries of the state but in the waning appeal of its self-conscious traditionalism.

In the first case, though the boundaries of the customary system in Bangladesh held, the customary law provided an institutional framing for legal decision highly reminiscent of a formal court rather than an arbitration based on communitarian concepts of justice. In Tripura, a conservative and hierarchical legal culture was simply indulged or ignored by the youth, raising the possibility that the customary system, though incorporated into the state courts, would lose its power over the social world through its rigidity in the face of changing social mores.

In Bangladesh, this thesis has deduced dynamism and internal plurality from accounts of customary practice in selected village locations and the accounts of law-making from the customary officials and political activists now so closely

involved in the delivery of local justice as to be instrumental in expanding customary institutions to encompass ostensibly more democratic means of providing justice. The terms of peace set out a process whereby customary law will be embedded in the new Councils, and controlled by elected bodies. It must be possible that at the point these provisions are activated, a similar closure to that viewed in Tripura will occur, that is formality replacing dynamism in the practice of customary law.

Customary law was engulfed in the first case example, and ignored in the next, both cases, for quite different reasons, suggested the legal cultures reconstructed in this thesis contain the seeds of their own destruction. The cases chosen to end this thesis suggest the threat to the vibrant critical communitarianism in the CHT might not arise *directly* from political meddling or even from state oppression but through the bureaucratisation that recognition will almost certainly herald. Even now, it might be said that political involvement is representative of a change in mindset and approach within the community. Ergo, the very adaptivity that has seen a resurgence of customary justice might contain an emerging threat to the identity and law of the Chakma, that is not directly from the state but from changes to legal consciousness caused by the embrace of recognition and the imitative response elicited from within the community. Recalling Fanon and Coulthard, this thesis closes with a warning that the dangers of pursuing recognition lie in its interpellative effects, especially in a postcolonial context in which recognition involves an abasement of community identity in the pursuit of power. Yet where recognition is demanded and fought for, this thesis suggests that struggle itself creates an adaptive and resilient legal culture and transforms the interior of community. Concomitantly, it has shown that recognition bestowed on terms set by the state encourages an essentialised and static iteration of community that serves the purposes of pacification as effectively now as in the colonial era. There is still no more effective form of colonisation, it seems, than that visited in the cultural realm and nurtured and carried within.

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