

Recognition, Identity, Justice: Oraon Custom in the Law Courts of Modern India

By
Sandeep Kindo

A dissertation submitted in partial fulfillment of
the requirements for the degree of

Doctor of Philosophy
(Asian Languages and Cultures)

at the
UNIVERSITY OF WISCONSIN-MADISON
2019

Date of final oral examination: 08/27/2019

The dissertation is approved by the following members of the Final Oral Committee:

Vinay Dharwadker, Professor, Comparative Literature and Folklore Studies, and
Asian Languages and Cultures

Heinz Klug, Professor, Law

Aparna Dharwadker, Professor, English and Interdisciplinary Theatre Studies

Anthony Cerulli, Associate Professor, Asian Languages and Cultures

© Copyright by Sandeep Kindo. 2019
All Rights Reserved

Abstract

This dissertation develops a new theoretical framework for an interdisciplinary analysis of legal disputes concerning inheritance, property, marriage, custom, identity, and other issues in India's Oraon community of indigenous people (constitutionally classified as a Scheduled Tribe), and of their resolution by law courts since 1950. It is the first scholarly study to use the Oraon example to examine how the post-colonial Indian judicial system generally uses modern law, judicial principles, evidence, and interpretation in decisions about tribal customs and customary laws. Chapter 1 offers a historical, cultural, and methodological overview of the subject and materials, and defines the dissertation's main research questions. Chapter 2 synthesizes a new theoretical perspective on the central problem of the legal and official recognition of an indigenous community's identity, by combining Charles Taylor's theory of recognition with Hans Georg Gadamer's hermeneutics and Ronald Dworkin's judicial interpretivism. Chapters 2-5 then apply this framework to specific cases and documents of national and international importance. While Chapter 2 assesses the influential 1986 Australian report on Aboriginal customary laws, Chapter 3 analyzes issues such as inheritance and disinheritance, property and marriage, widowhood and separation, and daughters and adopted children in Oraon custom in representative court cases. Chapters 4 and 5 provide a comprehensive, multifaceted discussion of the Indian Supreme Court's paradigmatic majority and dissenting opinions in *Kishwar vs.*

Bihar (1996), which highlighted conflicts between customary gender inequality and constitutional ideals of equality, non-discrimination, and justice. In Chapter 6, the dissertation then concludes that, since customary laws lack the standardized and legislative statutory characteristics of general law, courts may unduly privilege contested sources (such as S. C. Roy's anthropological accounts of the Oraons from 1915 and 1928) to determine what counts as custom. It also concludes that judges' interpretations and adaptations may reify tribal practices, and they may be affected by a range of formal and moral considerations. The study's various findings may have practical uses for legal scholars, lawmakers, lawyers, community members, activists, and members of the judiciary.

Table of Contents

Preface	v
1 Introduction	1
1.1 <i>Issues of Legal Recognition of Tribes in India</i>	1
1.2 <i>Recognition, Identity, and Justice</i>	7
1.3 <i>Literary and Cultural Criticism of Law</i>	13
1.4 <i>Court Opinion Sources</i>	16
1.5 <i>Contribution of Dissertation</i>	17
1.6 <i>Materials and Methods</i>	18
1.7 <i>Organization of Chapters</i>	20
2 Taylor, Gadamer, and Dworkin: Constructing a Theoretical Framework and Assessing Evidentiary Aspects of the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws	24
2.1 <i>Taylor's Conception of Recognition</i>	25
2.2 <i>Legal Hermeneutics: Gadamer and Dworkin</i>	35
2.2.1 Gadamer	35
2.2.2 Dworkin	39
2.3 <i>Theoretical Framework: Comparative Analysis of Taylor, Gadamer, and Dworkin</i>	45
2.4 <i>The Evidence of Aboriginal Customary Laws in the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws</i>	47
2.5 <i>Comparative Analyses of the Australian Report and the Theoretical Model</i>	54
2.6 <i>Conclusion</i>	57
3 Courts' Interpretation of Oraon Custom: Roy's Oraon Account and Implications of Religion, Marriage, and Adoption on Inheritance Custom	60
3.1 <i>Roy's Oraon Account: Implications of Oraons' Religious, Marriage, and Adoption Aspects on the Oraon Inheritance Custom and Other Changes in the Oraon Inheritance</i>	62
3.2 <i>Recognition of Oraon Inheritance in the Land Statute</i>	72
3.3 <i>Court Opinion on the Oraon Widows and Daughters' Right to Inherit Property</i>	74
3.4 <i>Court Opinion on the Adoption of a Son-in-Law in Oraon Inheritance</i>	80
3.5 <i>Conclusion</i>	85
4 The Law's Custom Versus the Tribes Inheritance Custom: Crafting a Reconciliation in <i>Kishwar v. Bihar</i>	88
4.1 <i>Facts and Claims</i>	90
4.2 <i>Privy Council's Conception of Custom in <i>Ramalakshmi v. Sivanantha</i></i>	94
4.3 <i>Tribe Custom and the Legal Premise</i>	98
4.4 <i>The Inheritance Custom as Practiced by the Tribes in India</i>	104
4.5 <i>Justice Ramaswamy's Decision</i>	116
4.6 <i>Conclusion</i>	118

5	Gender Equality Versus Tribes Custom: Reconciling the Constitutional Rights and the Inheritance Custom in <i>Kishwar v. Bihar</i>	121
5.1	<i>Constitutional Recognition of Custom</i>	122
5.2	<i>Constitutional Equality: Application and Reconciliation in Dissenting Opinion in <i>Kishwar</i></i>	125
5.3	<i>Majority Response to Justice Ramaswamy's Dissent</i>	141
5.4	<i>Conclusion</i>	154
6	Conclusion	156
	Bibliography	163

Preface

My goal in this dissertation has been to give an account of how law courts determine tribal customary laws in modern India. Specifically, my research focusses on disputes over Oraon tribe's customary law in the Oraon tribe or community of indigenous people. I combine cultural theory, history, and the geographical dimensions of culture to show how tribal customary law is framed, interpreted, and applied in court decisions. The court opinions that I utilize in this study cover Oraon property inheritance claims and related questions of marriage, widowhood and separation, and daughters and adopted children, as well as constitutional issues of gender equality. My discussion of these materials takes the form of six chapters, as displayed in the table of contents.

My interest in this investigation stems from my personal and professional backgrounds. My upbringing in an Oraon family in Jharkhand has given me experiences of the tribe's diverse cultural traditions in urban and rural settings. Also, while working on issues of tribal rights in my early law practice at the Jharkhand High Court, I gained a thorough understanding of tribal legal claims. Later on, my stint with a Harvard University anthropologist, David Maybury-Lewis, at Cultural Survival, Inc., in Cambridge, Massachusetts, oriented me to the academic study of indigenous peoples' identity problems at a global scale. Because of my newfound research interests in indigenous peoples, I helped institute the Center for Social Exclusion at the National Law School of India University in

Bengaluru. Although my dissertation originates from my personal background and experience, it has led me to a more rigorous scholarly study of tribal issues.

It has taken me the help of a multitude of individuals to complete my Ph.D. dissertation, and I owe a great deal to each of them. First and foremost, I am indebted to my advisor, Vinay Dharwadker. Attending Professor Dharwadker's theory courses in the early years of my doctoral studies was a serendipitous experience. His esteem for understanding high theory in broad and imaginative ways has taught me how excellent cultural criticism research is done. As my advisor, he recognized my experience and training backgrounds and encouraged me to develop an interdisciplinary humanities research topic focusing on the Oraons, with broader tribal law and policy implications. Throughout my efforts in the Ph.D. program at the University of Wisconsin, Professor Dharwadker has been an unfailing source of support, motivation, guidance, and reassurance, even during challenging times. He has supervised my Ph.D. work with a great sense of joy, gratification, and pride, and his passion for my topic was crucial for helping me complete this dissertation.

I am also grateful to my dissertation committee members for their invaluable contributions to my research. Professors Heinz Klug, Aparna Dharwadker, and Anthony Cerulli have provided useful advice on specific aspects of my dissertation and perused the final draft. Besides, Professor Aparna Dharwadker offered me a

project assistant position that supported my funding needs. My thanks also to the University of Wisconsin-Madison, as well as its Department of Asian Languages and Cultures, Center for South Asia, and General Library System, for providing resources for my degree program. Furthermore, I must express my sincere appreciation to S. Japhet, who is a Professor at the National Law School of India University in Bengaluru, for his constant mentoring during my college days.

Most importantly, I would not have been able to afford to undertake this endeavor without the continuous encouragement, patience, and support of my family. My heartfelt thanks are due to my father Marcus and mother Teresa, my sisters Mridula and Jyotsna, and my brother-in-law Alok, for their support and financial help. Additionally, I think it is essential that I thank my friend, Vandana Chaudhry, who is an Assistant Professor at the City University of New York in New York City, for her financial help and valuable personal advice on my life as a graduate student. Likewise, my gratitude to my other friends and colleagues, especially Arpita Gupta, Ian Atala, Anwasha Maity, Nalan Erbil, Redouane Khamar, Marcos Colon, Rajesh Chavda, Meenu Bhambani, and Sujith Pruseth.

1 Introduction

This dissertation draws on Charles Taylor's theory of recognition and Hans-Georg Gadamer's and Ronald Dworkin's legal interpretation theories to conceptualize a theoretical model for assessing judicial meaning-making about Oraon customary laws. It is the first systematic and scholarly study of the process of recognizing the Oraon tribe's customary laws in published court opinions in twentieth-century India. The Oraons, also known as the Kurukhs, comprise one of India's long-standing indigenous tribal communities and are classified among the "Scheduled Tribes" in the Constitution of India. With a current population of about 4.5 million people, the Oraons are one of the five largest tribes or communities of indigenous peoples in South Asia, and a majority of them inhabit the forested plateaus of east-central India, mostly in the Chota Nagpur plateau region in the state of Jharkhand as well as in adjoining states.

1.1 Issues of Legal Recognition of Tribes in India

The Constitutional recognition of tribes in India is dispersed. In admitting the social, educational and economic "backwardness" of these communities and the need to protect them from various forms of exploitation, the Indian Constitution (Articles

15 cl. 4 and 46) offers distinct legal protections for such officially classified tribes. However, while the Constitution classifies the various indigenous groups as “Scheduled Tribes,” it does not explicitly define the term “Scheduled Tribes.” As a consequence, the central government of India (after 1947) largely follows the working definition of “Scheduled Tribes” as developed by one of the several official committees that periodically study the classification of tribes. Specifically, the 1965 Advisory Committee Report on the Revision of the Lists of Scheduled Castes and Scheduled Tribes, popularly known as the Lokur Committee Report (as it was chaired and prepared by B.N. Lokur), defines “Scheduled Tribes” as indigenous groups characterized by “primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large and backwardness.” Much of the literature on tribal identity in India, however, has been critical of such official recognition and classificatory process (Advisory Committee Report 7).

The existing literature on tribal identity in India underscores the impact of colonial politics and power structures as well as post-colonial ideologies on the official classification process. In discussing the importance of the legal identity of tribes, Amita Baviskar is wary of the relationship between such legal identity, as “used by various social groups to define themselves,” and the “power of the regime of representation.” Accordingly, such studies view classifications of “Scheduled Tribe,” “tribe,” “indigenous people,” “aboriginal people,” or “*Adivasi*” with skepticism. Specifically, they find the legal demarcation between recognized tribes

and other surrounding caste-groups, with similar cultures and interests as the tribes, problematic. One consequence of such a demarcation is that, as Megan Moodie elaborates, land and culture form the central tropes for claims of identification and recognition when determining the differences of the tribes from the rest of Indian society (Baviskar 278-281; Moodie 8-9; B eteille; Sundar; Skaria; Ghurye; Guha).

The identity and power structure question has been a common theme in much of the popular Subaltern Studies literature on society in India generally. Veena Das interlinks gender and violence to explore subjectivity formation and to explore how they establish structures of power. In her formulation, Das contends that:

The ability to speak the violence is within the recesses of this culture of performance and storytelling, within the domains of family and kinship. Time is not purely something represented but is an agent that 'works' on relationships—allowing them to be reinterpreted, rewritten, sometimes overwritten—as different social actors struggle to author stories in which collectives are created or re-created (87).

For Andre Beteille (1965; 1991), lower castes have gained some political and economic power in the post-colonial decades. He contends that "the caste system is clearly a hierarchical system, although the nature of this hierarchy may be difficult

to ascertain beyond certain broad terms. Landowners, tenants and agricultural laborers (of the same caste) also constitute a hierarchy" (Béteille 1965: 4).

Other popular literature on tribes in India includes Verrier Elwin (1964), who uses a unique methodology in his wide-ranging study of tribes and their culture in India. As a missionary and a humanist, he first worked for the general welfare of the community before collecting data on their folklore and culture. For Elwin, the traditional fieldwork methodology of anthropology has limitations, and he contends that "[f]or me anthropology did not mean fieldwork: it meant my whole life. My method was to settle down among the people, live with them, share their life as far as an outsider... This meant that I did not depend merely on asking questions, but knowledge of the people gradually sank in until it was part of me" (142). While Ramchandra Guha's (1999) detailed historical analysis and critique richly contextualize Elwin and the field as a whole, G. N. Devy's recent work offers a complementary perspective from a theoretically articulated "indigenist" position.

Despite the importance of the tribal identity question, there has been little discussion about the issue in the legal domain. The conceptual disagreements about the tribes' official classification and ethnic identification also stem from the legal aspects that have consequences for tribal identity. Because a legal identity draws on the law's continuity and coherence characteristics, it mostly depends on historical archives and official reports for the classification of indigenous communities.

Besides, while the Constitution classifies the Oraon people as a “Scheduled Tribe,” there remains a paucity of evidence about the recognition of the Oraon tribal identity in the law courts. This dissertation therefore examines how the legal and ethnic identities of the Oraon are internalized and acted upon in court opinions in Oraon customary law disputes.

The theoretical and methodological frameworks of Charles Taylor’s recognition theory and Hans-Georg Gadamer and Ronald Dworkin’s analytical techniques unearth the underlying attitudes in the Oraon court opinions. These frameworks offer critical ways to engage with the courts’ complex interpretive processes in recognizing Oraon custom. Both recognition and criticism concepts share a mutual connection: they agree that identification and recognition involve complex processes of negotiation and formulation in “intersubjective” interaction or dialogue. This dissertation blends the traditional methods of legal reasoning with non-traditional ways of critically analyzing lawsuits that deal with the recognition of Oraon custom. It therefore seeks to illuminate the nature of legal meaning about Oraon custom: it explores the issues of composition, representation, and customary claims and shows how the court opinions have acquired and provided meaning in the sphere of Oraon custom in twentieth-century India.

After formulating this theoretical and methodological framework, the present study applies its critical techniques to closely examine court opinions in such areas

of Oraon personal-identity disputes as property inheritance and related marriage and adoption issues. These disputes are uniquely appropriate to this kind of exploration and inquiry in cases that involve questions of validating tribal custom. The recognition of Oraon custom in some of these cases reveal the use of distinct sources and lines of reasoning in the resolution of similar or interrelated disputes. In a dispute about inheritance, marriage, and adoption, for example, the courts cite Sarat Chandra Roy's account on Oraon custom. These examples highlight the extraordinary conflicts and tensions in the courts' lines of reasoning and methods of validation and invalidation. This dissertation argues that recognition and legal criticism ideas accentuate interpretive approaches for understanding meaning-making in court opinions, and it contends that courts' formal and moral arguments as well as evidentiary aspects of Oraon custom, and tribe customary laws in general, have consequences for the courts' meaning-making in such disputes. Given that this dissertation employs Taylor's recognition theory as well as Gadamer's and Dworkin's legal hermeneutics, a detail examination of which appears in Chapter 2, the next two sections here contextualize these theories and their application to disputes over Oraon custom by providing a summary of the foundational background and relevant ideas generally.

1.2 Recognition, Identity, and Justice

A general understanding of recognition can be inferred from Frantz Fanon's influential account on his experience and that of other men and women of African descent in France. In examining the issues of racism, Fanon relates racial identification with an idea of inferiority complex and states: "[The] Negro, having been made inferior, proceeds from humiliating insecurity through strongly voiced self-accusation to despair." Because they are projected as inferior, black individuals and groups are encouraged to identify with or inculcate the cultural norms of white society. Moreover, as Fanon argues, the black society fails to "become" white or "superior" because, as opposed to valuing their own merit or uniqueness, its members are reduced to a feeling that demeans them and projects them as failures. Fanon's perspective on racism and colonialism works as an illustration of how the process of recognition works psychologically, socially, culturally, politically, and legally (Fanon 43).

By contrasting the experiences of inferiority and self-worth, Fanon's example clarifies two essential aspects of recognition, and also the related phenomena of identity and justice. First, society's negative portrayal or misrecognition of one's uniqueness has adverse psychological consequences for a person or group with different qualities and merits. Such negativity harmfully impacts people's acceptance of their selves or identities. Second, the normative aspect of the process

requires a positive recognition of one's unique features or of one's identity as an identity of equal worth. These aspects of recognition also inform the idea of justice, which, as Iris Young notes, enables "individual capacities" and equal standing along with the mainstream society. Accordingly, while Fanon's critiques of racism and colonialism clarify the general process of recognition, various social-political activities such as "nationalist movements," demands of "minority" or "subaltern" groups, issues of gender justice, and indigenous movements ground their "need" and "demand" on recognition, identity and justice claims (Young 39, Taylor 25).

Most literature on recognition within the public domain pays particular attention to either Immanuel Kant's concept of equal dignity or Georg Wilhelm Friedrich Hegel's broader view of recognition. For Kant, the presence of rational moral agency in every person demands that all must be treated with respect. Thomas Scanlon incorporates Kant's position in his account of contractualism, which relates respect to interpersonal morality or reciprocal recognition. Such a notion of recognition respects the rational autonomous agency of each individual, and provides every person an equal moral and legal or normative standing. This implies that disrespect for and negative depiction or misrecognition of one's differences effectively deny ones' equal standing in society and cause immense harm to one's self-respect (Kant qtd. in Carter 544, Scanlon 147-158).

While the Kantian theories view recognition with equal dignity or respect of every person in the public domain, Hegelians develop an alternative view. Hegelian theories provide a broader perspective of recognition. As they argue, mainstream "hegemonic" citizenship limits the scope of recognition based on equal dignity-based recognition. Accordingly, individuals or groups encounter disrespect in society due to the uniqueness of their specific features, such as culture and religion. Such groups respond by demanding recognition of their identity. Hegelians find Kantian recognition notions inadequate for differently merited individuals and groups, and hence propose a broader conception of recognition that esteems differences and unique identities (Taylor 43-44).

Charles Taylor, Axel Honneth, and Nancy Fraser provide some of the primary scholarship on the significance of recognition theories in understanding human subjectivity in social analysis. Taylor defines identity as "a person's understanding of who they are, of their fundamental characteristics as a human being;" and since recognition defines identity, any lack of recognition or misrecognition of identity may cause harm to its bearers. He provides two valuable insights into recognition. Although he agrees with the essentialist view of understanding self and authenticity through introspection, he also recognizes that identity is negotiated and formulated through ongoing material or immaterial interaction or dialogue with "significant others," through intersubjectivity. However, some scholars have criticized Taylor's vocabulary of authenticity, which

recognizes group identity based upon specific characteristics and undermines individual peculiarities, and that in turn, enforces conformity (25).

For example, Kwame Appiah (1994) refers to Taylor's view in the context of black identity politics and claims that it seeks to define who is "black," and hence results in further victimization and segregation within the community. Similarly, in the context of defining a lesbian sexual orientation like women, Patchen Markell questions Taylor's attempt to meld the two poles of identity, the individual and the group, and argues that such conformities promote hegemonic norms over individual values (2003). Furthermore, much before Taylor's essay was published, Hannah Arendt provided a critique of an essentialist view of understanding self and authenticity through introspection. For Arendt, the mechanics of an understanding of self involves intersubjectivity, not in the personal but in the public domain, where others (or society as a whole) disclose or reveal who one is (1958, 179-192). However, Taylor's second model, supporting the formation of recognition through dialogue, appears to agree with Arendt.

While Taylor does not develop a detailed explication of the issues of interaction with "significant others," Alex Honneth examines extensively the questions of intersubjectivity by identifying and linking three "spheres of interaction" with three "patterns of [intersubjective] recognition": the spheres of love, rights, and solidarity (2007, 129-142). According to him, the interactive sphere

of love generates self-confidence and implicates primary or intimate relationships; the sphere of rights involves self-respect as well as a moral responsibility towards participation, equality, and respect; and the sphere of solidarity relates to self-esteem and recognition of one's characteristics and aptitudes. He argues that the three spheres or patterns provide for an optimistic outlook to oneself; furthermore, he evaluates motivations and justifications for social struggles by examining how these three modes of recognition are denied. For example, emotional distress is a symptom of misrecognition or of an illegitimate denial of recognition, which results in opposition and justifies social struggles. In Honneth's view, such social struggles are legitimate, coordinated efforts in specific social contexts, which otherwise may result in violence (1995, 122-169).

While Taylor and Honneth are in broad agreement, Nancy Fraser distinguishes her approach to understanding and interpreting the theory of recognition, and hence offers a different model of justice and injustice. Taylor and Honneth develop a monistic model, in which recognition is the original and foundational category of social analysis, and in which "redistribution" is a derivative phenomenon; whereas Fraser formulates a dualistic model, in which both recognition and redistribution are two independent, irreducible, and co-original foundational categories. The recognition-redistribution debate between Fraser and Honneth, published in 2003, lays out a detailed description of the two models. Honneth's monistic model of recognition endorses differentiation and responds to

cultural injustices based upon positive or negative recognition of identities; in contrast, Fraser's dualistic model of redistribution rejects differentiation and responds to economic injustice. According to Fraser, the binary opposition between recognition and redistribution means that neither can economic inequality be addressed by cultural recognition, nor can cultural particularity be recognized through economic parity. Contrary to the monistic argument, she believes that recognition alone is not sufficient, as it comprises only one dimension of social analysis in the theory of justice. While Taylor and Honneth associate recognition with self-realization or self-development, and consider questions of redistribution only secondarily (when they hamper self-development), Fraser relates recognition with social status, and considers questions of mis-recognition and mis-distribution when they hinder "parity of participation." She argues that mis-recognition derives from social arrangements based on the institutionalized subordination of particular identities, which emerges from a lack of parity of participation, or a denial of the representation of those identities in social interaction (Fraser and Honneth 29)

Fraser also makes a significant contribution to our understanding of remedies. In her earlier work, she proposes remedies in forms of economic redistribution and cultural recognition, which would achieve the fundamental deconstruction of society, and hence correct injustices; but, in her later work, she changes her position, and does not advocate for any particular remedy, claiming instead that remedies should be based on the specificities of the injustices (2000,

2001). Her earlier work provides for remedies in the form of “affirmation” and “transformation” that are valid for injustices in relation to both recognition and redistribution. While affirmation aims to rectify discrimination based on the social construction of subordination, but without changing such a construction, transformation seeks to intervene in the very socio-cultural structures that create social subordination and other forms of inequalities and injustices (2003: 23). Specifically, transformation aims to deconstruct the binary logic that creates and recreates hierarchical, “multiple, debinarized, fluid, and ever-shifting” conflicts (1997: 24). She also argues that while affirmative remedies attempt to change the sense of self of an individual, a group, or specific groups, transformative remedies affect the sense of self of all members of society.

1.3 Literary and Cultural Criticism of Law

James Clifford (2000) proposes that “a work of translation” is “dialogical but still realist,” and lays emphasis on “conjunctures, on complex mediations.” Clifford applies this critical approach in his earlier work (1998) on the study of “culture” and “tradition” and offers a cultural reading of a civil property lawsuit in the Mashpee American-Indian community, which suggests how individual members negotiate, invent, and adapt to acceptable norms while negotiating with “Mashpee identity.” Moreover, in recognizing the importance of such critical methods, he refers to the

works of Eric Hobsbawm and Terence Ranger (1983) and Benedict Anderson (1991), who argue that authenticity claims about tradition, culture, and identity involve historical and political processes in which symbols, stories, spaces, and times are selected and manipulated creatively. Clifford, thus, provides a unique approach to identity formation, as well as a critique of conventional legal reasoning and analytical thought (Clifford 2000, 98; Hobsbawm and Ranger qtd. in Clifford 2000, 98-99; Anderson qtd. in Clifford 2000, 98-99).

Similarly, Guyora Binder and Robert Weisberg extend cultural criticism to the field of law. They argue that law neither "reflects nor distorts" a "social world of subjects" but instead composes that world. That is, law fashions new values, and the cultural criticism of law explicates how choices are made about culture and identity. Also, in taking "legal phenomena" as more than mere "cultural artifacts" or "social texts," Binder and Weisberg develop different theoretical bases for their critical analyses. For example, they review the classic criticism of modernity by Friedrich Nietzsche, the postmodern social theories of Michel Foucault and Pierre Bourdieu, as well as the contemporary cultural criticism of Clifford Geertz and Stephen Greenbalt. For Nietzsche, knowledge is based on perspectivism, and he, therefore, views self-development as an aesthetic project and the world as a text subject to creative and aesthetic interpretation (Binder and Weisberg 463-539).

Others extend Nietzsche's perspectivism into the social sphere of identity formation. A classic example of this formulation is Foucault's theory of "disciplines." "Disciplines" is the term Foucault used for the "human sciences" in which both the investigator and the object of investigation are "disciplined" under controlled conditions of "interest." For Foucault, power is disseminated through these disciplinary mechanisms of normative "interest," which also define individual personality or identity. In contrast to Foucault, Pierre Bourdieu formulates the idea of "habitus" to recognize the interplay between human agency and institutions in creating power. "Habitus" is the term Bourdieu coined to refer to the dynamics of socialized tendencies involving behaviors, dispositions, interpretations, and experiences. While "habitus" is shaped by past events and structures, it actively shapes present and future practices and structures, and also conditions one's perceptions of these phenomena, and hence enables subjective creativity and adaptation in practice (Binder and Weisberg 463-539).

The structured model of Foucault and the more flexible social-order model of Bourdieu are applicable to the decision-making processes in the practice of law. They explain how legal actors cope with uncertainties, why there are variations in their responses, and what the implications are of the interaction of "symbolic capital" with norms, institutions, and individuals. In contrast, for Clifford Geertz and Stephen Greenblatt, cultural criticism of the law is articulated (in cultural anthropology and new historicism, respectively) in two crucial ways. First, the

criticism goes beyond "cultural forces" to analyze the renegotiations of identities and interests that channel the participation of individuals and groups in political and economic life. Second, it recognizes that social and political texts can be read both instrumentally as well as aesthetically (Binder and Weisberg 463-539).

For Binder and Weisberg, these theoretical sources provide an understanding of "modern social order as dependent on culture; of culture as centrally concerned with the representation of persons, populations, and institutions; and of the representation of persons, populations, and institutions as a way of illuminating social and moral values." Overall, a cultural criticism of law reveals how legal norms are composed, represented, and contested. In particular, a cultural assessment of lawsuits involves ascertaining the interrelations of "legal doctrine," "ritual," "strategic choice," and "imagination" that produces collective identity, tradition, and history. Thus, these analyses offer a critical understanding of the law's interpretive process and the relevant background information for this dissertation, which focuses on the legal interpretive process in Oraon custom lawsuits (Binder and Weisberg 463-539).

1.4 Court Opinion Sources

The sources on Oraon custom disputes used here are in the form of published court opinions and anthropological references to Sarat Chandra Roy (1928). In many of

these court opinions, the courts rely primarily on Roy's tribal ethnography for resolving Oraon custom disputes. Roy has been termed the "father" of Indian anthropology, but he had no formal training in the discipline, and even though his work has assumed the status of a classic, it has generated virtually no scholarly discourse. Most reported court opinions on Oraon custom in the higher courts in India since 1950 concern Oraon inheritance and related issues of marriage and adoption. The critical court opinions discussed in this dissertation are selective, but they are representative exhaustive in considering all aspects of issues and trends in Oraon inheritance disputes in the higher courts.

1.5 Contribution of Dissertation

In offering an exploratory and descriptive study of Oraon custom lawsuits, this dissertation draws on and also contributes to the theoretical research on judicial recognition of tribal custom. It broadly uses a monistic model in which "recognition" is the original and foundational category of analysis: Oraon custom disputes are about the affirmation of Oraons' distinctive identity but not about the distribution or redistribution of goods. This study agrees critically with the observations of Taylor, Gadamer, and Dworkin to the extent that tribal custom is negotiated and formulated through "intersubjective" interaction and dialogue. This study takes these interpretations forward in two ways. First, it explores a series of court

opinions that deal with questions of Oraon custom recognition and examines how judicial recognition composes and legitimizes customary identity without providing equal moral standing to women members. Second, it develops and applies a methodological and conceptual framework that is useful for examining the dynamics of four factors in lawsuit documents: legal principle, ritual, tactical choice, and imagination. Overall, this study enables a new exploration and explication of the nature of the legal meaning of Oraon custom in twentieth-century India.

1.6 Materials and Methods

The core research question can be formulated quite precisely: *How does the nature of Oraon custom transform when judicial recognition is applied to disputes about custom among members of the Oraon community?* This dissertation also deals with several secondary research questions. *Does judicial recognition provide equal moral standing to Oraon women members in shaping their customary rights through lawsuits? Does recognition of custom by courts reproduce a legal prescription of “identity” in Oraon lawsuits? How do Oraon disputes articulate and strengthen the core attitudes of the legal actors who shape and reproduce them?*

These fundamental research questions assume that Oraon custom disputes are suited for this kind of recognition-based analysis. Underscoring the importance

of custom, Sir Henry Maine argues that it is not necessary for courts or laws to “affirm” a tribe’s custom in order to be valid and binding (Allen, 1964: 120). Accordingly, even though the legal scheme in India follows the English common-law system of precedent or *stare decisis*, the Indian Constitution and the courts recognize and “preserve” the tribal custom that is “ancient,” “reasonable,” and “certain” as a significant source of law. The theories and approaches, as proposed by Taylor, Gadamer, and Dworkin, can be usefully employed in this research to understand how Oraon custom is negotiated and formulated through ongoing “intersubjective” interaction or dialogue in textual and non-textual materials.

Besides, this dissertation assumes that traditional approaches to legal reasoning have limited usefulness when addressing interdisciplinary issues of recognition, identity, and justice. Accordingly, the analysis here draws on critical techniques that are usually not applied to lawsuit analysis. As Guyora Binder and Robert Weisberg have argued, given that legal meaning-making comprises a process of interpretation, it is important to focus on the medium of composition, which includes authoritative legal texts, characters, identities, traditions, and institutions. Since composition fashions new values, Binder and Weisberg conclude that such analysis is “at once political and aesthetic.” James Clifford’s study of the land lawsuit of the Mashpee Indian community exemplifies such critical techniques. He emphasizes the forms of legal procedure and the categories of legal entitlements to examine how Mashpee witnesses strategize, negotiate, invent and adapt to conform

to an acceptable and hegemonic idea of “tradition,” a collective plan of constructing culture (Binder and Weisberg 27, 539)

Although Clifford's underlying framework does not involve a theory of recognition, his critical techniques provide the methodological background to interpretive subjectivities. These analyses furnish a method for disentangling the multiple interactive mediums in customary law composition. Thus, as interdisciplinary research on the judicial analysis of Oraon custom, this dissertation offers a nuanced, explicit, and careful description of the interactive interpretive process in which the courts expressively contest for meanings in their representations of Oraon custom. In extending such a process of composing meanings, by examining the legal principles, rituals, tactical choices, and imaginations in lawsuits, this dissertation defines new ways for exploring the inner characteristics of recognition and law-making, and explicates the nature of the judicial meaning of Oraon custom and tribal custom in general in contemporary India.

1.7 Organization of Chapters

While Chapter 1 of this dissertation is the present introductory overview of the subject and the field, Chapter 2 presents the theoretical and methodological

framework consisting of Taylor's recognition, Gadamer's fusion of horizons, and Dworkin's legal interpretivism theories required for the systematic study of the judicial recognition of the Oraon tribe's customary laws in published court opinions. The chapter also extends the framework to the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws to reveal the significance of evidence on Aboriginal customary law claims. Overall, the chapter defines the critical approach to the dynamics of legal principle, ritual, tactical choice, and imagination in lawsuits, which is applied in the subsequent chapters to court opinions on specific Oraon customary disputes.

Chapter 3 focuses on court opinions on Oraon inheritance custom and the related issues of marriage and adoption. It employs the critical approaches developed in the preceding chapter, and explores the nature of meaning-making in the courts' interpretive processes in opinions delivered in such cases as *Matius Tirkey and Anr. v. Jusuphin Lakra and Anr.* (2007) and *Anjalus Uraon and Anr. v. Kamil Uraon* (2004). The chapter also examines aspects of Oraon religion, marriage, adoption, and inheritance by tracing their treatment in Roy's early anthropological account of the Oraon, and places the discussion in a comparative perspective (1915 and 1928). Besides, the chapter analyzes Oraon claims about custom in these lawsuits, and how court opinions understand these custom claims.

Chapter 4 explores the 1996 case of *Madhu Kishwar and Others v. State of Bihar and Others*, which raises gender inequality issues in Oraon inheritance custom. This chapter focuses on the Court's general legal premise for examining a custom dispute, including tribal custom, and its impact on the petitioners' inheritance claims. In particular, the chapter assesses Justice Ramaswamy's dissenting judgment, which offers an extended treatment of the conceptual and structural points of legal argument and tribal custom. Besides, the chapter independently analyzes a range of sources cited in the opinion, and provides a more in-depth account of the judicial recognition of tribal custom and Oraon inheritance.

Chapter 5 continues the discussion on *Kishwar* and assesses the court's interpretation of the relationship between the Constitution's gender equality principles and Oraon inheritance custom. It studies the court opinion's legal, structural, and substantive considerations for determining the constitutionality customary tribal inheritance, including Oraon inheritance practices. The chapter draws on both the opinions given in *Kishwar*, Justice Ramaswamy's dissenting opinion, and Justice Punchhi's majority judgement.

Lastly, Chapter 6 offers conclusions about the dissertation's findings. Specifically, it highlights the significance of the theoretical framework, involving Taylor, Gadamer, and Dworkin's theories for understanding the nature of the courts' interpretation of Oraon custom, and tribal custom generally. Moreover, it

underscores the overall theoretical implications of this study for legal reasoning in such cases. The chapter also accentuates the generalizability and limitations of the findings of this study. The chapter ends with the research implications for law-makers and the judiciary and recommendations for further scholarly work.

2 Taylor, Gadamer, and Dworkin: Constructing a Theoretical Framework and Assessing Evidentiary Aspects of the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws

Although numerous studies have investigated Charles Taylor's theory of recognition, Hans-Georg Gadamer's fusion of horizons, and Ronald Dworkin's legal interpretivism theories, no study so far has explicitly looked at a combination of these frameworks for analyzing the problem of recognition of tribal custom in legal cases. This chapter provides an overview of Taylor, Gadamer, and Dworkin's theories and explores the link between them. It also reviews the evidence of Aboriginal customary laws as discussed in the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws. The discussion also evaluates the effectiveness of Taylor, Gadamer, and Dworkin's theories for the Australian Law Reform Commission's Report. One of the central claims here is that the interpretive approaches in the above theories offer a scholarly standard for understanding meaning-making in legal disputes, and specifically in disputes over the Aboriginal customary law.

This chapter is divided into six sections. While section 2.1 deals with Taylor's account of recognition theory, section 2.2 provides a concise analysis of Gadamer and Dworkin's legal hermeneutics. The next section presents a theoretical framework for understanding meaning-making in law. Section 2.4 then considers the nature of the evidence that establishes Aboriginal customary laws, as discussed in the 1986 Report, and section 2.5 further explores the theoretical framework for understanding interpretations of the law is further explored in this context. The final section of the chapter offers a general conclusion of these considerations

2.1 Taylor's Conception of Recognition

Charles Taylor conceptualizes recognition in relation to identity in the public sphere. He cites examples of “nationalist movements,” “minority or “subaltern” groups,” issues of gender justice, and concerns of cultural survival of various groups, and shows how both “need” and “demand” for recognition are about explicitly acknowledging certain defining features with which individuals or groups identify. Such identity, as Taylor explains, is “a person's understanding of who they are, of their fundamental characteristics as a human being.” Since recognition also shapes the identity of individuals and groups, lack of recognition or misrecognition is potentially harmful to those persons. Thus, in considering recognition's unique

relationship with identity, Taylor also views recognition as “a vital human need” (25-26).

In considering recognition “a vital human need,” Taylor adds a psychological dimension to the idea of recognition. As he explains, “misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred.” Furthermore, Taylor notes that “nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” Taylor cites examples of women in patriarchal societies to show how they are forced to accept and assume a sense of self-denigration and lowliness. Likewise, other minority groups, such as aboriginals, too, may take to self-devaluation whenever a belittling image is projected on them. Taylor’s association of the effects of misrecognition with anguish and suffering is similar to the conclusion reached by Frantz Fanon, who investigated the effects in black communities (Taylor 26).

Taylor focusses on and examines two popular contexts of recognition in the public sphere or on the social plane: the politics of dignity and the politics of difference. Generally, while the politics of dignity implies the universal application of equal recognition, or respect for “the equal dignity of all citizens,” the politics of difference spells “recognition of the unique identity” based on the specific features of individuals or groups, especially their cultural values or qualities. The former

grants the idea of equal respect to all autonomous persons, and considers it to be the most elementary standard of recognition. In the latter, however, one's accomplishments or unique characteristics are significant factors in the notion of acknowledgment and esteem (37-39).

Taylor, however, finds flaws in both these positions regarding dignity and difference. As he notes, whereas the politics of dignity or universal recognition promotes a uniform idea of citizenship or "false homogeneity," the politics of difference allows recognition with "equal value of different cultures," without considering whether different cultural norms are indeed equally valuable. Although the universalism claims to operate a "supposedly neutral set of difference-blind principles," these principles are mostly constructed on "one hegemonic culture," and subordinate individuals and groups are required to accept the dominant notion of citizenship. The argument against the latter, on the other hand, is that recognizing uniqueness is discriminatory and violates the idea of equal respect. Besides, treating all unique cultures with equal respect, for Taylor, is "condescending and ethnocentric:" it amounts to superficially providing a positive evaluation of those unique cultures, and such conclusions typically reflect the existing standards of the hegemonic culture. Since Taylor finds the two kinds of recognition inadequate and erroneous, he offers an alternative approach (43-44, 64, 70-71).

Taylor proposes an intermediate approach between the two arguments for dignity and difference arguments. His idea of recognition requires, first, that all cultures must be given value or worth only as a “starting hypothesis,” and second, that any claims of value should be verified by an “actual study of the culture.” Specifically, he considers valuable those human cultures that have brought to life whole societies over an extended period. In proposing this, he disregards any specific or limited cultural setting, such as “specific art forms,” which may not be of a value equal to the whole culture of a society. Further, his conception of what is valuable excludes short periods when cultures may go through decline or perversion. However, Taylor presumes that human cultures are valuable and worthy, with “presumptions of value implicit,” only as the “starting hypothesis” in a first step. His subsequent step involves verifying the validity of such claims (66-7).

Because Taylor’s “presumption” is a “starting hypothesis,” he requires establishing or verifying claims in the “actual study of the culture.” As he states, “for a culture sufficiently different from our own, we may have only the foggiest idea ex-ante of in what its valuable contribution might consist. Because, for a sufficiently different culture, the very understanding of what it is to be of worth will be strange and unfamiliar to us.” That is to say, Taylor does not promote accessing any distinct culture with the premise of a pre-determined or predicted standard of cultural value. Such an approach to studying a different culture, provides an inadequate of obscured understanding, because an outsider is unaccustomed to the context and

worthiness of its unique features. For Taylor, verifying claims in the “actual study of the culture” counters approaches based on ideas and claims that are invalid and unverifiable (66-67 and 98).

With this premise about the presumption of worth, what Taylor endorses is a method drawing on Hans-Georg Gadamer's “fusion of horizons” to the study of culture and states:

What has to happen is what Gadamer has called a “fusion of horizons.” We learn to move in a broader horizon, within which what we have formerly taken for granted as the background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture. The “fusion of horizons” operates through our developing new vocabularies of comparison, by means of which we can articulate these contrasts. So that if and when we ultimately find substantive support for our initial presumption, it is on the basis of an understanding of what constitutes worth that we couldn't possibly have had at the beginning. We have reached the judgment partly through transforming our standards.

Before proceeding to examine Taylor's remarks, it is important to discuss Gadamer's “fusion of horizons” that will explicate Taylor's position in this passage (Taylor 67).

Gadamer explains the notion of the horizon in the context of the "thinking mind." Generally, for Gadamer, "a horizon is the range of vision that includes everything that can be seen from a particular vantage point." However, he explains the "range of vision" by observing that "the word [horizon] has been used in philosophy to characterize the way in which thought is tied to its finite determinacy, and the way one's range of vision is gradually expanded." That is, Gadamer relates "horizon" with the perception or faculty of the "thinking mind" or consciousness, and argues that a horizon allows one to know the comparative importance of all that is within the range of vision. In relating the horizon to the "thinking mind," Gadamer, thus, claims that the horizon enable one to know that which can be envisioned within the frame of the horizon (302).

Gadamer applies the notion of "horizon" to the context of "historical understanding" to show that history comprises the horizon of the past. He employs the example of historical context or understanding throughout his explanation, and clarifies how one may acquire the historical horizon. As he remarks, "[t]he task of historical understanding also involves acquiring an appropriate historical horizon, so that what we are trying to understand can be seen in its true dimensions." In this statement, Gadamer argues that understanding of history or "historical understanding" is possible by transposing oneself from the present to the past in the process of "acquiring an appropriate historical horizon." That is, transposing helps one know the horizon of others, the significance of the past or the place of historical

texts in their historical context or situation. Still, because Gadamer's understanding is similar to an agreement, or is dialogical, it involves more than one horizon (303).

Since Gadamer conceptualizes understanding as agreement, he acknowledges the existence of more than one horizon at play in any process of understanding. As he states, "[i]n the sphere of historical understanding, too, we speak of horizons, especially when referring to the claim of historical consciousness to see the past in its own terms, not in terms of our contemporary criteria and prejudices but within its own historical horizon." Notably, he shows two horizons in "historical understanding": the horizon of the past and the horizon of the present. Likewise, Gadamer exemplifies how conversations between two or more persons involve horizons. Because Gadamer's understanding is dialogical, it seeks agreement among all participants in a conversation. Moreover, his conceptualization purports to employ multiple horizons for involving everybody in the conversation. That is, mere soliloquies of acquiring historical horizon are not enough for understanding (302-03).

Besides, Gadamer advances the concept of "fusion of horizons" involving two phases or steps significant to the process of understanding. First, understanding involves the "hermeneutic task" of "foregrounding" or projecting the past horizon. As he explains, because "[e]very encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and

the present,” therefore “[t]he hermeneutic task consists in not covering up this tension by attempting a naive assimilation of the two but in consciously bringing it out.” That is, in “foregrounding” the historical horizon, the hermeneutic approach differentiates the past from the present horizon. Such a distinction, for Gadamer, acknowledges one's awareness of "historical consciousness" is different from one's present "criteria" and "prejudices." However, the "fusion of horizons" goes beyond this separation (302-03, 306).

In the second step, the horizons synthesize. As Gadamer notes, “[p]rojecting a historical horizon, then, is only one phase in the process of understanding; it does not become solidified into the self-alienation of a past consciousness, but is overtaken by our own present horizon of understanding.” In other words, after a historical horizon is foregrounded, it is concurrently "overtaken" or "superseded" by the present horizon. To exemplify this process in the context of tradition, Gadamer claims that “continuing tradition” is the overlap of the present with the acquired historical horizon. Indeed, the process of superseding signifies the completion of the “fusion of horizons.” Gadamer’s understanding thus is a process of synthesis, and involves projecting the historical horizon and, subsequently, superseding it (307).

This helps to explain how and why Taylor invokes Gadamer’s "fusion of horizons," and seeks methodological support from it for his idea of recognition. As discussed earlier, Taylor intends to conceptualize his recognition as distinct from

other approaches that generally allow the study of culture with pre-existing ideas about cultural values. He pursues this goal by extending Gadamer's "fusion of horizons" to the interaction of different cultures. Taylor claims that the "fusion of horizons" helps one to move to a "broader horizon," that of the "unfamiliar culture." In effect, one develops "new vocabularies of comparison" to "articulate these contrasts," the contrast between one's own culture and that of the other. Furthermore, in the process, whenever the investigator can verify and demonstrate his or her value claims, he or she develops "an understanding of what constitutes worth" in the other culture. Such conclusions or understandings, for Taylor, also occur by "transforming our standards," or in Gadamer's phrase, by a "fusion of horizons." Indeed, "fusion of horizons" is central to Taylor's recognition of culture with the presumption of worth as a "starting hypothesis" to be verified in the "actual study of the culture" (66-67).

The study of other cultures with his distinct approach, for Taylor, is a moral issue. He claims that accepting the presumption that all cultures have value or equal worth requires both "willingness" and "admission." First, as he explains, "[i]t is only arrogance, or some analogous moral failing, that can deprive us" of the presumption of worth of other cultures. Because his approach requires a "comparative cultural study," by "transforming our standards" or "displac[ing] our horizons in the resulting fusions," it necessitates "willingness" on the part of the

hegemonic culture. This is the "willingness" to counter the typical approaches based on the pre-determined ideas and claims of the dominant culture (64).

Second, Taylor's presumption of worth demands "admission" that "we are very far away from that ultimate horizon from which the relative worth of different cultures might be evident." In suggesting that cultures exist in alienated horizons, he resists the multiculturalist claim of "equal value of different cultures." However, "admission" encourages and allows considering if and what different cultural values and practices are indeed valuable. This involves deciding what is good and what may not be good, which is moral judgement and makes presumption of worth a moral issue (64).

So far this chapter has focused on Taylor's recognition theory in general. Before proceeding to examine Taylor's idea in the context of customary laws, it is important to consider other related concepts. The following section will review two influential theories on legal hermeneutics by Hans-Georg Gadamer and Ronald Dworkin.

2.2 Legal Hermeneutics: Gadamer and Dworkin

This section discusses the ways in which Gadamer and Dworkin conceive of their respective interpretive approaches to law. It also identifies the key characteristics of the interpretation process in these two theories. Specifically, the analysis highlights the role of the interpreter in determining the most favorable interpretation. Overall, the section emphasizes the practical nature of legal interpretation.

2.2.1 Gadamer

Gadamer explicitly relates his hermeneutics of "fusion of horizons" to legal interpretation. Just as he recognizes the significance of the historian as an interpreter of the past, in legal hermeneutics, he examines how the jurist or judge understands the meaning of the law. Moreover, in comparing the approaches of a jurist and a legal historian, Gadamer seeks to explain the critical elements of his legal hermeneutics.

For Gadamer, the primary task of a jurist lies in applying the law to any given case requiring dispute resolution. As he explains, "[i]t is true that the jurist is always concerned with the law itself, but he determines its normative content about the given case to which it is to be applied." Gadamer's description of the function of

the judge is twofold sequentially: first, in determining the "law itself," the judge examines the law's original meaning, including the intentions of its historical framers. Second, however, when the judge applies the law to the present case, he considers the situational changes and reformulates the normative content of the law. That is to say, although the judge begins with the historical or original meaning, he or she is not bound by it. Instead, the jurist understands the meaning of a legal text or the law from the factors in the case at hand requiring dispute resolution (326).

In contrast, the legal historian does not resolve any present legal dispute. However, "[i]t is only in all its applications that the law becomes concrete...[so] the legal historian cannot be content to take the original application of the law as determining its original meaning...he will, rather, have to take into account the historical change the law has undergone." In doing so, the legal historian considers the law's many applications to determine its meaning. Specifically, he mediates between those applications, the original meaning, and the present application of the law. Thus, unlike the jurist, the legal historian does not settle conflicts, but in seeking to understand the past legal text in its application to the present, he follows the jurist's way of contemplation in order to arrive at that understanding (325).

Gadamer's basic description of both the jurist and legal historian underscores several features of his legal hermeneutics. First, the meaning of the law is

understood only in its practical application. In referring to Aristotelian ethics, Gadamer states that it “is concerned with reason and with knowledge, not detached from a being that is becoming, but determined by it and determinative of it.” However, in agreeing with Aristotelian ethics, Gadamer concludes that “[a]pplication does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal—the text—itself. Understanding proves to be a kind of effect and knows itself as such.” Here, in explaining the inseparable relationship between the universal and the particular or present interests or concerns, Gadamer underscores that understanding is “determined by” reasoning and “determinative of it,” *mutatis mutandis*. As such, the acts of interpreting a universal or a text and the law's application to any particular situation are not distinct. Instead, every understanding itself necessarily involves practical reasoning or application. Accordingly, in the context of law, Gadamer makes a distinction between its original meaning and its present legal meaning (312 and 341).

Gadamer also argues that the historical and juridical meanings of law are distinct. The application of the law to particular cases or disputes in the present does not follow its original meaning. As Gadamer states, “[i]n regard to law still in force we naturally assume that its legal meaning is clear and that the legal practice of the present simply follows the original meaning. If this were always the case, the...meaning of law would be both juridical and historically the same. For the

jurist too the hermeneutical task would be just to establish the original meaning of the law and apply it as the right one...[but this] ignores the tension between the original and present legal sense." Since the original reader and later interpreter are distinct, the job of the jurist is not to apply the original meaning as the "right one." Instead, the interpretation or meaning-making of the law takes place in the "present legal sense," in its application in a particular legal case (326).

Moreover, because interpretation and application work in unison, the interpreter's understanding necessarily develops through conversation or dialogue with a particular or present interest and concern. For Gadamer, interpretation is dialogical because the "spoken language—in the process of question and answer, giving and taking, talking at cross purposes and seeing each other's point—performs the communication of meaning that, with respect to the written tradition, is the task of hermeneutics." That is, the interpreter relates to others and with cultural past through conversation or dialogue, primarily through question and answer. Here, various pre-judgments, perspectives, and cultural norms are integral to such interactions, encounters, or experiences. This process of conversation or dialogue brings the past "written tradition" into the present. Thus, conversation or dialogue occurs inside a tradition and brings about understanding (368).

Gadamer further considers the issue of the temporal distance in understanding. For him, the course of temporal distance follows an "infinite

process." This process allows the exclusion of "fresh sources of error constantly...things are filtered out that obscure the true meaning; but new sources of understanding are continually emerging that reveal unsuspected elements of meaning." Here, the temporal distance is the distance in time between the interpreter and the text. In Gadamer's conceptualization, the temporal distance is variable and not fixed; it changes and broadens. Furthermore, the inconsistent nature of temporal distance eliminates narrow pre-judgments and prejudices and reveals true and precise meaning. Accordingly, in facilitating and adding value to meaning, temporal distance is significant to understanding (298).

2.2.2 Dworkin

Like Gadamer, Dworkin also explains his idea in the historical context. He proposes that law is interpretive of legal history. Essentially, Dworkin purports to show the relationship between the judge in the present and legal history, and he examines the propositions of law through descriptive and evaluative analysis.

Dworkin is critical of legal positivists' view of a proposition of law as purely a description of legal history. As he states, "propositions of law seem to be descriptive—they are about how things are in the law, not about how they should be—and yet it has proved extremely difficult to say exactly what it is they describe."

That is, Dworkin's disapproval of the position of legal positivists is concerned with their exclusive attribution of the reality of a proposition of law with a past institutional event or instance of law-making. For legal positivists, the descriptive proposition is an articulation of the "law as it is." While Dworkin sees the value, albeit grudgingly, of such a conception's usefulness, he thinks that valid description is achievable only in clear-cut instances. To illustrate his point, he notes that, "[I]f the Illinois Legislature enacts... 'No will shall be valid without three witnesses,' then the proposition of law, that 'an Illinois will needs three witnesses' is accurate only in virtue of the past event of decision-making or statute-enacting." In abstruse instances, however, Dworkin finds legal positivists' descriptive conception of the law inadequate (1982: 180).

In explaining the weakness of the descriptive approach in complex cases, Dworkin cites the example of the proposition about the constitutional validity of any untested affirmative action policy or program. He explains that "[i]f that [proposition] is true, it cannot be so just in virtue of the text of the Constitution and the fact of prior court decisions..." To clarify Dworkin's explanation, unlike the earlier clear-cut example of the Illinois Legislature requiring three witnesses to a will, the equal protection clause of the Fourteenth Amendment to the United States Constitution does not explicitly provide for any affirmative action scheme. The Constitution merely guarantees everyone the right to equal protection under the law, and although it is the basis for governmental policies and schemes that address

historical and social discrimination, the meaning of the clause is often debatable. Moreover, any proposition or statement affirming the constitutional validity of a particular untested affirmative action policy is often controversial. Dworkin, thus, finds descriptive approach inadequate to explain how complex and controversial propositions, such as the statement about affirmative action succeed in describing the past event of Constitutional enactment, and to demonstrate whether propositions are true and actually express the "law as it is" (1982: 180).

In assessing an evaluative theory of the law, Dworkin is equally critical of its analytical capacity to provide an understanding of the law. In contrast to the descriptive conception, the evaluative conception disconnects itself from any legal history. Instead, it assesses a speaker's statements or propositions in relation either to his personal preference in politics or to his belief in some objective or natural law based on political morality principles. The propositions here articulate what the judge or the speaker "wants [prefers] the law to be" or what the law "ought...to be" in virtue of his or her beliefs. Dworkin faults the evaluative approach mainly for its self-contradiction, because "someone who says that a particular untested affirmative action plan is constitutional does mean to describe the law as it is..., and not as it "ought to be" (180). Despite the shortcomings of descriptive as well as evaluation, Dworkin sees enough value in both the conceptions to offer reconciled and reconstructed versions of the two (1982: 180).

Dworkin develops an alternative to narrow conceptions of description and evaluation by focusing on the contradiction between what specific rules of interpretation or "techniques of statutory construction" offer and what judges actually do. The "techniques of statutory construction" enable the interpretation of obscure law statements by discovering the intention of the author or the framer of the law. Whenever the author's intentions either do not exist or are not ascertainable, however, "judges pretend they are discovering the intention...[but] impose their own view of what the statute should have been." In other words, although the judge attends to his or her own preferences or beliefs about the law, he claims that he is stating the "law as it is," supposedly in the historical sense of its enactment. Dworkin also views this as a new-law-making activity by the judge, as he or she follows "the way he or she thinks best." Dworkin therefore views the complex and controversial propositions of law, in particular, as neither purely descriptive nor just evaluative. Instead, the propositions of law are uniquely interpretive of legal history, even as they employ aspects of both description and evaluation (1982: 181-182).

In Dworkin's unique hybrid formulation, which he also terms as "law as integrity," interpretation seeks to demonstrate how and why an entire branch of law is valuable. As he states, "legal practice...must...satisfy a test with two dimensions: it must both fit that practice and show its point or value" (194). In other words, legal practice focuses both on its constraining formal features as well as the

supporting substantive political contexts of legal interpretation. While the former element of fit, attending to structural qualities of institutional integrity and coherence in law, warrants that the judge accommodates the past legal or doctrinal history in his or her interpretation, the substantive political considerations provide the bases and flexibility for including or excluding some aspects of the legal history. That is, in determining or selecting the most appropriate legislative intentions or previous opinions or legal precedents, amongst the various available historical meanings, the judge also employs some political theory and personal political preference. He constructs and refines a legal philosophy in the contexts of certain general principles or policies relating to social goals or beliefs about justice, as the best justification for his interpretation and selection. Furthermore, the judge may also consider some texts or past actions as "mistaken" or wrongly decided, either in order to overrule or to circumvent previous decisions or precedents. For Dworkin, the dimensions of fit and substantive justification make the law valuable, because they play constraining as well as supporting and supplemental roles as they flexibly enable legal interpretation (1982: 194-96 and 1986: 255-57).

To summarize, in contrast to the exclusivity in description and evaluation, Dworkin's interpretivism views legal interpretation broadly as an activity that offers a general and inclusive understanding of the law. As he explains, "[t]he idea of interpretation cannot serve as a general account of the nature or truth of propositions of law, however, unless it is cut loose from these associations with the

speaker's meaning or intention." In particular, his interpretivism of law attends to the interpretation of the law differently from the specific ways in which legal practitioners usually understand the law. It aims to focus on various contexts beyond the typical legal rules of interpretation or "techniques of statutory construction." Here, the contexts may include the legal history as well as one's preferences of political choice or beliefs in some political morality. As a distinct and alternative theory of analysis, interpretivism it incorporates aspects of both descriptive and evaluative conceptions of legal propositions, and rejects an absolute division between the two conceptions. In dismissing exclusive legal positivism and natural law and offering a general and inclusive explanation of the meaning of the law, Dworkin's interpretivism is closer to Gadamer's hermeneutics (Dworkin 1982: 181).

Drawing upon the three strands of theoretical arguments encountered so far in Taylor, Gadamer, and Dworkin, the next section moves on to assess ways of bringing them together to define a methodological standard for the study of recognition of custom in law.

2.3 Theoretical Framework: Comparative Analysis of Taylor, Gadamer, and Dworkin

The use of two complementary dimensions of analysis is a common feature of Taylor, Gadamer, and Dworkin's theories. While Taylor begins with the "starting hypothesis" of presuming that all human cultures are valuable, he subsequently demands the "actual study of a culture" to determine its actual value. He proposes the dual approach in order to rectify the problems of such a presumption, because a presumption of the equal worth of all cultures is essentially "condescending and ethnocentric," reflecting pre-determined attitudes based on hegemonic standards. Likewise, his moral argument also proceeds along a "double axis," because recognition is a moral issue, and it requires both "admission" and "willingness." Specifically, it requires the "admission" that cultures have value but that these cultures are situated at a distance. One must therefore have the "willingness" to verify a culture's worth by conducting an "actual study." Constructing and using these complementary dimensions of analysis are essential elements in Taylor's treatment of recognition.

In a comparable vein, Gadamer conceptualizes historical understanding by considering two dimensions: past and present. Gadamer's "historical understanding" depends on these two horizons and his legal hermeneutics places the law's original meaning within the horizon of the past, and the situations in a

given legal dispute within the horizon of the present. For Dworkin, too, propositions about the law have two complementary dimensions: the descriptive and the evaluative. His legal interpretivism is a hybrid formulation and uses features of both dimensions. It requires accurate description or “fit,” as defined by legal texts, precedents, and practice, as means to maintain institutional integrity. His interpretivism also deems “substantive” or evaluative political-moral considerations to be crucial to normative reasoning. Since the descriptive and evaluative modes are flawed when used separately, a hybrid interpretivism offers the best way to bring the two dimensions together.

Taylor, Gadamer, and Dworkin’s theories also involve an interplay between two complementary dimensions of analysis. For Taylor, the interplay between distant or unfamiliar and adjacent or familiar cultures creates recognition and understanding of another culture and its values. Likewise, for Gadamer, the relationship between the horizon of the past and the horizon of the present has consequences for understanding. For Dworkin, the law's interpretation involves an extensive interplay between descriptive and evaluative considerations. These analyses show the importance of the interaction between the two dimensions for interpretation as well as recognition in relation to a culture, a past, or a law. These features of the analytical framework are significant for meaning-making in lawsuit disputes especially for the processes of recognizing tribal customs, resolving conflicts, and delivering justice. The next section contextualizes this theoretical

position by applying it to an important international example of the recognition of tribal customary laws.

2.4 The Evidence of Aboriginal Customary Laws in the 1986

Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws

The 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws highlights critical differences between Aboriginals' customary laws and the general law. As the Report discusses, while Aboriginal groups follow various customary laws, the common law interpretive ways apply legal principles generally to all and overlook custom differences among the Aboriginals. Besides, the diverse and unwritten custom, as well as its practice by the remotely situated Aboriginal groups, create practical complexities for courts. Moreover, due to their limited access to and understanding of the court system, Aborigines fear losing control over "interpretation and content" of their customary laws. In stating the differences and law's adverse impact on tribe custom, the Report, thus, decries courts' active involvement as well as their reliance on or judicial notice of the already "established" Aboriginal customary laws either in legislative statutes or in judicial precedents.

To mitigate the adverse impact on the Aboriginal customary laws, the Australian Report suggests a proof or evidence-based understanding of Aboriginal customary laws. First, the Report emphasizes specific dispute and states: “What is relevant in such cases is the customary laws of the community at the time the dispute or event occurred.” In emphasizing the particular time of the dispute, the Report disregards the “antiquity” requirement from the Aboriginal customary laws. Moreover, it clarifies the general use of the phrases “from time immemorial” and “historical continuity” in tribe custom descriptions. As the above remark suggests, while the time-specific evidentiary condition for establishing the Aboriginal customary laws renders the phrase “from time immemorial” irrelevant, it characterizes “historical continuity.” That is, to determine “established and accepted” tribe custom, the Report purports to accentuate the time and dispute specific evidence (pars. 614 and 642).

Another vital custom evidentiary aspect involves anthropological and Aboriginal testimonies. As the *Borrooloola Land Claim*, as well as the *Warumungu Land Claim* examples cited in the Report, suggest, in Aboriginal customary law claims, counsels use Aboriginal and anthropological testimonies as evidence. In the *Borrooloola Land Claim*, for example, where the two Northern Territory primary producers’ organizations disputed land ownership, the anthropologists Avery and McLaughlin testify as witnesses of the Aboriginal customary laws, and they affirm “as...expert[s] dealing with general anthropological propositions.” Likewise, as

Borroloola shows, its Commissioner, Justice Toohey also considers Aboriginals' testimonies as crucial evidence for determining the land dispute involving the Aboriginal customary laws. While lawsuits invoke both anthropological and Aboriginals' testimonies, difficulties arise, however, when an attempt is made to implement the formal evidence rules (par. 626).

Because the evidence rules generally reject hearsay evidence in a civil trial, these rules have an impact on the anthropological testimonies. The Report cites Justice Maurice in the *Warumungu* example and quotes: "what an anthropologist is told, at least in the context of gathering materials for the purposes of a land claim, is hearsay through and through." Similarly, as cited in the Report, *Borroloola* presents a similar view: "when Mr. Avery and Mr. McLaughlin recounted what Aboriginals had said regarding the whereabouts of their own country, they were...giving evidence of a hearsay nature." That is, due to their dependence on Aboriginals, anthropologists' testimonies are often contested as hearsay evidence. While the formal evidence rules hinder anthropologists' testimonies, they also affect Aboriginal evidence (par. 626).

As regards the difficulties with Aboriginal testimonies, the Report quotes Justice Maurice in the *Warumungu* example:

[T]he Statements spontaneously volunteered by Aboriginal informants may be of great value in assessing a claim. No doubt this is why they are so often

cited when anthropologists and others give evidence. Ordinarily, self-serving statements made out of court are excluded because of the ease with which they can be manufactured. However, in land claims the value of and place for such materials has been clearly demonstrated.

These remarks point to the contradiction in Aboriginal evidence. Although it finds those testimonies that Aboriginals provide instinctively and willingly relevant, the remarks caution against valuing Aboriginals' "self-serving statements made out of court." Both the testimonies are challenging: the former, on account of the formal evidence rules that generally forbids hearsay evidence, and the latter point to the deceitful nature of Aboriginals' "self-serving" hearsay accounts. As examined here and previously, the hearsay question in the evidence rules is a common condition that has a considerable impact on both anthropological and Aboriginal witnesses. The official Aboriginal Land Commissioner's Practice Directions of 1979, however, stipulates ways to overcome the evidence impasse (par. 626).

On the issue of the admissibility of evidence, the Report refers to the Practice Direction 25 (1979):

There will be no strict adherence to the ordinary rules of evidence. In particular, as a general proposition, hearsay evidence will be admitted, the weight to be attached to it to be a matter for submission and determination. Relevancy will be the controlling test for the admissibility of evidence.

The Report clarifies these evidence requirements with the *Borrooloola Land Claim* example, which employs the Practice Direction's admissibility. In recognizing the consequences of "the ordinary rules of evidence" on anthropological and Aboriginal testimonies in the Aboriginal land dispute, it ignores the formal rules that generally disallow hearsay evidence. In contrast, *Borrooloola* privileges "weight" or value in the anthropological and Aboriginal testimonial evidence. That is, in response to the hearsay claims, *Borrooloola's* Commissioner, Justice Toohey considers the supporting Aboriginal testimonies for validating the anthropological evidence. Thus, in noting the Practice Direction's requirement, as well as its application in the *Borrooloola Land Claim* example, the Report recommends considering the testimonies together and interpreting Aboriginal evidence with the anthropological framework (pars. 626 and 642).

To remedy the evidence nuances in Aboriginal disputes, the Report also recommends changes in the evidence statute law. It recommends an exception clause for admitting hearsay or opinion evidence as given by someone who "has" or "would be likely to have" the "special knowledge or experience of the customary laws" in dispute. As stated earlier, while law generally limits expert evidence based on hearsay, most anthropological opinion evidence comprises hearsay information. Especially due to the inadequacy of observational studies, investigators, such as anthropologists, also rely on participants' explanations. Accordingly, the Report suggests an exception for specific hearsay opinion (pars. 634 and 642).

The Report also recommends that in admitting the Aboriginal evidence, the statutory provision applies to the question of or interpreting fact in a case. As the Report argues, while such provision generally allows Aboriginal evidence in a lawsuit, it addresses the specific evidence situations. It recognizes the “experiential evidence” by persons who, although they may lack formal training, have long “contact and experience” with Aboriginals. Besides, it approves expert or knowledgeable witnesses, including hearsay evidence, for determining “ultimate issue or issues of fact” and on questions of “common knowledge” where juries have access to Aboriginal evidence. In contrast to focusing on “assertions or generalizations,” these changes also encourage litigants and the courts to emphasize evidence of Aboriginal customary laws. In considering these advantages and proposing changes in the evidence statute, the Report refers to section 48 of India’s Evidence Act as a guide; however, for this dissertation, the discussion below highlights all the relevant customary law clauses in the Indian Evidence Act (pars. 633, 634, 636 and 642).

The statute of the Indian Evidence Act 1872 helps with the problem of determining evidence and proof in court litigation and has specific clauses on customary laws. Specifically, Section 45 provides that “[w]hen the Court has to form an opinion upon a point of foreign law or of science or art...the opinions upon that point of persons specially skilled in such foreign law, science or art...are relevant

facts. Such persons are called experts.” Furthermore, as Section 48 states, “[w]hen the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.” Additionally, Section 49 stipulates that: “[w]hen the Court has to form an opinion as to the usages and tenets of any body of men or family...or the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.” Lastly, Section 57 requires the courts “to take judicial notice of...on all matters of public history...for its aid to appropriate books or documents of reference.” These statutory clauses provide for flexible and simple rules of evidence.

The Indian evidence statute clauses recognize opinions, as evidence, of persons who are either familiar with the existence of the customary norms, like the members practicing the custom, or experts who are “skilled” or trained in the related “science or art,” i.e., the relevant field of study such as anthropology for example. Also, the courts are allowed to take judicial notice of custom by referring to relevant “books or documents” providing already proven or established customs. Thus, in offering various kinds of proof, the Indian statute affords adaptability with evidence and proof of local custom. The idea of permitting courts to take judicial notice of custom in Section 57, however, has had its fair share of criticisms for reasons as stated at the beginning of this section. Due to its general consideration of

Aboriginal nuance evidence, India's evidence statute is a standard for the Australian Report.

2.5 Comparative Analyses of the Australian Report and the Theoretical Model

The Australian Report analyses have generated a wealth of information on the importance of evidence of Aboriginal customary laws. The Report's significance to this dissertation, however, deserves comparison with the theoretical model comprising Taylor, Gadamer, and Dworkin's ideas. This section examines ways in which the evidence aspects of Aboriginal customary laws are relevant to the theoretical notions. Moreover, the discussion that follows seeks to shed light on how these reviews inform the judicial understanding of Aboriginal customary law. While there are many evidentiary aspects in the Report, the review in this section studies a few examples that support the theories discussed previously.

In pointing out the adverse impact of the general law on Aboriginal customary laws, the Australian Report upholds Taylor's politics of difference critique. The Report views tribe custom as "questions of fact and not of law" and disapproves "[d]ecisions based on assertions or assumptions about Aboriginal customary laws." Moreover, as the Report alerts, such unsubstantiated opinion

“lead to mistaken or ill-informed decisions, which can do considerable harm.” These Report observations are comparable to Taylor’s analysis that describes unproven declarations and esteem for the uniqueness of other cultures as “condescending and ethnocentric.” While the Australian Report recognizes the differences between the ordinary law and the Aboriginals customary laws, in rejecting the “assertions or assumptions” based on Aboriginal customary laws understanding, it supports Taylor’s hegemonic standard critique (Recognition of Aboriginal Customary Laws ALRC Report par. 614, Taylor 70-71).

There is another way in which the Australian Report is similar to Taylor’s need for recognition argument. Overall, the previous analyses have shown that the Report seeks to determine the Aboriginal customary laws by emphasizing the unique evidence approaches in proving the Aboriginal customary laws. Due to the need for courts’ active role in employing these approaches, such efforts are necessarily a moral issue. This morality issue is similar to Taylor’s recognition that is grounded on moral principles. As discussed earlier, Taylor requires both “admission” that cultures have value and exist at a distance as well as “willingness” for verifying cultures’ worth in “actual study.” The moral condition is common to both the Australian Report’s recommendations and Taylor’s recognition (Taylor 64).

The Australian Report offers results that also corroborate the findings of a great deal of Dworkin’s previous work in legal interpretivism. As cited in the

Report, the Practice Direction and the *Borrooloola Land Claim* overlook the formal evidence rules that generally disallow hearsay evidence, and, instead, they privilege “weight” or value in the anthropological and Aboriginal testimonial evidence. This approach stems from the adverse consequences of formal evidence rules on anthropological and Aboriginal testimonies. That is, as explained in Dworkin’s conception, the substantive or the anthropological and Aboriginal testimonies and the fit or the evidence rules considerations create the alternate “weight” or value approach (pars. 626 and 642).

As regards Gadamer’s fusion of horizons, in recommending interpreting Aboriginal evidence together with the anthropological framework, the Australian Report is also consistent with Gadamer’s theory. The Report’s insistence on considering Aboriginals and anthropological testimonies together is similar to the act of the fusion of horizons. It allows foregrounding the anthropological evidence in the Aboriginal horizon. Subsequently, in superseding the Aboriginal horizon, anthropologists construct expert opinion. In requiring courts to verify the anthropological framework with the supporting Aboriginal testimonies, thus, the Australian Report reflects Gadamer’s method (pars. 626 and 642).

The Australian Report’s accent on the time and dispute specific evidence for determining the “established and accepted” tribe custom further supports Gadamer’s idea. The Report’s emphasis on the time and dispute specific evidence

ignores the “antiquity” constraint from the Aboriginal customary laws. Such emphasis allows foregrounding the evidence in the dispute specific past horizon. However, the evidence, such as the anthropological or expert opinion supersedes the past horizon. This fusion of horizons, of evidence and the specific dispute, helps the courts to determine the content or meaning of Aboriginal customary laws in the given case (par. 642).

These analyses are generalizable to Australian Report’s other specific discussion on laws of evidence and the proof of Aboriginal customary laws or traditions. The specific examples include the Report’s focus on reading the fact in the case, its recognition of “experiential evidence” as well as an expert or knowledgeable witness. The analysis is also applicable to India’s Evidence Act. The analytical framework’s generality also clarifies why the Report purports to encourage counsel and courts to underscore the importance of evidence of Aboriginal customary laws. However, as pointed out in the next conclusion section, such analyses have limitations (pars. 633, 634, 636, and 642).

2.6 Conclusion

The aim of the present research in this chapter was to examine Charles Taylor's recognition, Hans-Georg Gadamer's fusion of horizons, and Ronald Dworkin's legal

interpretivism theories and propose a combined framework of these theories for analyzing the problem of recognition of tribe custom in law or legal cases. The second goal of this study was to investigate the effects of the comparative framework on the evidence of Aboriginal customary laws as discussed in the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws. The findings indicate that Taylor, Gadamer, and Dworkin's theories have individually considered the effects of interpretive approaches on the understanding of a culture, a past, or the law. Due to the similarities of their approaches, taken together, these theories offer a theoretical standard for understanding meaning-making in lawsuit disputes.

Moreover, the investigation of the Australian Report has shown that the above combined theoretical standard also allows interpretive approaches for understanding the recognition of Aboriginal customary laws in court cases. Precisely, this chapter has analyzed comparatively the Australian Report's discussion on laws of evidence and the proof of Aboriginal customary laws in lawsuits as well as the theoretical model comprising Taylor, Gadamer, and Dworkin's ideas. The comparative research has demonstrated the significant relationship between the Report and the theories. As the previous discussion indicate, the relationship informs the judicial understanding of Aboriginal customary laws. Although this study focuses on the evidentiary aspects of

Aboriginal customary laws, the findings may well have a bearing on other Aboriginal customary law issues.

The above approach will prove useful in expanding this dissertation's understanding of the recognition of the Oraon tribe customary laws in the reported court cases. It will help examine the impact of both anthropological and tribe evidence on Oraon disputes. Also, as regards the Oraon disputes, this research will aid in reviewing the court strategies for evading legal limitations, and its methods for collecting tribe evidence. A limitation of using this kind of approach is that it precludes Oraon customary laws, and tribes customary laws in general, which appear in the legally binding forms such as legal precedents and legislative statutes. Still, this theoretical framework approach helps unveil the fundamental structures and elements of the interpretation procedure and provides tools for examining and explaining the judicial rulings in the remaining parts of this dissertation. The next chapter provides an account of the Oraon custom, as discussed in the various court cases.

3 Courts' Interpretation of Oraon Custom: Roy's Oraon Account and Implications of Religion, Marriage, and Adoption on Inheritance Custom

The aspects of Oraon inheritance custom is a classic problem in India's courts because the courts depends on Sarat Chandra Roy's Oraon accounts for evidence on the Oraon inheritance custom. Roy, who was a trained lawyer, practiced in the Court of the Judicial Commissioner in Ranchi in British India during the early twentieth century. Roy published his field-studies on the Oraons in 1915 and 1928. Due to the historical value of Roy's Oraon accounts, the continued reference to Roy's work as the source of proof on the Oraon inheritance custom by the Indian courts is exceptionally problematic. The courts' reliance on Roy overlooks the changes in the various aspects of the Oraon inheritance custom in the past century.

There has been no detailed investigation of how courts in India determine the tribe custom and especially the Oraon inheritance custom. Much uncertainty still exists about the courts' approaches for determining the evidence in Oraon inheritance disputes. This chapter will examine how courts construct different aspects of the Oraon inheritance custom in the various court opinions this study investigates. Secondly, this research will assess Roy's description of the Oraon inheritance. This chapter intends to determine the extent to which courts rely on

Roy's Oraon account and whether they offer alternatives for determining proof of the Oraon inheritance custom.

This chapter begins by reviewing Roy's account on the Oraon inheritance custom and includes aspects of Oraons' religious beliefs, marriage, and adoption practices that have a bearing on their inheritance customs. Moreover, it examines changes in the Oraon inheritance, as reported in Roy's account. It will then go on to provide a concise analysis of the Chotanagpur Tenancy statute that recognizes the tribe customary laws, including the Oraons. Following this, the chapter discusses the reported court opinions on issues of Oraon women's right to inherit property as well as the implications of adoption on the Oraon inheritance practice. The critical court opinions selected for discussion here are representative, and yet exhaustive in considering all aspects of issues and trends in Oraon inheritance disputes in the higher courts. They illuminate the typical judicial foundation and understanding of Oraon inheritance. In particular, court opinions offer the circumstances of the disputes, the claims of customary norms as well as the general law, and the sources and evidence of Oraon inheritance custom or lack thereof.

3.1 Roy's Oraon Account: Implications of Oraons' Religious, Marriage, and Adoption Aspects on the Oraon Inheritance Custom and Other Changes in the Oraon Inheritance

Before proceeding to examine Roy's account on the issues of the Oraon inheritance custom, it is necessary to discuss the general relationship between Oraon's land tenure and religious custom briefly. In terms of this relationship, Roy states:

When the Oraons settled in the Chota Nagpur Plateau, each family, or each group of brothers or cousins with their families...selected a...jungle area suitable for clearance and cultivation...These pioneer families...were called the Bhuinhars of the village, and the lands [thus] cleared...the Bhuinhari lands of their respective khunts—stocks or families...[T]he process...involved a disturbance of the spirits residing in the jungles [called khut-bhuts], the duty of making periodical sacrifices to the *nads* or spirits...necessarily devolved on the Bhuinhar stocks or khunts...[T]o this day does the village-priest, who was originally the village-patriarch and village-chief, offer sacrifices...to the whole host of general (as distinguished from family) spirits...The propitiation of the khunt-bhuts and the village-deities are meant to keep the village in general—its inhabitants, cattle, fields and crops—from harm's way. And these deities and spirits—the chief of whom...can only be propitiated by a Bhuinhar, that is to say a descendant of the original clearers of the jungle.

While Roy's statement here describes the relationship between the Oraon's land and religious beliefs, it also seems to suggest a pertinent role for the *Bhuinhar*. Because the Oraon settlers depended on the *Bhuinhar* for appeasing the village spirits, they regard him with a higher social status. Accordingly, for Roy, Oraon's religious beliefs also have implications on their social organization (1915: 106-109).

Regarding the issues of the Oraon inheritance custom, Roy explains the impact of Oraon's religious beliefs and socio-economic circumstances on their inheritance customs. As Roy describes:

[The Oraons had a] peculiar belief in the State of the human soul after death spirit. The human spirit, after the dissolution of the physical body, is believed to reside in the underworld where the spirits of all the deceased Oraons of the same clan of a village live in shadowy forms and constitute a closely united group...spirits are believed to derive nutrition from the essence of the offerings made to them by their male descendants...As their own well-being depends on the possession by their male descendants of sufficient means for regularly providing rice-offerings and rice-beer libations to them, these spirits of the dead are naturally solicitous about the preservation in the hands of their male descendants of the property they have left behind.

Roy's remarks point to Oraons' belief that spirits of the dead Oraons reside together as a common clan in the village. Moreover, these spirits depend on the Oraon male descendants or other agnates of the common totem clan who feed them with

offerings such as “rice-offerings and rice-beer.” Besides, to make such offerings, the male descendants required “sufficient means” of property, and, accordingly, as the Oraons believed, these spirits favored their male descendants to preserve their left-behind property (1915: 369-371).

Also, Roy's account describes the sanctions by the Oraon spirit world for ignoring their property preservation by the male descendants: [The descendants and other property' possessors] run the risk of being chased by the spirits who are assembled there to do justice...Oraon[s] have narrated...experiences when chased by such spirits, they ran home for dear life or fell down senseless, and in either case some sickness or other at once over took them.” It is apparent in Roy's description that for the Oraons, the spirits' retributions in forms of "sickness or some other affliction" ensue on the families of the male descendants or other agnates belonging to an exogamous totem clan for failing to preserve the ancestor's property. Moreover, in the case of marriage, where an Oraon married daughter takes away such property, the retribution misfortunes befall her husband's family. Also, if misfortunes occur in the adopted son-in-law's family after the death of his sonless father-in-law, he gives away the father-in-law's “moveable property (especially iron implements, broomsticks, and winnowing baskets)” to the deceased father's agnates. Thus for Roy, due to the retributions by the spirits, the Oraon male descendants or agnates preserve their ancestors' property (1915: 370-72)

In Roy's account, Oraons' both religious and social conditions inform their inheritance customs. As discussed above, for Roy, the Oraon members and their ancestors' spirits of the same exogamous clan reside together as a "one village-family," and because the descendants are required to perform sacrificial offerings to the spirits, they are afforded "sufficient means" or property inheritance. However, as Roy explains, upon marriage, the Oraon daughter leaves her father's village-family to reside with her husband's village-family of a distinct clan. As a result, the Oraon custom prohibits the Oraon daughters from performing the "sacrificial offerings and libations." Moreover, Oraon married women are also not allowed to partake in such religious customs. Besides, while Oraon custom disallows the married daughters from inheriting their fathers' family property, it also limits married women's ownership rights in their husbands' family property. Thus, for Roy, these religious and social reasons explain why, in the Oraon custom, the property remains within the clan, and women have limited inheritance rights of the property (1915: 369-372).

Although the Oraons' socio-religious conditions ground their inheritance customs, as Roy describes, the changing economic situations had implications for the Oraon inheritance custom. As described at the beginning of this section, for Roy, when the Oraons first settled in the Chota Nagpur plateau, their cultivated lands were *Bhuinhari* lands. Accordingly, because there were no landlords, the concepts of rents or taxes were alien to the Oraon cultivators. The "propitiation of the village-

deities and the khunt-bhuts” was the only requirement imposed on the Oraon peasants. However, as Roy describes, “when land-lordism was established, and rents or services and other impositions came to be attached to some of these Bhuinhari lands...portions of these lands had to be set apart.” That is, certain lands were excluded from taxation by the alien landlord, such as *Khunt bhutkheta* or the stock-family priest land, *Gairahi bhutkheta*, *Pahanai* or *Dalikatari* or the village-priest's service land, and the *Pujar* or *Panbhara khet* or the service land of the village-priest's assistant. Because the Oraon landholders of these lands performed rituals for appeasing the village-deities, their lands received the tax exemption. For Roy, this official landlord intervention on the Oraon *Bhuinhari* lands influenced the Oraon inheritance (1915: 109-10).

Commenting on the relationship between the landlord system and Oraon inheritance, Roy notes that: “alien landlords generally manage to take possession of such property when there is no member of his own Khunt surviving him unless the deceased owner happened to execute a deed of transfer during his life-time.” This description is in contrast to the discussion in the previous paragraph where, in the absence of other *Khunt* members, Oraon inheritance devolved to other Oraon *Bhuinhar* agnates in virtue of common descent. In the landlord description, however, the alien landlords require Oraons to “execute a deed of transfer” in the instance of the lack of surviving *Khunt* inheritors. Moreover, in the absence of such “deed of transfer,” the landlords acquired such *Khunt* lands. For Roy, the alien

landlord system, as well as Oraons' changed economic conditions, influenced particular adaptations in the Oraon inheritance (1915: 372-73).

Roy points to the essential rules for adoption that emerged in the Oraon inheritance, and he states:

“[A]n Oraon owner of lands who has no sons may have recourse to either...adopt a son to himself or take into his house a 'prospective son-in-law.' If the adopted son belongs to his own clan and khunt, and has been adopted on the other agnates of the owner agreeing in the presence of the Panch to forego in his favour their claim to inheritance, such adopted son acquires the full rights of a son; otherwise he is only entitled to inherit the rajhas lands of the adoptive father. A *ghar-dijoa* son-in-law (adopted as such before marriage) can, in no case, inherit the Bhunhari lands of his deceased father-in-law...

As stated in the previous paragraph, the alien landlords took possession of lands that were devoid of male inheritors from the same *Khunt* as the deceased Oraon owner. Moreover, as a result of the changed economic situation, the Oraons embraced the practice of adoption for showing inheritance continuity in the family (1915: 374-75).

As regards the importance of the State court system on the Oraon inheritance, a few examples from Roy's account are discussed here. Roy states that

upon the death of the father, the family ownership of land continued along the agnates or the male line of descendants involving, either the father's sons, or in their absence, his nearest family of male agnates, in the order of preference, including his brothers, nephews, uncles, and eventually, other members of the clan. Also, where the father had more than one son, the eldest son became the head of the family. However, whenever the property got divided further among the sons, the eldest son received a somewhat larger share as a settlement for renouncing his authority of the family head. Likewise, where the father had more than one wife, the sons of the first wife received a larger share than that of the other wives. However, Roy is wary of the general application of such rules. Commenting on the variations in the inheritance share among the Oraon sons, Roy claims that “[t]his custom of unequal division is falling into disuse in some parts of the Oraon country, and therefore in each case where an equal division is demanded in Court, proof of local custom should be adduced”. In this remark, Roy intends to caution that the Oraon sons’ property shares differed was also clan and village specific at the local not to be generalized for all Oraon (1928: 380-86).

In an additional example, Roy shows that while the Oraon *Panchayats*, the traditional justice system, recognized and allowed the married sons’ right to demand property partition even during the life of their father, especially when family members did not get on with each other, the State courts did not enforce this demand devoid of father’s wish to partition. The courts’ influence on the Oraon

inheritance also involves the issue of a larger share of the property to the sons of the first wife as discussed previously. Roy points to the effect of the "Hindu ideas of partition and inheritance" on the judicial officials, and coupled with the courts' ignorance of the local Oraon custom, as the reason for the decline in the Oraons' unequal partition practice. Primarily, as Roy explains, the affected Oraon sons strategically used the State court-system over the traditional Oraon *Panchayats* to seek equitable partition (1928: 380-87).

Another important aspect of influence on the Oraon inheritance concerns the general law's principles of a written legal will or testament, which allows a person to determine the inheritance of his property after the person's death. As Roy notes:

The Oraons never attained that stage of legal development in which the will of an owner of property is permitted to override the claims of his kindred in blood...But at the present day there appears to be a growing desire to change the customary course of devolution of property when an Oraon owner has no male issue. Such an Oraon generally seeks to make a will or a gift of his lands to his daughters or daughter's sons, but when he is told that this is not allowed by the law, he...seeks to defeat the law by making a 'surrender' of his rayati lands to the landlord, and the latter is induced to make a fresh settlement of the land with the man's daughter or son-in-law or daughter's sons as may be desired.

Although the enforcement of a legal will document appears problematic, Roy's above remarks suggest "a growing desire" among some Oraons for recognizing the contemporary legal principle of the will. This demand somewhat reflects Oraons' changed socio-economic conditions and Oraons' move towards private ownership of land property. (1915: 387, *Wills* Legal Information Institute)

Roy's investigation of Oraon inheritance patterns has shown that the Oraon's socio-economic conditions and State intervention had consequences for the Oraon inheritance custom. In recognizing these developments, as discussed in this section, Roy's research presents the development as "innovation" in the Oraon inheritance custom. For Roy, although historically Oraon followed village-community ownership of land, it evolved into family-based private ownership. Especially, as the above discussion suggests, with the advent of the landlord system, each Oraon family, with father as the patriarchal head, ended up with the private ownership of the tribe's erstwhile public lands. The unwavering Oraon inheritance along the male-descendants, however, survived the evolving landownership patterns and remained actively preserved (1928: 380-86).

To summarize the gender inequality issue in the Oraon inheritance, in Roy's account, Oraons' religious practices and socio-economic settings led to the exclusion of the descendant and dependent women from the absolute ownership and inheritance of land. Whereas Oraons had developed a family or clan-based

ownership, married daughters who lived in their husband's house were thought to pass on the property outside of the clan to her in-laws. Also, considering that, for Oraons, the living family members, as well as their ancestor-spirits comprised their respective village as a close-knit family, the married daughters who moved outside the clan, were prohibited from performing the sacrificial offerings to the clan's ancestral-spirits in propitiation. Accordingly, Oraon women-descendants had restrictive ownership in father's or husband's property. The Oraon daughters and the wives or widows were allowed appropriate maintenance until their marriage or death respectively; they held possession of the property for maintenance, which eventually went to the male heirs as the absolute owners (1915: 369-87).

Regarding Roy's writing style on the Oraon inheritance custom, it is interesting to note that besides providing a detailed assessment, Roy states the Oraon inheritance rules in a prescribed format. He presents the rules "in the form of a code" or statute stating that "[t]he arrangement and phraseology of the Indian Succession Act (1885) have, so far as possible, been followed in drawing up the following code of Oraon Customary law of Inheritance and Succession." Accordingly, Roy's account identifies two broad Oraon inheritance issues and presents them in separate sections: "(a) Where he [father] has left lineal male descendants" and "(b) Where the Last owner has left no Lineal Male Descendants." Moreover, he lays down various inheritance rules and explanations organized in various subsections within these two broad topics. Clearly, in following the statutory form of

construction, Roy purports to respond mainly to the official and State courts' demands. Essentially, Roy's formulation prescribes Oraon inheritance custom as a legal code. A full discussion of Roy's account on Oraon's every inheritance rule lies beyond the scope of this study. However, the later sections in this chapter examine Roy's specific Oraon inheritance customary rules that appear in the various court opinions. (1915: 379-87).

3.2 Recognition of Oraon Inheritance in the Land Statute

Turning now to a concise explanation of the recognition of Oraon inheritance in the statutory law, that is, the Chotanagpur Tenancy Act of 1908. The enactment of the Tenancy Act in British India was in response to resistance movements of tribes residing in the Chota Nagpur region, including the Oraons, against land grab and levies on their land by local rulers, merchants, and money lenders. The Tenancy Act both recognizes and institutionalizes aspects of tribes' customary landholding practices but also introduces and establishes characteristics of modern State like the requirements of land registration, fee, and annual rents or property taxes (Chapter II and Chapter III of the Act). As an example of the former, the Tenancy Act recognizes Oraon's *Bhuinhari* lands and Munda's *Khuntkatti* lands allowing tribes the ownership over the lands recovered from the forest and cultivated by original settlers (Classes of Tenants in Chapter II of the Act). Also, to prevent their

further land alienation, it provides for demarcating tribes' land through surveys and records (Roy, 1915, pp. 36-51).

The Tenancy Act also frames the tribe succession to land along the male line of descent explicitly but also obliquely and open-endedly. In describing the different classes of land tenants accurately, Sections 7 and 8 of the Act recognizes "descendants in the male line" as legal heirs of the specific Oraon's *Bhuinhari* lands or the Munda's *Khuntkatti* lands that the original settlers recovered from forests for cultivation. However, Section 76 of the Act provides a general recognition to tribes' "custom, usage or customary right" relevant to their landholding practices. In effect, Section 76 allows courts to determine the tribe inheritance custom especially in all other acquired forms of land properties, like where later settlers or *raiyat* occupied parts of the original *bhuinhari* lands. While the Tenancy Act recognizes the different classes of tribe tenants, it leaves their precise inheritance custom undefined.

Due to the lack of a definite description of the tribe inheritance custom, a summary of the Chotanagpur Tenancy Act is possible by referring to Roy's Oraon account. As discussed earlier, for Roy, Oraons followed a form of land ownership custom that excluded women from the ownership. They practiced separate ownership of land held by each family, and married daughter was thought to contradict such form of ownership as they would take land-ownership outside the

family to her in-laws. Accordingly, the cultivated lands remained in the family and along the male line. Thus, as Roy concludes: “the Oraon's customary laws of inheritance and succession are the outcome of this ideal of ownership of cultivated lands by the family.” Thus, as regards the Chotanagpur Tenancy Act, it provides two forms of recognition of custom: while it specifically institutionalizes the inheritance of Oraon’s *bhuinhari* lands along the male-line of descendants, it also enables inheritance custom as an undefined entity. Overall, these results indicate that the law recognizes the Oraons’ patrilineal inheritance custom. The next two sections, therefore, moves on to discuss the courts’ understanding of Oraon inheritance custom.

3.3 Court Opinion on the Oraon Widows and Daughters’ Right to Inherit Property

The Jharkhand High Court’s opinion in *Matius Tirkey and Anr. v. Jusuphin Lakra and Anr.*, decided in 2007, directly relate to Oraon widows' and daughters' inheritance and succession rights. Here, the dispute arose between extended family members belonging to the Oraon tribe because the defendant, who was the married daughter and the only child of her deceased father, was, in 1962, gifted, from her widowed-mother, the title to the deceased father's landed property. The appellants, who were the male members of the extended family, disputed the property transfer.

The appellants argued that Oraon custom excludes widows and daughters from inheriting the ancestral property, and moreover, the appellants claimed that because they were the nearest male agnates of the daughter's father, they were the true inheritors of the father's property.

The daughter defendant, although accepted the applicability of Oraon customary law, contested the appellants' view of the Oraon inheritance custom. As the defendant claimed, because her father had exclusively acquired the property in question, both the daughter and widow had the property holding rights for maintenance. In addition to applying the Oraon customary law argument, the daughter defendant also used the general law doctrine of adverse possession, which grants ownership title to a person occupying adversely someone else's land continuously for a period as specified in limitation statutes. Because the claimants raised both customary laws as well as general law arguments, Justice Patnaik, who delivered the single-bench court opinion in *Matius*, had to decide based on both the Oraon custom as well as the general law.

In the first place, Justice Patnaik determines the evidence of the Oraon inheritance custom. Accordingly, he refers to an earlier 1968 case *Sinta Munda and Others v. Jonathan Munda and Others*. Although, in contrast to *Matius*, *Sinta* involved members of the Munda tribe, the cases were somewhat similar. Notably, members of both tribes resided in the same geographical region, Chota Nagpur, and

like the Oraons, the Munda tribe also followed inheritance along the male line. Also, the issue raised in the two cases was comparable, i.e., widow's ownership rights to ancestral property of the deceased husband. Primarily, because *Sinta* expressly determined the source of the Munda customary law, Justice Patnaik draws on *Sinta*; the paragraph below briefly discusses *Sinta*.

Sinta had specifically established the source of Munda customary law. In recognizing the Munda custom prohibiting a widow from gifting or selling away her deceased husband's share in the land property, the Patna High Court, in referring to the earlier trial court decision in *Sinta*, stated:

As held by the trial court, the tribal customary law of inheritance governing the Mundas is that the widow of a Munda gets life interest in the properties left by her husband and has no power to alienate the same by way of sale or gift. The book 'The Mundas and their Country' by Sarat Chandra Roy...which is recognized as a book of authority on the tribal people and their customs, bears this out (par. 3).

As these remarks indicate, the court in *Sinta* acknowledged Roy's Munda account as the source of the Munda tribe customary laws. However, *Sinta's* reference to Roy's account was devoid of the bibliographical information.

Now returning to the *Matius* discussion, despite the variations between *Matius* and *Sinta*, Justice Patnaik, in *Matius*, refers to *Sinta* to locate the Oraon

customary laws. As he explains, the “principle of customary law of inheritance among the tribal people of Oraon Community, is inferred from relevant authoritative texts and also relied upon in the judgment of the Patna High Court in the case of [*Sinta*]” (*Matius*, par. 10). Drawing on *Sinta*, for Justice Patnaik, thus, if Roy’s account on the Munda tribe is an authoritative source of evidence about the Munda custom, Roy’s accounts on the Oraons should likewise be understood as evidence of the Oraon custom. However, unlike *Sinta*, which cited the actual title of Roy’s book on Mundas, in *Matius*, Justice Patnaik does not specify the book’s title when he states that the Oraon custom “is inferred from” Roy. Still, and accordingly, Justice Patnaik generally states that the Oraon customary principles can be “inferred from relevant authoritative texts,” i.e., Roy’s Oraon accounts as evidence of Oraon customary laws.

Next, Justice Patnaik determines the content of the Oraon inheritance custom. In agreeing with the appellants, Justice Patnaik merely states:

[T]he widow does not inherit the properties of her husband and neither does the married daughter inherit the properties of her father. If a person dies without a male issue, then his widow and unmarried daughter hold the properties of her husband/father in lieu of their maintenance. This right to hold the properties in lieu of maintenance also entitles a widow a life interest in the properties and she is entitled to remain in possession of the properties as a limited owner and as long as she is in such possession, her possession

cannot in any way mature to an absolute title of ownership as against the rightful heirs of the deceased (par. 10).

Although Justice Patnaik does not offer bibliographic information, his proposition is an adaptation of Roy's Oraon account. Here, while the Oraon customary law allows maintenance to a widow and any unmarried daughter albeit with limited ownership right in the husband's or father's property, it prohibits "an absolute title of ownership." Necessarily, in *Matius*, because the widow did not have the actual ownership or legal title to the husband's property, she lacked the right to transfer ownership to her daughter. Moreover, because the daughter defendant was a married daughter, following Justice Patnaik's proposition, she also had no right to maintenance in the form of limited ownership right to the property (Roy 1915: 382-87).

Because Justice Patnaik relies on Roy's account on the Oraons, Justice Patnaik discounts specific facts that have additional implications. Although the governmental Revisional Survey records listed the disputed properties with the names of the daughter, father, and father's brother, it also noted, in its "remark column," that the brothers possessed separate shares of land between them. Likewise, even though the defendant's grandfather and great-uncle's names too jointly appeared in the Survey records, they had been "orally separated" and "lived separately cultivating their respective shares." Whatever may be the practical and institutional logic of such informal acts of separation, they do offer intentional and

behavioral indications for individual and exclusive property ownership and implicitly exclusivity in inheritance. Indeed, the daughter defendant contested the appellants' view that Oraon custom proscribes women from property holding rights, Justice Patnaik's construction, however, ignores exploring evidence outside of Roy's account. Thus, while Justice Patnaik documents the Survey records and facts about the separate possessions, his reliance on Roy renders the facts inconsequential (par. 5).

Lastly, Justice Patnaik addresses the general law issue of adverse possession. Besides disputing the customary law, the daughter defendant had also claimed the land ownership right in virtue of adverse possession. Usually, the legal doctrine of adverse possession allows a person, who without permission or objection occupies someone else's land for a significant time, the legal title to that land (Legal Information Institute). As regards India's limitation statute, it stipulates twelve years of adverse possession to permit the possessor the ownership title (Section 65, *The Limitation Act, 1963*). These general law principles have implications for the defendant's claims.

In *Matius*, the daughter defendant had occupied the land since 1962 when her widowed mother executed the gift deed in the defendant's favor. Also, since 1963, the appellants' father had been albeit unsuccessfully challenging the land title transfer to the defendant in the local administrative offices as well as the trial

courts. His petitions for revoking the land transfer, however, lost either on the grounds of lack of jurisdiction or on default for not following up. After his death, his sons, the appellants, filed a civil suit challenging the gift deed in the lower court in 1995. However, for Justice Patnaik, the appellants filed the 1995 suit more than thirty-four years since the defendant had been in adverse possession of the property, and Justice Patnaik, thus, allows the title ownership right to the daughter defendant. That is, although the Oraon customary norms prevented the defendant from the title ownership, discussed previously, the scope of such norms is, however, curtailed in virtue of the general law in Justice Patnaik's final analysis.

3.4 Court Opinion on the Adoption of a Son-in-Law in Oraon Inheritance

The Jharkhand High Court's judgment in *Anjalus Uraon and Anr. v. Kamil Uraon* (2004) discusses the issue of the adopted son's or prospective son-in-law's inheritance and succession rights as practiced by the Oraons. Here, the ancestral land in question was, in the early twentieth century, cultivated jointly by three Oraon brothers. However, one brother died when the governmental Survey records of rights were implemented. The Survey records, thus, while also listed the deceased brother's widow along with the remaining two brothers as the joint owners of the ancestral property, it also noted that they each possessed the property

exclusively and separately from each other. Subsequently, the widow too had passed away leaving behind a twelve-year-old daughter, Sahbani, who later married with Chunni and whose two sons are the appellants in *Anjalus*. As regards the remaining two original brothers, one along with his wife died without bearing a child; and the other also died, but had left behind a son and the defendant grandson. In sum, while only one original-brother had biological male descendants, including the defendant grandson who took possession of the property, the appellants' or Sahbani's sons disputed the defendant's sole inheritance to the ancestral property. Under the Oraon customary laws, the appellants sought the court to declare them as lawful heir, comparable to the defendant, since their father Chunni was the *ghardamad* or the adopted prospective son-in-law that enabled the continuity of the male line of descendants also in Sahbani's family.

Justice Vishnudeo Narayan, who delivered the single-bench court opinion, affirms the Oraon inheritance and succession custom involving the adopted *ghardamad* or prospective son-in-law. He states that although "[i]n absence of any lineal descendants of the deceased Oraon [Oraon] holder of the property it passes to the nearest agnate," but that one may "make a show of continuing his family after his death" either by adopting a son or "take into his house a prospective son-in-law" or through adopting "a person as his son-in-law before marriage for the cultivation of his land and, thereafter, get his marriage solemnized with his daughter and adopt him as [*ghardamad*]." Also, that the *ghardamad* could only inherit non-

bhuinhari land such as the *rajhas* land, which, as explained in Roy (43), is the land that the descendants of original settlers gave away to later settlers. Effectively, *bhuinhari* land converts to *rajhas* land. Essentially, while the adopted *ghardamad* or the prospective son-in-law, upon his marriage with a daughter inherits the *rajhas* land, only the nearest male agnates can inherit *bhuinhari* land. Forasmuch as both the widow and her deceased-husband died before their daughter Sahbani's marriage, they died without adopting any prospective son-in-law for Sahbani who was still twelve years old young then. Justice Narayan, thus, refuses to recognize appellants' father Chunni as the *ghardamad*, and equally, the appellants' claim of inheritance (par. 13).

In framing the Oraon customary principles on adoption and inheritance, Justice Narayan offers no explicit and specific reference or attribution to any sources as evidence of Oraon custom. He begins his proposition by merely stating that "[s]uccession/inheritance is patrilineal in the Oraon tribes as per their customary law" and "it is a well recognized customary law in the Oraon tribe that..." (pars. 13 and 14). Still, Justice Narayan's remark is in part a direct quote from Roy (in 375-75). Specifically, "[a]n Oraon [Oraon in Roy] owner of the land who has no sons or any lineal descendant may have recourse to either of the two contrivances to make a show of continuing his family after his death. He may either adopt a son to himself or take into his house a prospective son-in-law" (*Anjalus*, par. 13 and Roy, 75). Moreover, the parties in *Anjalus* never disputed such custom and

offered a standard view of the custom. Clearly, for Justice Narayan, his proposition on adoption and inheritance is a reaffirmation of the generally established Oraon customary norms, in virtue of both Roy's account as well as the opinions of the parties. Whether the parties have a standard view of custom somewhat also because they are the established legal principles, however, is another matter.

A more explicit reference to Roy as the source of Oraon adoption and inheritance custom appears in the Jharkhand High Court's opinion in *Budhu Oraon v. Biras Mani Minz and Ors* (2001). In addressing the similar adoption and inheritance issue as discussed in *Anjalus*, *Budhu* stated that “[f]or the aforesaid proposition [*ghardamad* and inheritance] reference may be made to the book "Oraons of Chotanagpur" written by Sri Sarat Chandra Roy.” In establishing the custom, *Budhu* spells out the specific title of Roy’s work, which is rare. Although other court opinions do refer to Roy, they are either oblique references or without information on the title of the book. Still, and evidently, the Oraon adoption and inheritance is established principle in law, is sourced in Roy, and also appears to be the indisputable common knowledge.

As a consequence of the established principle, thus, *Anjalus* ignores family tradition and privileges the formally established custom. Arguably, in allowing the widow’s name to list in government’s original Survey records, the two original brothers had recognized the equal land ownership of the deceased brother's widow.

This recognition in the Survey records is deviance from what Justice Narayan, and courts in general, establish as the Oraon inheritance custom. Mainly, this family's intention for allowing the listing of the widow's name on the Survey records belies the established patrilineal inheritance custom, which Justice Narayan ignores in his assessment. Conceivably, the parties too, in *Anjalus*, discount the family choice argument to enable their absolute ownership over the property. Since the appellants had a third deceased brother whose descendants were three daughters, potentially the family-tradition claim would adversely affect petitioners' absolute ownership also over their deceased brother's share in the land property. Likewise, for the defendant, the family-tradition deviation goes against his case over the widow's property. While they are a wise strategy, custom then is also a custom of convenience.

While the parties did not raise the general law issue of adverse possession, the court opinion does allude to this issue, albeit in passing. Since the death of the widow in 1930, male descendants, including the defendant, possessed the entire property in virtue of the customary law. Only in 1982, the appellants first filed a lawsuit in the lower courts objecting to the defendant's possession of the property. Although the parties' claims did not include the limitation statute's question of adverse possession, Justice Narayan, still, made a passing remark that the "principle of adverse possession has no application at all in this case." Specifically, because, for Justice Narayan, upon the widow's death, the defendant, along with his

father and grandfather, had inherited the property in virtue of being the nearest male agnates under the Oraon inheritance custom. Moreover, the appellant had no evidence to prove that the defendant's possession for more than twelve years was without appellants' permission or objection. Accordingly, especially for the appellants, the question of adverse possession appears unpersuasive (par. 14).

3.5 Conclusion

In this investigation, the aim was to assess the Oraon inheritance custom construction in the reported court opinions in twentieth century India. The most prominent finding to emerge from this study is that courts consider Sarat Chandra Roy's accounts on the Oraon inheritance custom as evidence of inheritance practices by the Oraons residing in the Chota Nagpur plateau region. Specifically, as regards the Oraon widows' and daughters' inheritance and succession rights, the Jharkhand High Court's opinion in *Matius* shows that the Court refers to Roy as proof of Oraon inheritance custom. Justice Patnaik, in *Matius*, finds the inheritance content in Roy's description and accordingly, decides that an Oraon married daughter has no right to maintenance or the limited inheritance right in her father's property. Moreover, due to his reliance on Roy's account for evidence on the Oraon inheritance custom, Justice Patnaik omits specific facts in the official Revisional Survey records. The records point to the family's intentions for individual and

exclusive property ownership and deviating from Roy's Oraon inheritance description.

Likewise, concerning the adoption of a son-in-law in Oraon Inheritance, the example of the Jharkhand High Court's judgment in *Anjalus* demonstrates that Roy's Oraon account provides the content and evidence on the question of adoption of a son-in-law in Oraon Inheritance. Besides, similar to the *Matius* construction, Justice Narayan, in *Anjalus*, disregards the family tradition, which, as evident in the official Survey records, appear to contradict Roy's inheritance description. Instead, Justice Narayan privileges Roy's prescription of the Oraon inheritance practice. Also, the parties in these cases do not dispute the custom rules as described in Roy's account. These findings confirm that Roy's Oraon account has prescriptive value in court lawsuits on Oraon inheritance custom. Another significant finding in this study was that the legal procedural rules outplay the Oraon inheritance custom. Specifically, the limitation statute's question of adverse possession has consequences for the final determination of the outcome of the Oraon inheritance disputes.

Due to courts' dependence on Roy's account for defining the Oraon inheritance custom, this study also set out to analyze Roy's Oraon inheritance description. This research has found that Roy's accounts also offer a historical development of the Oraon inheritance custom. As discussed in this chapter, Roy, in

his works published in 1915 and 1928, discusses various socio-economic as well as regulatory factors responsible for the changes in the Oraon inheritance rules.

Moreover, as an example, Roy's account points to the new desires of some Oraons to recognize the legal will or testament in property inheritance matters. Accordingly, Roy's description's generalisability to the various Oraon inheritance court disputes that arose at different times, and the region is problematic.

In general, therefore, it seems that, as these findings suggest, there is a role for courts in seeking dispute and regional specific evidence in promoting particular Oraon inheritance practice. The evidence of Aboriginal customary laws in the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws, as discussed in the previous chapter offers a better alternative to India's courts' approaches on tribe inheritance disputes. It would be interesting to compare these findings with other court opinions on different issues within the same broader topic of Oraon customary laws. The next chapter, therefore, examines the questions of tribe custom evidence in general, as discussed in the court opinion on the issue of gender inequality in the Oraon inheritance custom.

4 The Law's Custom Versus the Tribes Inheritance Custom: Crafting a Reconciliation in *Kishwar v. Bihar*

To date, no lawsuit in India has explicitly looked at gender inequality in the tribe inheritance custom. The 1996 case of *Madhu Kishwar and Others v. State of Bihar and Others* represents the lone Indian Supreme Court decision on this issue.

Primarily, *Kishwar* reviews the tribe inheritance custom as practiced in the Chota Nagpur area. The petitioners, who are tribe members, reside in Chota Nagpur. They challenge gender discrimination in their inheritance custom and in the Chota Nagpur Tenancy statute, which also recognizes the petitioners' patrilineal inheritance custom. Although the discriminatory custom issue is familiar to Chota Nagpur's tribes, *Kishwar* has a considerable impact on the Oraon inheritance custom. While the petitioners vary, the lawsuit has also been filed by an Oraon woman claiming gender discrimination in the Oraon inheritance.

The *Kishwar* judgment discusses the general legal premise for examining a custom dispute, including tribes custom, and its impact on the petitioners' inheritance claims. Moreover, it addresses the consequence of India's Constitution on gender inequality as challenged by the petitioners. Accordingly, the discussion in this dissertation follows the Court's two broad topics: first, the conceptual and structural issues for recognizing the tribe custom and second, the constitutional gender equality question. This chapter examines the first topic, and the subsequent

chapter will analyze the latter constitutional question. In presenting the first topic, this chapter focusses on and examines Justice Ramaswamy's dissenting judgment, which offers extended treatment of the conceptual and structural point. Due to the writing of their decision after Justice Ramaswamy's dissent, the majority frames its opinion as a response to Justice Ramaswamy. Moreover, because it endorses Justice Ramaswamy's view on the conceptual issue, the majority appraisal is devoid of a discussion on the topic. Although this chapter centers on Justice Ramaswamy's opinion, it draws on a range of sources cited in the opinion and provides a more in-depth insight into the judicial recognition of tribe custom and the Oraon inheritance.

This chapter has five subdivided sections. While the first section contextualizes the research by providing background information on the case, the second section evaluates the Court's legal premise for grounding a custom. In the third section, the analysis moves on to the structural aspects of admissible evidence and the tribe customs. The fourth section reviews the Court's findings on the inheritance custom as practiced by the tribes in India. The fifth section presents an assessment of the Court's strategy and its impact on the petitioners' inheritance claims.

4.1 Facts and Claims

As stated above, *Kishwar* evokes the general claims of gender discrimination in the inheritance custom as practiced by various tribes in Chota Nagpur. The petitioners' tribe membership, however, is varied. The main or the first petitioner, Madhu Kishwar, is a women rights activist but not a tribe member. The other three women petitioners are residents of Chota Nagpur and members of two different tribes: the second and third petitioners belonged to the Ho tribe, and the fourth, the Oraon. Although the Oraon petitioner had filed a separate lawsuit, the Court considers the petitions jointly as they raise a "common question of law: whether female tribal is entitled to parity with male tribal in intestate succession," where someone dies without a will. Specifically, the petitioners seek from the court a general declaration that in denying women the right to inherit property, their discriminatory inheritance custom, and as also portrayed in the Chota Nagpur Tenancy Act, is unconstitutional and invalid. The specific statutory and constitutional provisions are reviewed in the next chapter.

Moreover, as stated in Justice Ramaswamy's dissenting opinion, the petitioners underscore the general arguments and facts of women's abuse in the practice of the inheritance custom. The petitioners raise moral arguments stating that "tribal women toil, share with men equally the daily sweat, troubles, and tribulations in agricultural operations and family management" and that the

customary law denying women the inheritance of property is “unfair” and “unjust.” The petitioners also argue how usufructuary right, which allows women to use and enjoy the property but prohibits them from altering it, is “illusory” as lineal male descendants usually seek women’s exclusion through coercion. Further, they offer the various grounds of women’s exclusion, such as women’s acts of “adultery” with non-tribals and remarriage, and highlighted how such exclusion commonly involves incidents of violence like suicides, physical attacks, and murders. Due to the general nature of women’s abuse allegations as advanced by the petitioners, the court opinion does not present any precise instances of discrimination and ill-treatment.

As regards the response of the respondent, the Bihar government offered its unwillingness to make any changes to the Tenancy Act. To provide the inheritance rights to the women members of the tribes, the Court had issued an interim order instructing the Bihar government to modify the Tenancy Act. Accordingly, the government had constituted the Tribal Advisory Board “consisting of the Chief Minister, Cabinet Ministers, [and particularly] legislators and parliamentarians representing the tribal areas,” and passed a resolution in a meeting held in 1988 stating that:

The tribal society is dominated by males. This, however does not mean that the female members are neglected. A female member in a tribal family has right of usufruct in the property owned by same is the property of her husband after the marriage. However, she does not have any right to transfer

her share to anybody by any means whatsoever. A widow will have right to usufruct of the husband's property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring, the children succeed the property of the father and the mother will be a care taker of the property till the children attain majority....[E]very tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation of the tribal land in the hands of non-tribals.... [Their] right of transfer of their rights [property] is the origin of malpractices like dowry and the like prevalent in other non-tribal societies (dissenting opinion).

The response raises the social and political impact of the Tenancy statute amendment. It points to the apprehensions of tribes' land alienation as resulting from the tribes' land transfer to members outside of the tribes. Moreover, the response mentions the threats of "agitation" and "social unrest" by the tribes should the respondent government amend the Act. Clearly, in refusing to initiate any legislative changes in favor of women's inheritance, the respondent, thus, appears to yield to the political coercion tactics of the legislators and parliamentarians representing the various tribes. A further inquiry, however, into the apparent attitudes endorsing the kind of patrilineal inheritance offers insight into the role of gender in decision-making.

Although the court opinion does not describe or pinpoint the lawmakers present at the Tribal Advisory Board meeting, research explains the composition of the Board. As noted in the court opinion, the Board had met twice to discuss the tribe women's inheritance question: first, in 1988, when it passed the above resolution, and next, in 1992, when they restated their earlier viewpoint. Both the meetings also comprised twenty-eight state legislators and five federal parliamentarians who belonged to and represented the various tribes in Bihar. However, Bihar's ninth legislative assembly between the years of 1985 and 1990 had only one tribal woman lawmaker; and likewise, the 1985-1989 federal parliament had one tribal woman from the State of Bihar. The succeeding legislative assembly, in 1990-1995, had two elected women from the tribal communities, and the 1991-1996 federal parliament, however, had none from Bihar. That is, hardly two tribe women lawmakers were present in the Tribal Advisory Board meetings. Therefore, the gender inequality in decision-making, in part, may explain a male-influenced hegemonic clarification of tribe-citizenship in the Board resolutions. Now returning to *Kishwar*, the next chapter examines Justice Ramaswamy's discussion on the legal premise for grounding a custom (Statistical Report on General Election, 1985 to the Legislative Assembly of Bihar, Statistical Report on General Election, 1985 to the Eighth Lok Sabha, Statistical Report on General Election, 1990 to the Legislative Assembly of Bihar, and Statistical Report on General Election, 1991 to the Tenth Lok Sabha).

4.2 Privy Council's Conception of Custom in *Ramalakshmi v.*

Sivanantha

In discussing the legal premise for a custom dispute, Justice Ramaswamy cites directly from the 1872 opinion of the Judicial Committee of the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*:

[Custom] is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends

(*Ramalakshmi*, 585-86).

This definition points to the judicial understanding of custom. In just quoting precisely the Privy Council's description of custom, however, Justice Ramaswamy's opinion withholds the case details, including issues and explanations offered in *Ramalakshmi*. Moreover, Justice Ramaswamy does not clarify the peculiar requirements of custom stated in the quote: it is unclear what pieces of evidence generally determine the "antiquity and certainty" situations in custom.

Conceivably, an analysis of Justice Ramaswamy's approach to the specific

inheritance custom problem in *Kishwar*, however, will spell out his understanding of the custom description cited here.

Before proceeding to examine the aspects of custom and evidence in *Kishwar*, it is essential to assess, in brief, the definitional contexts of custom described in the Privy Council's reported case, *Ramalakshmi*. This case advances an estate title dispute and determines the validity of a local custom. The title dispute arose because, following the death of a landlord, his two surviving sons, born to his second and third wives each, claimed individually their exclusive right to inherit the landlord's "impartible" estate. Because the landlord's first wife had died without issue, and the respondent was the eldest of the two sons, he also relied his arguments on the local custom rule as observed in the district of Tinnevely in British India's state of Madras. Where the first wife bore no male child, the local custom accorded sole-heirship to the oldest of all the sons of the remaining wives. In answer to the respondent's argument, thus, the Privy Council, in *Ramalakshmi*, also had to clarify the custom validity issues (570-71).

In addition to specifying the definition of custom, as quoted in Justice Ramaswamy's opinion in *Kishwar* above, *Ramalakshmi* probes the evidence issues and states:

[B]ut their Lordships consider that whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in

the Courts in India, the substantial principles on which the authenticity and value of all evidence rest, should be observed. One of these principles is, that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the Zemindars [landlords] or some of them might not have been called as Witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider...the only evidence offered, viz., the Collector's Letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district. The summary of the Collector (if it may be looked at) discloses that the Zemindars were not unanimous in their view of the custom; and it further appears, that their opinions were given with reference to the succession to a zeminadary [estate/territory] in a family of a different caste (588).

The propositions, here, identify critical aspects of acceptable evidence in judicial decision-making on custom disputes. Due to the practical difficulties in obtaining evidence, it ignores the "strict and technical rules" governing evidence. In discarding the rigid rules, however, the *Ramalakshmi* interpretation allows "best evidence" that promotes "authenticity and value." The examples of such evidence, as

the interpretation offers, include oral or written testimonies of the various local landlords and administrative records. Moreover, these evidence sources must, however, point to consistent opinions in regards to the local and caste-specific custom. While these evidentiary aspects seek to confirm the existence of the local custom explicitly, they also elucidate the Privy Council's approach for interpreting custom.

Ramalakshmi's evidentiary features and examples, above, both explain and pose problems for the custom description requiring "ancient" or "antiquity" and "invariable" or "certainty" conditions. Although the evidentiary formulations appear to associate the latter conditions with the consistent opinions as well as the specific place and caste settings, they do not clarify how the evidence relates to the former "ancient" or "antiquity" terms. The critical problem with requiring oral or written accounts of landlords or governmental agencies is that there are limits to how far the evidence can be taken, individually, in "ancient" or "antiquity" terms. Moreover, thus, there is an inconsistency with the stipulation entailing "clear and unambiguous" evidence of "ancient and invariable custom": consistent testimonies are temporal. Arguably, due to the challenges with defining "ancient" or "antiquity" custom terms with evidentiary conditions, *Ramalakshmi*, instead, focusses on "authenticity and value" based evidence, which it finds in the consistency aspects (585-86 and 588).

Now returning to the *Kishwar* opinion, Justice Ramaswamy does not explicitly underscore *Ramalakshmi's* conceptual and practical distinction. As this section indicates, while *Ramalakshmi's* custom conception privileges “ancient” or “antiquity,” its practical understanding, however, emphasizes “certainty” with local and caste specific custom as validated by consistent evidence. Analyses of Justice Ramaswamy’s strategies to the specific tribes custom questions in *Kishwar*, however, will elucidate his approach to the conceptual and practical difference. Next, as the following section examines, Justice Ramaswamy discusses the legal validity of the tribe custom.

4.3 Tribe Custom and the Legal Premise

In addition to simply quoting *Ramalakshmi's* judicial conception of custom in general, Justice Ramaswamy, in *Kishwar*, also highlights the specific tribes custom explanation as offered in the non-judicial sources. He cites an official sponsored report by Singh and Mahanti and states: “Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society.” Although Justice Ramaswamy does not clarify, it is clear that, in contrast to *Ramalakshmi*, Singh and Mahanti’s report adopts a broader perspective; it avoids

the tribes custom description in ancientness terms. Although *Ramalakshmi's* emphasis on evidentiary consistency features, in effect, somewhat mitigates ancientness, Singh and Mahanti's description in itself eliminates complexities with ancientness. In quoting Singh and Mahanti's description, however, Justice Ramaswamy seems to distinguish between ancientness and the tribes custom (Singh and Mahanti, chp.III, 8).

To understand the legal and the tribes custom dichotomy, Justice Ramaswamy cites Anand Prasad Sinha, who worked as the Judicial Commissioner of Chotanagpur:

The element of certainty and definiteness of custom in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally product of dominating mind, nurtured in the belief of super-natural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted on the element of totem and taboos. That is the reason that majority of the customs

prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage.

Although Justice Ramaswamy's opinion purports to draw on Sinha's legal and tribes custom dichotomy description, his opinion is devoid of a clear explanation of Sinha. Accordingly, the discussions below turn to Sinha's account that points to a few critical and distinguishing contexts of tribes customs. In contrast to the legal requirement of "certainty and definiteness," as Sinha states, "divergent custom" exists among tribes and regions. Moreover, while law values custom's "antiquity" for its "acceptance and existence," the extent of ancientness is inconsequential to tribes. Also, the law's specific demands for continuity and peaceful existence are difficult to establish in custom practice among tribes. Thus for Sinha, due to the adverse conditions both of evidence rules and tribes custom, the legal recognition of tribes customs is challenging (310).

Another feature in Sinha's description is the nexus of spirituality and custom as practiced by tribes. Whereas the general understanding of custom evolution privileges sociological or need-based "spontaneous growth" explanations, Sinha identifies tribes custom as emphasizing the significance of totem and taboo, i.e., the spiritual power and obligation in virtue of the belief in supernatural force. Such customs with the spiritual force develop as family law within families under the authority of the patriarchal head. That is, the totem and taboo based tribe custom is

also a construct of the “ruling minority,” the patriarchal heads. Moreover, accordingly, it is mostly bereft of public demands, and, sometimes, morality (310-311).

A consequence of the emphasis on spiritual aspects, as Sinha argues, is the tribes custom’s lack of legal status or validity; though a few customs have attained the legal status, including inheritance, adoption, and marriages. Specifically, Sinha suggests the lack of “scientific explanations” as a reason for the lack of legal validity. As explained earlier, insofar as tribes custom extends from one generation to another, it locates its origin in totem and taboo. Due to the presence of totem and taboo spiritual elements, a need-based sociological or empirical account can only explain tribes customs inadequately. Arguably, such a deficiency in “scientific explanations” challenges formal evidence rules demanding certainty, and, thus, undermines custom’s legal status or validity. Sinha’s account, however, is unclear about the implications of challenges for the exceptional inheritance, adoption, and marriage customs that have legal validity (310-311).

As also cited in Justice Ramaswamy's opinion, Sinha ends his account by grounding tribes custom with the general premises of tribal life:

If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operations are the sole occupation for livelihood; all are tagged,

linked and based upon certain conduct and behaviour reflecting, nearly custom and it may be said that entire tribal society is based upon the rigid rules of custom and any society still untouched by the influence of urbanisation exists in the phenomenon of religion mixed with magic custom (Sinha 311).

Sinha's statement here seems to suggest a pertinent role for agriculture in the lives of tribes. For Sinha, tribes' livelihood depends on agriculture, and their entire life, "conduct and behavior," revolves around the agricultural occupation. However, Sinha's mention of the tribes' agricultural trade is in the settings distant from urban effect. Moreover, this distance allows, in tribes custom, the characteristic blend of "religion...and magic." Accordingly, Sinha purports to ground his tribes custom description with the tribes' independent and distant agrarian living without urban impact on their spiritual tradition.

Sinha's account, necessarily, is a recap of the general presumptions of tribes custom and the typical difficulties with the custom's legal validity. His description is brief and simplified. Moreover, it lacks a reference-citation of sources that inform Sinha's account. Conceivably, as a legal officer commissioned in Chottanagpur, Sinha also draws on his professional and personal experience to rehash a judicial understanding of tribes custom in general. Accordingly, when Justice Ramaswamy, in *Kishwar*, quotes Sinha's description, he credits Lalita Prasad Vidyarthi in place of Sinha: "Dr. L.P. Vidyarthi in his Tribal Development Act and Its

Administration...has stated at page 310 that..." Here, while Vidyarthi, a professor of anthropology at Ranchi University, is the volume editor, Sinha is the author of the description that Justice Ramaswamy quotes. In ascribing Vidyarthi, however, Justice Ramaswamy, perchance, either seeks to attach anthropological credibility to the description or commits a citation error. Regardless of these criticisms, Sinha's account outlines the necessary implications for the legal recognition of the tribes custom.

Sinha's legal recognition challenges above also arise from views similar to the *Ramalakshmi's* judicial conception, discussed in the previous section, that seemingly conflates the two custom conditions: "antiquity" and "certainty." In contrast to viewing custom conceptually, Sinha's concern is addressed by *Ramalakshmi's* application approach that privileges custom's "authenticity and value" and requires evidentiary consistency. That is, just as *Ramalakshmi* is concerned with consistent accounts on the local and caste specific custom, the focus on the current and the particular region and tribe consistent evidence resolve Sinha's "divergent custom" problem. Still, due to the accent typically on legal or judicial conceptions, like the one in *Ramalakshmi*, Sinha's account finds legal custom and tribe custom contradictory. Taken together, as these findings suggest, proper application somewhat settles the judicial conceptual challenge: in the application, there is an association between "certainty" and consistent custom

unique to tribe or caste and local or region (Sinha 310, Ramalakshmi 585-86 and 588).

As was pointed out earlier, in *Kishwar*, Justice Ramaswamy quotes Sinha to highlight the legal and tribes custom dichotomy. Justice Ramaswamy, however, appears to follow the reconciling approach as analyzed above. As noted in first paragraph of this section, Justice Ramaswamy differentiates between ancientness and the tribes custom. Moreover, as the next section examines, Justice Ramaswamy moves on to probe the inheritance custom as practiced by various tribes and in different regions in India. Clearly, instead of accepting the reconciling approach or *Ramalakshmi's* practical methodology on its face value, as his strategy shows, Justice Ramaswamy aims first to establish that the inheritance custom's certainty necessarily points to the unique tribes and regions.

4.4 The Inheritance Custom as Practiced by the Tribes in India

Justice Ramaswamy intends to scrutinize the tribes inheritance custom with the certainty premise context. He purports to assess whether tribes follow a uniform inheritance custom throughout India, and, accordingly, Justice Ramaswamy turns to the "empirical study by Anthropologists and Sociologists." Justice Ramaswamy's references include, first, the account on the Chenchus tribe by the Austrian

ethnologist Christopher von Furer-Haimendorf, who was an officer with British India's North-East Frontier Agency and, subsequently, a tribal affairs advisor to the Nizam's Government of Hyderabad. In his short explanation of Furer-Haimendorf's account, Justice Ramaswamy states:

Chenchus women tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband, are joint possessors of the family property insofar as it is acquired by the daily labour.

In this explanation, Justice Ramaswamy aims to display the gender-equal property ownership practice by the Chenchus, but his description lacks clarity.

A juxtaposition of Justice Ramaswamy's explanation and Furer-Haimendorf's account reveals contradictions. While Justice Ramaswamy appears to associate Chenchus women's "equal status" with the ownership and inheritance issues, Furer-Haimendorf, however, relates equality with a Chenchus family's freedom to "live with either the husband's or the wife's tribal group." Moreover, contrary to Justice Ramaswamy's emphasis on "family property," as Furer-Haimendorf notes, Chenchus followed a communal landholding arrangement and allowed its members to hunt and gather in that communal land. Although Justice Ramaswamy's description is obscure and contradictory, an assessment of Furer-Haimendorf's

account of the Chenchus tribe, below, provides a more precise context to Justice Ramaswamy's response on the certainty question (Furer-Haimendorf 3).

Furer-Haimendorf documents the changing economy states of the Chenchus tribe between 1940 and 1980. As Furer-Haimendorf notes, the forest-dwelling Chenchus traditionally lived "on wild fruits and tubers and the occasional game hunt[ing]," and continuously moved "from one collecting ground to another." Moreover, due to remoteness, the Chenchus seldom traded "honey or other minor forest produce" for cereals. Their seclusion, however, ceased with the government's 1894 and the 1930 forest reserve notifications and the subsequent commercial timber activities. Although, on Furer-Haimendorf's intervention for preserving their traditional livelihood, the Nizam's government demarcated a forest area as the "Chinchu Reserve," the commercial demand for minor forest produce altered Chenchus' economy. To meet the demand, the official sponsored Girijan Cooperative Marketing Society led the tribe to collect minor forest commodities for commercial value. That is, they moved "from gathering roots, tubers, and wild fruits for consumption to the collection of minor forest produce on a large scale for sale": the transition from a subsistence food-gathering economy to a cash economy (xi, 81-83).

Despite their economic transition, due to the continued maintenance of their forest dependent lifestyle, in Furer-Haimendorf's account, the "Chenchus of the Nallamalai Hills" is unusually distinguished as "foodgatherers and hunters" tribe.

This classification is in contrast with other tribes who Furer-Haimendorf, in his in discussion on the Andhra Pradesh forest policy, identifies either with "shifting-cultivators" or "settled farming populations" categories. However, Furer-Haimendorf is wary of Chenchus' continued status as "foodgatherers and hunters" tribe: "Until 1979, forest conservancy and the pursuance of the Chenchus' traditional lifestyle were not in conflict...However, in 1980 I noticed large-scale inroads into the bamboo forest...for the exploitation of bamboo on the upper Amrabad Plateau." Conceivably, deforestation would further change Chenchus' economic situation and their classification to an agrarian or labor community (83-84).

Besides offering a general economic pattern, Furer-Haimendorf also discusses the economic variations within the Chenchus, albeit with regards to a minor population:

The Chenchus on the lower Amrabad Plateau...have lived for some generations in close contact with non-tribal agricultural populations. The Chenchus of some communities, such as Mananur, were able to acquire land and learn to cultivate...In the villages east of Amrabad...they depend entirely on agriculture, but most are short of land and of plough bullocks, and work mainly as farm servants or casual labourers for landowners belonging to the higher Hindu castes.

Furer-Haimendorf's description indicates that Chenchus' economic conditions also had regional variations; especially, for a minor population who lived outside of the forested Nallamalai Hills. These smaller groups had transitioned to settled farming and owned land, and some also worked as laborers. Arguably, Chenchus' general economic transitions, discussed previously, as well as their specific regional variations involving the shift from communal to individual land ownership have implicit implications for their inheritance custom. As regards Justice Ramaswamy's description of Furer-Haimendorf, although the description is short and unclear, still, Justice Ramaswamy's reference to Furer-Haimendorf's Chenchus account is significant to the certainty and consistency questions (Furer-Haimendorf 188).

Justice Ramaswamy cites another gender-equal inheritance example as offered by P. Ramaiah, a professor with the economics department at Kakatiya University in Andhra Pradesh. In quoting Ramaiah's account on Andhra Pradesh's Koya tribe, Justice Ramaswamy states that: "Hereditary rights rule the property distribution arrangements. If a man dies, his wife and sons get equal share of the property. Widow gets her husband's share from the property." While Justice Ramaswamy's Koya reference point to the widow's equal share in her husband's property, his statement lacks clarity on the scope of the Koya widow's landholding rights that may impact gender equality. For example, as discussed previously, the Oraon inheritance custom allows limited landholding rights to its women members, thus, impacting equality. Although Justice Ramaswamy's Koya citation is short, he

appears to find somewhat gender-equal inheritance custom in the Koya account (Ramaiah 9).

A more explicit inheritance custom example, that Justice Ramaswamy mentions, is found in the account on the Santhal tribes by William George Archer, a British administrator who worked as the Deputy Commissioner of the Santhal Parganas district—presently a region in Jharkhand state—between 1942 and 1945 and documented the “principles of tribal law” of the “Sant[h]als of the Sant[h]al Parganas.” In citing Archer, Justice Ramaswamy highlights the Santhal's inheritance custom. As Justice Ramaswamy states, the unmarried Santhal woman has limited land rights. That is, while she has no partition rights, for Justice Ramaswamy, “some land may be kept by her father or a brother for financing her marriage and maintaining her, but that is to fulfill their duties towards her and does not confer upon her any rights.” If the father or brother fails in their maintenance duties, the unmarried Santhal woman, however, is entitled to “claim enough land for keeping her till marriage.” Although she has limited landholding rights in her father’s property, the unmarried Santhal woman has absolute right over the land she acquires independently (Archer 1_e-1_k, 135).

In regards to the married Santhal woman’s right to her father’s property, Justice Ramaswamy, quoting Archer, writes that in the absence of her male agnates, the married Santhal woman is allowed to keep her deceased-father’s land

if she marries a "ghar jawae," a man who cultivate her father's land, and, subsequently, upon marrying her, becomes the adopted son-in-law. Without her marriage to a "ghar jawae," she shares the land-property with her other married sisters. Moreover, during the Santhal woman's marriage, "two to three bighas of land would be given as Stridhan" as "her absolute property" and "right of the father, brother or agnates are extinguished" over that Stridhan property. Upon her death, her children inherit her absolute property, but, in their absence, her father, brother, mother or her male agnates receive the property. These instances allow the married Santhal woman to receive her father's property (Archer 140-147).

Besides the issue of the father's property, Justice Ramaswamy's opinion cites Archer also to describe the Santhal woman's right to her husband's property. In a divorce or a separation between the husband and wife, as Justice Ramaswamy notes, the Santhal inheritance custom allows the equal partition of husband's property: "the wife and children get one share [each], and the husband gets one share." Also, in the context of widowed Santhal woman, she continues to live with her deceased-husband's joint family as before. Any maintenance refusal by her in-laws, however, entitles the widow a share in the jointly held land property. Furthermore, in an entire family's partition, the widow, along with her children, have the right to the deceased husband's share in such jointly held property. Due to the emphasis on her maintenance, thus, for Justice Ramswamy, "she gets life

estate,” i.e., the Santhal woman’s right to a share in her husband’s property lasts her lifetime (Archer 156).

While Justice Ramaswamy’s reference to Archer point to the specific inheritance custom example among the Santhals of the Santhal Pargana area, his cited work of Singh and Mahanti presents Santhal’s custom as practiced in different regions. In quoting Singh and Mahanti, whose work focuses primarily on the tribes in Orissa state (presently known as Odisha), Justice Ramaswamy observes that Santhal’s inheritance custom “is not strictly patrilineal,” and “[s]ome...preferred succession among son and daughter equally.” In contrast, despite the “on-going acculturation process,” many Santhals, however, “have not completely discarded the customs.” This narration reveals the differing inheritance custom attitudes among the Santhals of Orissa (Singh and Mahanti 38-45).

A striking difference emerges from the comparative analysis of Archer as well as Singh and Mahanti’s Santhal inheritance accounts. While Archer proposes a uniform Santhal inheritance custom, Singh and Mahanti highlight a range of the Santhal custom. As the local administrator between 1942 and 1945, Archer purports to “set out the principles of tribal law” governing the Santhal tribe in the Santhal Pargana region. Unlike Archer, Singh and Mahanti submitted their report in 1993, and their account extends to the entire Orissa state. These preliminary observations point to the two apparent variables responsible for the difference

between the accounts: time and region. Such studies examining tribes' customs have limitations, and their findings cannot be generalized (Archer 1e).

As a specific example, Archer's study has severe limitations for understanding the Santhal custom. Firstly, Archer surveys and documents the "current Sant[h]al law." As Archer observes, "[i]n adjusting disputes or punishing offences, a tribal court [of Santhals] is moved not only by the ways in which similar disputes have been adjusted formerly or offences punished but also by contemporary tribal attitudes." That is, both custom as well as the "contemporary tribal attitudes" inform the dispute resolutions among the Santhals. However, in the absence of codified or written Santhal custom and because of the lack of custom for newer issues, Archer emphasizes the role of the "contemporary tribal attitudes" in Santhal law. Thus, in differentiating Santhal law between its historical custom and "current" sense, Archer's account is limited in scope and reflects the Santhal law of the time (1e-1f).

Also, Archer's findings may not be generalizable to Santhals inhabiting the geographically unconnected regions. His discussion on the shift in Santhal inheritance rules exemplifies the generalization issue. Specifically, when a previous widow's inheritance rule, allowing the Santhal widow to inherit the husband's land until she stays in the village, was changed to recognize her right to inherit for life, for Archer, this inheritance transformation followed a gradual and continuous

process. That is, any new or distinct inheritance practice first begins consensually among a few families, and, subsequently, it translates into a voluntary usage of the village and, finally, of the entire region. Moreover, due to the respect for previous ancestors and usages as well as the local or neighboring views, the distinct Santhal practices typically culminate into a common regional custom. Accordingly, Archer's account focusses on and generalizes the Santhal law within the Santhal Pargana regional limits. His regional generalization approach, however, ignores the distinct inheritance practice variations at the family and village levels. While time and region are the apparent broad categories of limitations, these specific analyses of Archer's account clarify nuances in the limitations (1_g).

Although Archer's limitations are generalizable to similar studies, including those that Justice Ramaswamy refers in *Kishwar*, his findings neither can be extrapolated to Singh and Mahanti's Santhal inheritance accounts nor all Santhals and other tribes. Despite the extrapolating checks, as regards the Oraon and the Munda tribes, Justice Ramaswamy refuses their exclusive discussions similar to the Santhal inheritance example. As Justice Ramaswamy states, because of Sarat Chandra Roy's accounts, "The Mundas and their country...and The Oraons of Chota Nagpur...dealt with inheritance on the same lines" as Archer's Santhal, "so they need no reiteration." However, a comparison instance, on the question of adoption of a "prospective son-in-law" in the absence of an unmarried daughter's father or mother, for example, indicates that their inheritance customs may vary. In contrast

to Archer's Santhal account that points to the village community's adopting authority, Roy's Oraon description, as noted in the previous chapter, limits the adopting authority with the Oraon sonless-father or mother alone. Although, the Oraon example signals a nuance, still, in simply identifying Roy's Oraon and Munda accounts, Justice Ramaswamy appears to emphasize the broader patrilineal inheritance nature of custom as generally practiced by these tribes (Roy 75).

In addition to the examples of the empirical accounts discussed in the preceding paragraphs, Justice Ramaswamy's discussion on the question of formalizing the tribes custom also has consequences for the tribes custom's certainty issue. Specifically, Justice Ramaswamy highlights the bureaucratic demand for written codes of the tribes custom. In quoting a bureaucratic report, Justice Ramaswamy states that because of the continuation of the tribes custom in the unwritten form, the "courts are unable to reach a definite conclusion" in the tribes custom disputes. Moreover, the changing tribes custom with the influence of "other advanced societies" also causes courts' inability or uncertainty. Accordingly, due to the belief that formal written codes or legal statute aids courts determine disputes, the report recommends formalizing or codifying the tribes custom. Still, there are criticisms to such bureaucratic demands that emphasize the courts' decision-making challenges (Ghosh 89).

To underscore the opposition to any official move towards codifying the tribes custom, Justice Ramaswamy quotes Singh and Mahanti and states:

[T]o reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from one community to other would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided (Singh and Mahanti 1).

These remarks admit the contradiction: the static form of written codes denies the organic form of tribes custom. Moreover, the remarks suggest that a codified form of the tribes custom creates confusion for the tribe members, and leads to their “exploitation.” In referring to both bureaucratic demand and criticism, Justice Ramaswamy seems to acknowledge the challenges as well as the impasse.

The comparative analyses of the bureaucratic report and the empirical studies point to another consequence, however. An impact of the bureaucratic report’s demand for codifying the tribes custom is that it changes the ‘certainty’ description. This demand views ‘certainty’ with written codes or statutory laws, which provide the courts the convenience of definiteness in decision-making. As assessed earlier, however, the empirical studies confirm the view that the term

‘certainty’ implies consistent evidence for establishing the region or tribe specific custom. The act of codifying tribes custom, however, shifts the certainty description: from the tribes’ particular view to the official view of the tribes custom. The bureaucratic demand for a uniform codified tribes custom, thus, contradicts the certainty premise that privileges the local tribe custom. In fact, as Justice Ramaswamy concludes, in *Kishwar*, all the studies reviewed in this section establishes the certainty premise; the next section examines Justice Ramaswamy’s conclusion (Ghosh 89).

4.5 Justice Ramaswamy’s Decision

Justice Ramaswamy concludes by stating:

It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain ancient and consistent and whether it has acquired the status of law. However, as noticed above, Customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and

practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly occurred the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.

As these remarks imply, Justice Ramaswamy refuses to broadly invalidate Chota Nagpur's tribe inheritance custom, which, as *Kishwar's* petitioners have alleged, discriminates against women. As noted in the first section, the petitioners are members of the two distinct tribes, Ho and Oraon, and they dispute the gender discriminatory inheritance custom as generally practiced by the tribes in Chota Nagpur and as also portrayed in the Tenancy Act. Although Justice Ramaswamy recognizes the "general trend" of "patrilineal succession" as observed by the tribes "throughout the country," for him, the tribes inheritance custom also differ and are local and group specifics, the premise he establishes through an extensive range of sources reviewed in the previous section. Accordingly, in the absence of the explicit

evidence on the unique inheritance custom as practiced by the individual petitioners, Justice Ramaswamy balks on determining the discriminatory nature of the petitioners' custom.

Justice Ramaswamy's concluding remarks also highlight the essential contradiction in law's treatment of custom. In offering his inability to decide in the absence of "acceptable material," he states that such material evidence will help him determine if inheritance custom is "valid, certain ancient and consistent..." His narrative of what comprises a legally valid custom is similar to *Ramalakshmi's* custom formulation discussed in the second section; and, as examined previously, the term 'ancient,' in such formulation, however, poses evidentiary challenges. But, in stating that "customs...vary from tribe to tribe and region to region, based upon the established practice prevailing..." Justice Ramaswamy seeks certainty with 'consistent' evidence as regards the unique local and tribe specific custom. That is, although the custom formulation and the practical approach are contradictory, to overcome the conceptual encounters, Justice Ramaswamy follows the practical interpretation similar to *Ramalakshmi*.

4.6 Conclusion

This chapter has examined Justice Ramaswamy's understanding of the difference between a law's custom and the tribe custom in *Kishwar*. Drawing on the previous

Privy Council's decision on *Ramalakshmi*, Justice Ramaswamy reiterates that law's custom description emphasizes requiring "ancient" or "antiquity" and "invariable" or "certainty" conditions. In contrast, the tribe custom, and especially the tribe inheritance custom, are unique and non-generalizable. While Justice Ramaswamy establishes the unique custom as practiced by the tribes in India, this research has offered a more in-depth study indicating the distinct tribe custom. It has also examined the impact of the contradiction between a law's custom and the tribe custom.

A prominent finding to emerge from this inquiry is that the distinct tribe custom, and especially the tribe inheritance custom, poses difficulty for the law's custom description. While the law's conception requires evidence to point to the custom's ancientness and static qualities, such evidence is impracticable as regards the tribe custom. The analysis has also shown that to overcome the conceptual and practical impasse, Justice Ramaswamy's opinion privileges the workable custom evidence. That is, his application ignores the "ancient" requirement, and, instead, Justice Ramaswamy associates "invariable" or "certainty" provisions with custom evidence unique to tribes circumstances. Accordingly, due to the lack of specific evidence by the petitioners in *Kishwar*, Justice Ramaswamy is unable to ascertain if their inheritance custom discriminated against women.

The significant theoretical implication of this study is that the judicial understanding of the law's custom formulation lies in its application. As the chapter has shown, the tribe inheritance custom reifies the law's custom premise. While this implication is generalizable to all tribe customs, the judicial interpretation approaches differ in instances where tribe custom exists in the legally binding codified form, such as the Chota Nagpur Tenancy statute. The next chapter, therefore, moves on to explore *Kishwar's* discussion on the Constitution's gender equality question and its impact on the tribe inheritance custom as stipulated in the Chota Nagpur Tenancy statute.

5 Gender Equality Versus Tribes Custom: Reconciling the Constitutional Rights and the Inheritance Custom in *Kishwar v. Bihar*

This chapter continues the last chapter's discussion on *Kishwar*. While the previous chapter examined the legal premise of custom and the tribe custom, this chapter assesses the Court's interpretation of the relationship between the Constitution's gender equality principles and the tribe inheritance custom. Specifically, this chapter aims to evaluate the extent to which the *Kishwar* court opinion employs legal, structural, and substantive considerations for determining the constitutionality questions of the tribe inheritance custom, including the Oraon inheritance. This research draws on the two opinions as given in *Kishwar*, Justice Ramaswamy's dissenting judgment, and Justice Punchhi's majority opinion. As stated in the previous chapter, Justice Ramaswamy's dissent was delivered before the majority opinion, and thus, the majority frames its opinion as a response to Justice Ramaswamy.

This chapter first gives a brief overview of the Constitutional recognition of customary law and the relationship between gender equality rights and customary laws. Because Justice Ramaswamy's dissent opinion provides this background

discussion, his opinion is the focus of the constitutional background discussion. Next, the chapter assesses how Justice Ramaswamy dissenting opinion reconciles the problems of constitutional equality and gender discrimination in tribe inheritance customs. Following this discussion, the chapter moves on to analyze the majority opinion's response to the dissent and their approach to the equality question.

5.1 Constitutional Recognition of Custom

In *Kishwar*, Justice Ramaswamy highlights how the Constitution of India recognizes customary norms. Specifically, Article 13 recognizes "[a]ll laws in force in the territory of India immediately before the commencement of this Constitution," and the term "laws" here, include "custom or usage" or the customary norms (cl. 1 and cl. 3, sub-cl. a). Article 13, in its recognition, however, also requires a condition stating that "in so far as they [laws, including custom] are inconsistent with the provisions of this Part [III], shall, to the extent of such inconsistency, be void" (cl. 1). That is, the Constitution does not recognize those propositions of law and custom that conflict with fundamental rights guarantees such as the "right to equality" stated in Part III of the Constitution (arts. 12-35). Justice Ramaswamy, thus, reaffirms the basic scheme of the Constitution, which while honors customary

norms, offers "primacy to fundamental rights" in the event of a conflict between the two.

In reasserting the rule of how fundamental rights principles repudiates custom in situations of inconsistencies between the two, Justice Ramaswamy also draws on a few earlier court cases including, for example, the Supreme Court's opinion in the 1965 case of *Sant Ram and Ors. v. Labh Singh and Ors.* In merely citing and iterating the rule from *Sant*, Justice Ramaswamy, however, does not provide any details like facts, issues, or reasoning. Primarily, *Sant* involved the sale of immovable property, but the defendant who owned the adjacent house had protested the sale on account of the custom of pre-emption practiced in his town. The custom of pre-emption allowed the owners of an adjoining property the right to preferential-buyer in the event sale of immovable property. Therefore, the Court had to resolve whether the custom of pre-emption was like 'law' and affected by fundamental rights of the Constitution of India, precisely, the fundamental rights Article 19 that disallowed any "unreasonable restrictions on the right to acquire, hold and to dispose of property" (cl. 1, sub-cl. f [now repealed] and cl. 5). In quoting Article 13, which annuls laws inconsistent with fundamental rights, and allows the term "law" to include custom, the Court, in *Sant*, wrote that the custom too, like 'law,' and was affected by fundamental rights such as Article 19. That is, fundamental rights vetoes customary norms to the extent of inconsistencies between the two.

In another example, Justice Ramaswamy restates the rule on the relationship between statutory law and fundamental rights from *Bhau Ram v. B. Baijnath Singh and Others*, albeit without offering any further details about the case itself. Unlike *Sant*, in *Bhau*, the custom of pre-emption was provided in the statute-laws in the States of Madhya Pradesh, Delhi, and Maharashtra. These statutes stipulated pre-empting sale of immovable property to both co-sharers, or partners, as well as anyone who owned the adjoining property. While the appellants were the purchasers of the immovable properties, the defendants claimed pre-emption based on vicinage. The Court, in *Bhau*, observed that because the pre-emption clause also prevented "strangers, i.e., people belonging to different religion, race or caste, from acquiring property," it was unreasonable and inconsistent with fundamental rights—like, Article 15, prohibiting discrimination based on "religion, race, caste, sex, [or] place of birth," and Article 19 (cl. 5), disallowing such unreasonable restrictions of no public interest. That is, laws that are inconsistent with fundamental rights are invalid.

5.2 Constitutional Equality: Application and Reconciliation in Dissenting Opinion in *Kishwar*

In *Kishwar*, Justice Ramaswamy dissenting opinion employs two ingenious ways to respond to the problems of constitutional equality and gender discrimination in tribe inheritance customs. First, in order to understand the significance and the effect of applying the Constitutional equality principles to gender discrimination questions in *Kishwar*, Justice Ramaswamy relies on the ruling of the earlier court opinion of Rajasthan High Court in *Jani Bai v. State of Rajasthan and Ors.* Because in citing *Jani*, however, Justice Ramaswamy merely states its ruling, a direct reference to the published court opinion of *Jani* also offers a further examination of his analogical mention. In *Jani*, the statute, the Rajasthan Colonisation Act, 1954, allowed the State of Rajasthan to frame rules in order to grant land to landless persons in a colony, or settlement. The following Rajasthan rules thus framed, however, were controversial. While it allowed the permanent allotment of land to persons who earlier held a temporary land lease for cultivation, the rules also stipulated granting the allotted-persons' surplus land to their "adult sons." In effect, the rules excluded adult daughters from the land allotments, and the Rajasthan High Court had to determine the question of the validity of such gendered rules.

Jani interpreted the gender contexts of the Rajasthan rules, and also with the Constitutional prevention of gender discrimination and equality principles. Firstly,

in rejecting the respondent's claim that the daughters moved into their husbands' home after marriage and the discriminatory rules prevented "fragmentation of the holding [land]," the Court wrote that the "compactness of holding" was not a "factor" in the "context" of Rajasthan's statute and rules. In fact, as *Jani* stated, in allowing the allotment of the father's surplus land only to his son, or sons "as co-tenants and not as joint-tenants," the rules, in contrast to the "fragmentation" and "compactness" claims, already construed each son as "distinct units" and independent of the father. In Rajasthan rules, thus, the Court found no "context" or "object" for "any rational basis to permit classification on...the ground of sex." Secondly, for *Jani*, such rules, in the absence of "rational...classification" between sons and daughters, violated Article 15 of the Constitution of India that prohibits gender discrimination. Still, the concern that any decision invoking Article 15 to invalidating the discriminatory rules, while it stalled land allotment to sons, offered no advantage to daughters either, dissuaded the Court from such invalidating decision, favoring a somewhat reconciliation of rules themselves instead (pars. 15-16).

The Court, in *Jani*, also referred to the Constitutional Article 14, ensuring equality, in part, also as an additional justification in support of reconciling the Rajasthan rules. The Court viewed the State's action of land allotment as inconsistent with the equality principles in Article 14 of the Indian Constitution. Since the term 'surplus land,' which in the Rajasthan rules referred to the lands

that remained unassigned after the completion of the allotment of lands to the temporary lease-holders, belonged to the Government of Rajasthan, the Court wrote that the "distribution of State largesse cannot be made in violation of right to equality." Thus, the Court argued that while the concept of equality in Article 14 prevented discrimination in the State's land allotment, the concept also justified the Court's overall efforts in reconciling the discriminatory rules to achieve gender parity (par 20).

In reconciling the discriminatory rules, the Court, in *Jani*, invoked the Rajasthan General Clauses Act of 1955, which was created to assist with interpretation of the State's laws. Notably, Section 14 of the Act, which stated that "unless a different intention appears the words importing masculine gender shall be taken to include the females." Since the "context" and "object" of the Rajasthan rules offered no reasonable basis for classification on sex, the Court found no valid "different intention" to avoid the "ordinary rule" of interpretation in Section 14. Accordingly, the court opinion, *in Jani*, stated that "[w]e accordingly hold that the word 'son' importing masculine gender used in Rules...shall be read...[to] include females...and similarly the words "his/he" shall include "her/she". Further, as the Court observed, "[u]nless the above construction is made, Rule[s] would be rendered invalid which consequence is to be avoided for obvious reasons. The construction made by us will result in upholding these provisions as valid and this is sufficient reason for making this construction." Thus, in employing the interpretative

provision of Section 14 the Rajasthan General Clauses Act of treating alike the words implying masculine and feminine genders, the Court reconciled discrimination between sons and daughters, and, also, prevented the Constitutional invalidation of the rules (par. 21).

Drawing on *Jani*, thus, Justice Ramaswamy, in *Kishwar*, delves into the questions of invalidating the Tenancy provisions as unconstitutional. To begin with, Justice Ramaswamy acknowledges the significance of custom among tribes and states:

Customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly occurred the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs...they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate.

Although Justice Ramaswamy recognizes that customary norms of tribes, intrinsically and generally, governed their personal affairs including, matters of succession and inheritance of property, he is concerned that in the specific matters

of inheriting property, tribes, in general, follow the gendered forms of inheritance along the male line. Because of the interference between the former recognition and the latter concern of inequality, Justice Ramaswamy must find a way to rescue himself from this opposition, the question of custom versus constitutional validity.

To this end, as a result, Justice Ramaswamy examines the specificities in custom among the tribes. He writes that "the customs among the Scheduled Tribes, vary from tribe to tribe and region to region...[t]herefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law." Furthermore, for Justice Ramaswamy, "[u]nder these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles...of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court." Because tribes and regional variations informed custom, for Justice Ramaswamy, disputes too are distinct with specific facts and pieces of evidence requiring the exclusive "acceptable material." However, he does not specify the "acceptable material" of sources and evidence for determining "whether customary succession is valid, certain, ancient and consistent." Arguably, in stating the different classes of tenants and recognizing the general landholding practices among the tribes of Chota Nagpur, the Tenancy Act itself is, somewhat, evidence of validity, certainty, and consistency questions. Still, in ambiguously claiming that *Kishwar* lacked specificities and "acceptable

material,” Justice Ramaswamy offers his inability “to decide” and annul the Tenancy clauses as unconstitutional.

While he is unclear about “acceptable material,” Justice Ramaswamy’s observation requiring specific facts in *Kishwar* is also paradoxical. On the contrary to his lack of specificities claims, however, as Justice Ramaswamy himself affirms at the beginning of his dissenting opinion, the petitioners, mainly, belonged to the Ho and Oraon tribes of the Chota Nagpur plateau region. Furthermore, nevertheless, the petitioners generally challenged the constitutional validity of the Tenancy clauses as the provisions omitted women from tribes’ inheritance and succession of property and the laws were also commonly applied to all tribes of the region. Although the facts offered some specific background to the dispute, the petitioners had primarily sought from the Court a general pronouncement of unconstitutionality of the Tenancy clauses. Still, because he recognizes the significance of customary norms in the lives of the tribes, in evoking the specificities analysis, thus, Justice Ramaswamy seems to seek an escape from a binary framework of custom against the constitutional validity of the Tenancy clauses.

For Justice Ramaswamy, thus, *Jani* offers an alternate route. Drawing on *Jani*, Justice Ramaswamy invokes the General Clauses Act, 1897, federal legislation created to assist with interpretation of statutes, to address the gender discrimination issue in *Kishwar*. Specifically, the General Clauses Act allows

interpreting “words importing the masculine gender...to include females,” but contingent upon “anything [nothing] repugnant in the subject or context” of any statute being interpreted [sec. 13, cl. 1]. In *Kishwar*, however, while Justice Ramaswamy rewords this provision stating that “males include[s] females...subject to statutory scheme”—in contrast to understanding “statutory scheme” in the context of the Tenancy statute in question—he interprets “statutory scheme” as “the Constitution[al]” scheme that offers prominence to right to equality and prevention of gender discrimination. Also, accordingly, in employing his interpretative construction to Sections 7 and 8 of the Tenancy Act, Justice Ramaswamy wrote that “if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son.” Justice Ramaswamy, in his unique way of expanding the range of General Clauses Act to Constitutional equality and prevention of discrimination, thus, somewhat seeks to reconcile and achieve gender parity in inheritance in the Tenancy Act.

Although he obtains reconciliation from *Jani*, Justice Ramaswamy’s analogical reference to *Jani* is strikingly confined and unclarified. In quoting *Jani*, he merely states what that Court had held: “that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the rules under that Act.” That is, the principle determined in *Jani* prevented any distinction based on gender and allowed

interpreting the term 'son' to include 'daughter' since the daughters were "equally eligible" in other respects. In referencing solely to the principle or rule stated in *Jani*, Justice Ramaswamy determines the similar result of gender equality in *Kishwar*. Still, and consequently, in merely stating the principle and ignoring other considerations of *Jani*, especially, the facts, his confined reference does not clarify the nature of analogical reasoning with *Jani*. Still, by juxtaposing the cases, it is possible to explain the extent to which the rationale of the principle of the analogical case of *Jani* is applicable in *Kishwar*.

While both *Jani* and *Kishwar* employ the state and federal General Clauses Acts to derive the principle to interpret the statutory laws, their analytical rationales vary. Commonly, while the Acts allow interpreting "words importing the masculine gender"..." to include females," such construction is only permissible since they do not conflict with "subject or context" or "different intention" of distinguishing the genders. In analyzing "subject or context" or "intention," *Jani* considered its facts involving the Rajasthan statute to locate the "context" of gender distinction in the "fragmentation of the holding." On the contrary, to pinpoint the "context," Justice Ramaswamy's construction in *Kishwar*, ignores the State statute, the Tenancy Act, and instead draws on the constitutional right to equality. That is, he extends the reasoning of the specific factual context stated in *Jani* to the broader context of constitutional rights in *Kishwar*. Although *Jani* used General Clauses Act as a means to achieve the constitutional requirement of gender equality, Justice

Ramaswamy uses constitutional equality both as a means and as an end. Thus, at least in analogy, the differing analytical rationales render Justice Ramaswamy's analogical argument weak or remote.

In his second ingenious method, Justice Ramaswamy employs the concept of justice, equity, and good conscience. In particular, he has recourse to opinions of the Supreme Court, such as *Maneka Gandhi v. Union of India* and *Harbans Singh Etc. v. Guran Ditta Singh Etc.* The former case dealt with the question of the constitutional soundness of a State action in virtue of a statute. As ascertained from the published court opinion in *Maneka*, the case involved the seizure of the petitioner's passport, with no opportunity of prior hearing, by the Delhi passport authority on the grounds of public interest under the Passports Act of 1967. Section 10 of the statute allowed State to "impound...or revoke a passport" whenever the "passport authority deems it necessary...in the interests of the general public" (sec. 10, cl. 3). That is, while the Act merely allowed impounding the passport, it lacked any explicit provision of offering "reasonable opportunity" of prior hearing to the petitioner. Accordingly, the petitioner argued that, in denying her the opportunity of hearing before confiscating her passport, the State had violated petitioner's constitutional fundamental rights including, "personal liberty" and "equality before law" and (arts. 21 and 14). The petitioner, thus, sought from the Court to determine the constitutional validity of the State-action and the controversial provision of Section 10 in the Passports Act that was silent on the issue of the prior hearing.

The Court, in *Maneka*, had two options: to either declare the contentious statutory provision as unconstitutional or offer a "reasonable opportunity" construct and interpretation to the provision. The Court considered the statutory provision of the Passport Act jointly with Article 21, disallowing deprivation of one's "life or personal liberty except according to procedure established by law," and Article 14, providing "equality before law," (Indian Constitution). In considering the constitutional validity under Article 21, the Court examined the "direct and inevitable effect" of State-action of seizing the petitioner's passport and determined that the State-action amounted to denying the petitioner her "right to go abroad"—a violation of her "personal liberty." That is, because the Passport Act, in virtue of the State-action, deprived the petitioner of her fundamental right of "personal liberty," the Court had the option to declare Section 10 of the Passport Act as unconstitutional, and, thus, invalid.

The Court, however, focused on the "equality before law" principle in Article 14. The Court also wrote that "equality" includes "reasonableness" of legal procedures to satisfy the principles of "Natural Justice...be right and just and fair and not arbitrary, fanciful or oppressive." Because, in its provision on passport confiscation, the Passport statute was silent about any prior hearing opportunity question, the Court interpreted Section 10 of the statute to include the "pervasive" principles of "Natural Justice" stating that "even when statute is silent[,] the

law...make an implication and apply the principle." In other words, in interpreting the controversial statutory provision, the Court used its "Natural Justice" argument and offered the construct of "reasonable opportunity" of prior hearing in Section 10. The Court, thus, in lieu of declaring the entire provision of Section 10 as unconstitutional and void on account of the "personal liberty" question, maintained the provision's constitutional validity through "equality" in Article 14 by emphasizing that the principles of "Natural Justice" of "right, just, and fair[ness]" were implicit and intrinsic to Section 10.

The second case of *Harbans Singh Etc. v. Guran Ditta Singh Etc.* involved the specific issues of limitation statute in suits of mortgage of property. In this case, the defendant's predecessor had executed mortgage by hypothecating his agricultural lands to the mortgagees, the appellants. Later, he entered into a compromise with the appellants on the mortgage payment and obtained a compromise-decree from the local revenue officer, the Collector. However, when the defendant's predecessor defaulted on the payment, the Collector dismissed his application seeking redemption or repossession of mortgage lands. After the death of the mortgagor, his heirs, the defendants in *Harbans*, filed suits of redemption in the district's civil Court. However, since the suits were filed beyond one year from the date when the Collector had dismissed the predecessor's application, the appellants claimed that the suits in the civil Court were barred by limitation under the Redemption of Mortgages (Punjab) Act 2 of 1913 and the Limitation Act of 1903.

Section 12 of the former and Article 14 of the latter allowed the filing of redemptions suits within one year. The Court, thus, had to determine if limitation barred the redemptions suits.

In *Harbans*, the Court uniquely derived its redemption construct. The Court stated that the respondent's redemption petition was not barred by limitation as the Collector's Court earlier had dismissed the predecessor's redemption application for defaulting in payment, but the redemption right itself was not dismissed. Further, in its determination, the Court cited Section 60 of the Transfer of Property Act, 1882 providing the mortgagors the right of redemption of their mortgage property. Although the Act did not apply to the State of Punjab at that time, the Court wrote that the principles implicitly embodying the redemption right in Section 60, i.e., principles of "Justice, Equity, and Good Conscience," were still applicable. That is, the redemption right provided in the inapplicable statute was still made applicable in virtue of the substantive natural justice principles arguments.

In mentioning cases like *Maneka* and *Harbans*, Justice Ramaswamy, thus, in *Kishwar*, highlights two interpretive aspects. First, as stated in *Maneka*, in determining whether a statutory provision violates one's constitutional-fundamental rights, the Court must also examine the "direct and inevitable effect" of the State-action in virtue of the statutory provision. Here, if the "effect" of the State-action is found to breach any fundamental right, then the relevant statutory

provision enabling such action, too, is constitutionally incongruent. Second, as *Maneka* offered, the constitutional provision "equality before law" in Article 14 includes the substantive moral principles of "reasonableness" and "non-arbitrariness." This relationship between the Constitution and moral principles allows constructive interpretation, by expanding or "reading down" the statutory provision in question, in ways that conform with moral principles of "reasonableness" and "non-arbitrariness," or the natural justice principles comprising "justice, equity and good conscience." Such "reading down" constructive interpretation is offered both in *Maneka* as well as *Harbans*. Although Justice Ramaswamy recognizes the two interpretive aspects, he employs the second interpretive form in *Kishwar*.

Because Justice Ramaswamy intends to employ the "reading down" constructive interpretation method, he must offer certain substantive principles claims also by borrowing concepts from other statutes, including those inapplicable to Oraons. He refers, particularly, to the Hindu Succession Act of 1956 and, generally, the Indian Succession Act of 1925, the inheritance and succession statutes applicable exclusively to Hindu and Christian communities respectively. In quoting the Hindu Act, Justice Ramaswamy, however, acknowledges that the Act does not apply to the Oraons, the statute states that "nothing contained in this Act shall apply to the members of any Scheduled Tribe" (sec. 2, cl. 2). Similarly, as Justice Ramaswamy admits, the Indian Succession Act did not apply to the "tribal

Christians residing in the State of Bihar." The statute empowers "State Government to exempt any race, sect or tribe in the State from operation of Act," and an official notification had excluded tribal Christians of Bihar from the ambit of the Act (sec. 3). Still, drawing on earlier court opinions, such as *Harbans*, Justice Ramaswamy finds the inapplicable succession statutes somewhat relevant for interpreting the Tenancy Act clauses in *Kishwar*.

For Justice Ramaswamy, although the statutes do not apply to Oraons, and tribes in general, in contrast to the Tenancy Act in question, the gender discrimination is less pronounced in the Hindu and Christian inheritance and succession statutes. As he states, the Hindu statute "modified the pre-existing law and intestate succession gives right of succession to Hindu female," and "has enlarged limited estate...into absolute right of property held by a Hindu female." In fact, in 2005, a decade after *the Kishwar* decision, the Hindu Succession Act was further amended, allowing Hindu women an equal share in intestate succession (sec. 6). Still, under the pre-amended statute that Justice Ramaswamy refers to in *Kishwar*, offered, albeit unequal, intestate succession rights to Hindu women. Moreover, while the Tenancy Act accords tribal women limited property-ownership, the Hindu Succession Act offers Hindu women full ownership rights to any property acquired by them including, either through inheritance or maintenance (sec. 14, cl. 1). While Justice Ramaswamy offers some explanation on gender and property rights in the Hindu Succession Act, he does not delve into the Christian inheritance

statute. Still, Justice Ramaswamy holds the property rights principles of both the statutes as reference points to interpret Tenancy clauses in *Kishwar*.

Justice Ramaswamy references the inheritance statutes applicable to Hindu and Christian communities to respond to the question of the validity of the clauses in the Tenancy Act. As he states, "the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice equity, fairness, justness and good conscience would apply to them." That is, for Justice Ramaswamy, while the specific clauses in the Hindu and Christian succession statutes were inapplicable to Oraons, their foundational natural justice principles, that allowed for particular property rights to women in the succession statutes, also apply to the Tenancy Act clauses in *Kishwar*. Accordingly, in virtue of the substantive principles, he allows the Scheduled Tribe women "to succeed the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights..." Substantially, in offering the "reading down," constructive interpretation, Justice Ramaswamy himself amends the discriminatory provisions in the Tenancy Act, he allows tribal women equal share as well as absolute holding rights. In providing a gender-neutral construction to the Tenancy clauses, thus, Justice Ramaswamy attempts to maintain their constitutional validity in the amended form.

Although Justice Ramaswamy refers to the interpretive features of *Maneka* and *Harbans*, the cases offer analogical difficulties. First, both *Maneka* and *Kishwar* lack common characteristics of analogy. Whereas *Maneka* implicates the issue of the legal procedure of reasonable hearing, *Kishwar* involves the substantive inheritance question as derived from custom. While in *Maneka*, the issue in question, "reasonable opportunity" of hearing, was explicitly absent in the statute, the issue of gender-based inheritance is worded categorically in the Tenancy Act. The disputed Sections 7 and 8 in the Tenancy Act explicitly stated the legal provision recognizing "descendants in the male line." In clarifying "reasonable opportunity," *Maneka's* construction did not negate anything explicitly stated in the statute. On the contrary, Justice Ramaswamy's draws on *Maneka's* construction for amending and negating in part the explicitly written legal stipulation. Although Justice Ramaswamy amends the Tenancy clauses, *Maneka* does not provide a robust analogous case in support of his argument.

Second, in citing *Harbans*, Justice Ramaswamy provides a weak analogical argument. The applicable statutes in *Harbans*, the Redemption of Mortgages (Punjab) Act 2 of 1913 and the Limitation Act of 1903, laid down legal procedures for enforcing redemption of land mortgages in judicial bodies in Punjab. In that, the statutes were silent on the substantive definitional aspect about the right to redemption. Accordingly, the Court in *Harbans* had to draw upon the substantive right to redemption definition established in a statute not applicable to Punjab, the

Transfer of Property Act, 1882. On the contrary, in *Kishwar*, the Tenancy Act itself defines the disputed substantive concept of the right to inheritance. Thus, the cited *Harbans* case merely illustrates applying the principles of the inapplicable statute, and it is not analogous to the facts in *Kishwar*, however.

5.3 Majority Response to Justice Ramaswamy's Dissent

Because the majority opinion was delivered after Justice Ramaswamy's dissenting opinion, Justice Punchhi, who presented the majority opinion, primarily, constructs his arguments in response to the dissent. His opinion expressly references to the dissenting opinion. As an example, Justice Punchhi begins by stating that "[w]e have read with great admiration the opinion of...Ramaswamy." Likewise, the majority often cites dissenting views through its opinion. While the majority opinion responds explicitly to Justice Ramaswamy's dissent, and it formulates arguments drawing on issues advanced in the dissenting view, Justice Punchhi appears wary of dissent's approaches of interpretation.

First, Justice Punchhi discusses the question of application of the succession statutes, the Hindu Succession Act and the Indian Succession Act, referred to in the dissenting opinion. Similar to Justice Ramaswamy's dissent, Justice Punchhi observes that, as expressly stated in the Hindu Succession Act, it is inapplicable to

tribes, including the Oraon (sec. 2, cl. 2). Likewise, under the Indian Succession Act, various tribes, such as the Oraon, are excluded from the Act's purview (sec. 3).

Justice Punchhi, thus, agrees with Justice Ramaswamy that "in terms" the Hindu Succession Act and the Indian Succession Act did not apply to Oraons and other tribes. However, as reviewed in the earlier paragraphs, because Justice Ramaswamy's alternative construct, still, allows indirect utilization of the inapplicable succession statutes in the custom of inheritance of the Oraons, the majority opinion also scrutinizes dissent's ingenious work-around recourse to the Acts.

While, to interpret the statutory gender terms and phrases, Justice Ramaswamy's first approach invokes the General Clauses Act, in response, Justice Punchhi refers to the Hindu Succession Act. Specifically, as stipulated in the latter Act, "unless the context otherwise requires, words importing the masculine gender shall not be taken to include females" (sec.3 cl.2). This provision is similar to Justice Ramaswamy's reference in the General Clauses Act discussed in the previous section. In comparison, both the Acts offer a similar interpretive idea to the gender question; to clarify, they allow the identic-interpretation of gender-expressions, treating both masculine and feminine words and phrases. Still, while the General Clauses Act provides interpretive assistance to statutes in general, the gender-interpretive clause in the Hindu Succession Act is specific to expounding its clauses in the Act. To interpret the Tenancy clauses, Justice Ramaswamy's first method,

thus, exclusively utilizes the General Clauses Act, but does not refer to the Hindu Act. In merely quoting the clause of the Hindu Act, Justice Punchhi, on the other hand, does not explain the scope of its application. The majority opinion, thus, overlooks the dissent's first approach of applying the General Clauses Act to the gender-phrase issue.

Justice Punchhi, however, does mention the General Clauses Act, albeit with claims different than Justice Ramaswamy's assertion. As he states, "[a]ttention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundanti cautela." Section 13 of the Act has two clauses: while the first permits including females in "words importing the masculine gender," the second clause, in stating that "words in the singular shall include the plural, and vice versa," prescribe synonymy of numbers. Justice Punchhi, however, relates Section 13 with the "general rule of plurality" (sec.13, cls. 1 and 2). That is, in contrast to Justice Ramaswamy's first method, focusing on the first clause, Justice Punchhi directs his attention to the second, the number question. Thus, while the majority opinion disregards dissent's method of interpreting the gender question with the General Clauses Act, in referring to the number problem in the second clause instead, Justice Punchhi's majority view also offers an alternative use of the Act.

Justice Punchhi appears to explain his application of the General Clauses Act when he states that "[r]ules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Nonuniformities would not in all events violate Article 14 [Constitution]." In this observation, Justice Punchhi assigns "plurality," or the number question, with the "differential treatment" and "[n]onuniformities" issues of succession laws; especially, whether succession laws must apply uniformly to diverse social and religious groups. That is, uniformity ensuring conformity of "other systems of law," including the tribe customary law systems, with "the Hindu Succession Act and the Indian Succession Act as models." In connecting the General Clauses Act's number provision with the uniformity question, Justice Punchhi's composition of the Act, thus, is distinct from Justice Ramaswamy's affirmation.

In the context of the constitutional validity of the Tenancy clauses, Justice Punchhi primarily focuses on two principles. First, because Justice Punchhi's majority view advances the uniformity or plurality question, the opinion also perceives the issue in light of constitutionality claims. In observing that "[n]onuniformities would not in all events violate Article 14 [Constitution]," Justice Punchhi equates uniform application of succession laws claims with constitutional equality of Article 14. Moreover, in another remark, he states: "In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of

personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort." This statement too confirms Justice Punchhi's reference to "the principles of personal laws applicable to others" with the "equality principle." In relating uniformity question with equality, and observing that not all instances of piancey defy equality, however, Justice Punchhi's claim is simple and imprecise and lacks elaboration.

Still, because Justice Punchhi equates the question of uniform succession laws among distinct groups with the constitutional equality of Article 14, his constitutionality construct, thus, also appears to shift the goalpost of Article 14. In fact, throughout the opinion, his sparse use of the term 'equality' appears only about the issue of uniformity, and inadvertence with gender. That is, about Article 14, the shift is from dissent's gender equality considerations to the majority's attention to the broader question of uniformity of succession laws across social and religious groups. Evidently, in generating such a shift, Justice Punchhi ignores the relationship between gender and equality principle, the very issue raised by the petitioners and also discussed in the dissenting opinion's ingenious methods.

On the other hand, despite ignoring to equate gender with equality, another critical aspect in Justice Punchhi's constitutional construct involves viewing the gender question in a different light. In the final part of the court opinion, Justice Punchhi writes:

There is no scope thus in reading down the provisions of section 8 and even that of section 7 so as to include female descendants alongside the male descendants in the context of section 7 and 8. It is only in the larger perspective of the Constitution can the answer to the problem be found...Life is a precious gift of nature to a being. Right to life as a fundamental right stands enshrined in the Constitution. The right to livelihood is born of it.

In responding to Justice Ramaswamy's reading down-methods of interpreting the clauses, these remarks by Justice Punchhi indicate that the majority considers gender as a right to livelihood question. Because the majority interpretation, while avoids relating gender with equality principle, employs the right to livelihood to the gender question instead, such construction completes the shift from constitutional equality to livelihood principles. Accordingly, Justice Punchhi applies the constitutional right to livelihood to the gender context in the Tenancy clauses.

Commenting on the implication of the constitutional right to livelihood, specifically, in regards to Sections 7 and 8 of the Tenancy Act, Justice Punchhi argues:

Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is

what Section 7 and 8 recognize. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Section 7 and 8, to make way to [a] male relatives within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in Section 7 and 8 has to remain suspended animation so long as the right of livelihood of the female descendants of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions to be read as a burden to the statutory right of male succession, entitling her to the status of an intervening limited dependent/descendants under section 7 and 8. In this manner alone, and up to this extent can female dependents/descendants be given some succor so that they do not become vagrant and destitute.

Because the Tenancy clauses associate succession with male members of the tribes, Justice Punchhi's statement here suggests that he is concerned with the livelihood of the women members. Moreover, the issue of livelihood is a constitutionally recognized right. However, in invoking the constitutional right to livelihood and suggesting, thus, to place Sections 7 and 8 on "suspended animation" as "long as they [women members] remain dependent on it [property] for earning their livelihood," the majority opinion also appears to reinstate the tribe inheritance custom inadvertently.

As examined in the previous section, it is clear that various courts' formulation of the Oraon custom of inheritance determines widows and unmarried-daughters' right to hold properties in place of maintenance, albeit without an absolute ownership title. In placing on "suspended animation" the Tenancy clauses, thus, Justice Punchhi's interpretation effectively recapitulates the inheritance construct of other courts' opinions. His reasoning for deferring the clauses, in his remarks cited in the above paragraph, however, uniquely hinges on the constitutional right to livelihood argument. That is, besides the constitutional-livelihood claim, Justice Punchhi's interpretation is devoid of alternative sources that formulate custom of inheritance in ways that previous courts present. Arguably, in a dexterous and purportedly inadvertent manner, the majority opinion presents the Tenancy clauses, effectively, similar to the previously established construct of the custom.

In addition to the constitutional rights questions of equality versus livelihood, another essential aspect of the majority opinion's disagreement with the dissenting view is with presenting a different reading of the Tenancy Act in itself. Commenting on the Chotanagpur Tenancy Act, Justice Punchhi states:

A bare outline of these provisions goes to show that these have been enacted to identify classes of tenants. These provisions have no connection with the ownership of land. Section 3(XXVI) defines 'tenant' to mean a person who holds land under another and is, or but for a special contract would be liable to pay rent for that land to that other person. Sub-section (1) of Section 4 is plainly tied up with Section 5. Subsection (2)(d) & (b) of Section 4 is tied up with Section 6 and sequently with Section 76. Local customs, as the illustrations under Section 76 show, are for the purpose of streamlining the tenancy rights and landlord-tenant relationship. Sub-section (2)(c) of Section 4 in the same pattern is tied up with Section 7. Lastly sub-section (4) of Section 4 is tied up with Section 8 relating to "Mundari Khunt-kattidhar". All these tenants, as classified, do not own the tenanted lands, but hold land under others. Their tenancy rights are identified and regulated through these provisions. The personal laws of the tenants nowhere figure in the set up.

Justice Punchhi's remarks indicate that while the Chotanagpur Tenancy Act recognizes the different classes of tribe tenants, including as practiced in the Oraon tribe, it leaves their precise inheritance custom undefined. This limitation with the

Tenancy Act explains why the court opinions on Oraon inheritance custom, as also mentioned in the previous two chapters, look elsewhere for evidence on the tribe inheritance custom.

Justice Punchhi's opinion also discusses the structural issue of statutory-amending prerogative. As Justice Punchhi remarks:

Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist Court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However, laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the Court, it compulsively needs to apply, somewhere and at some time, brakes to its self-motion, described in judicial parlance as self-restraint.

Justice Punchhi appears wary of drawing on Justice Ramaswamy's dissent approach of "[j]udge-made amendments" to the Tenancy clauses. As discussed previously, the dissenting interpretation invokes natural justice principles of

"justice, equity and good conscience" and offers "reading down" of the clauses. Such a method, in the majority's view, affords structural difficulty. Because, for Justice Punchhi, such amendments are a legislative function, he opposes any judicial interpretation that effectively amends statutory law.

Another structural problem for the majority opinion comprises factual concerns. Commenting on Justice Ramaswamy's opinion, Justice Punchhi states:

We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on page 36 of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution, and each case must be examined when full facts are placed before the Court.

As was pointed out in the previous chapter, Justice Ramaswamy had reasoned that the absence of "acceptable material" evidence on tribe inheritance custom restricted his ability to determine if the tribe inheritance custom discriminated against women. Following Justice Ramaswamy's specific reasoning, Justice Punchhi offers the additional structural rational: deficiency of factual information in the petitioner's case. As was pointed out previously, the petitioners, in *Kishwar*, are also women members of different tribes, including the Oraon. So because the Tenancy clauses recognize their custom of inheritance along the male line and adversely affect them as well as women members in general, they are asking for the clauses to be struck down for violating the equality rights provisions of the

Constitution. While the petitioners have general, but, adequate connection with the adverse effects of the Tenancy clauses, and moreover, their facts comprise the very conditions offered expressly and implicitly in the clauses, Justice Punchhi, still, offers the structural deficiency of facts objection.

Besides offering the descriptive legal and structural arguments, Justice Punchhi also justifies the majority evaluation with other substantive considerations. For example, his remark quoted above also points to "political reasons" that deter legislatures from amending the gendered-clauses in the Tenancy Act. In the remark, it is clear that because, for Justice Punchhi, the gender question involves sifting and examining the entire heap of personal laws of tribes, he is mindful of the political implications.

Another substantive consideration relates with question of "[j]udge-made amendments" to the Tenancy clauses. Commenting on Justice Ramaswamy's method of "[j]udge-made amendments," Justice Punchhi states:

[i]f this be the route of return on the Court's entering the thicket, it is for better that the Court kept out of it. It is not far to imagine that there would follow a bee-line for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models...Judge-

made amendments to provisionary over and above the available legislature, should normally be avoided.

As Justice Punchhi claims, the "[j]udge-made amendments" way of interpreting amounts to open a pandora's box of demands for equating "other systems of law," including customary norms of other tribes, with "the Hindu Succession Act and the Indian Succession Act as models." This rationale, too, illustrates substantive considerations in majority claims.

In addition to the substantive objections to "[j]udge-made amendments," another example of substantive factors embroils the demand for rescinding the gendered Tenancy clauses, especially, consequent on constitutional equality test. Justice Punchhi concludes: "[w]e would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about chaos in the existing state of law." This statement identifies the majority's substantive concerns with quashing the Tenancy clauses as unconstitutional; specifically, pandemonium generally with the validity anxieties about the tribe inheritance and succession customary laws. Accordingly, because of substantive political and moral sensitivities, Justice Punchhi is loath to neither concur in the dissent's view of amending the Tenancy clauses nor rescind the gendered clauses.

5.4 Conclusion

This study of *Kishwar* has examined the Court's interpretation of the relationship between the Constitution's gender equality principles and the tribe inheritance custom. The research has shown that both the minority and majority opinions use divergent substantive considerations for determining the Constitutional gender equality questions in *Kishwar v. Bihar*. Justice Ramaswamy's dissenting opinion employs two inventive methods to address the problems of constitutional equality and gender discrimination in tribe inheritance customs. Justice Ramaswamy reconciles the impasse by invoking the General Clauses Act and amending the gender discriminatory Sections 7 and 8 of the Tenancy Act. Accordingly, he interprets the phrase "male descendants" in the Tenancy clauses to include female descendants.

Moreover, Justice Ramaswamy employs the natural justice principles of justice, equity, and good conscience to the Tenancy Act clauses. Through this "reading down" constructive interpretation, Justice Ramaswamy amends the discriminatory clauses for allowing tribal women equal inheritance as men. In providing a gender-neutral construction to the Tenancy clauses, thus, Justice Ramaswamy attempts to maintain the Tenancy clauses' constitutional validity in the amended form. That is, instead of voiding the controversial Tenancy clauses for reasons of violating constitutional equality, Justice Ramaswamy amends the

Tenancy clauses. Evidently, Justice Ramaswamy is driven by the substantive considerations of gender equality.

Justice Punchhi, majority opinion, on the other hand, equates the constitutional equality question with the uniformity issue, i.e., if succession laws were uniform among the distinct groups. Accordingly, Justice Punchhi changes the discussion from dissenting opinion's gender equality concerns to the majority's broader question of uniformity of succession laws across social and religious groups. Also, in contrast to the gender equality claims, Justice Punchhi considers gender as a right to livelihood question. Accordingly, Justice Punchhi applies the constitutional right to livelihood to the gender context in the Tenancy clauses.

Justice Punchhi is unwilling to neither agree with the dissent's view of amending the Tenancy clauses nor annul the gendered clauses. Justice Punchhi's approach reveals that substantive political and moral sensitivities influence his opinion. Especially, as the research has shown, Justice Punchhi intends to avoid chaos on the question of tribe inheritance custom. Overall, this study strengthens the idea that, because tribes customary laws are mostly a question of fact, the substantive considerations have an impact on Court opinions on tribe customary disputes.

6 Conclusion

This dissertation set out to provide the first systematic account of the recognition of the Oraon tribe customary laws in the published court opinions in twentieth-century India. To that end, this study aimed to design a theoretical model and evaluate the courts' meaning-making about the Oraon customary laws. The analyses of Charles Taylor's recognition, Hans-Georg Gadamer's fusion of horizons, and Ronald Dworkin's legal interpretivism theories indicate that these three concepts offer the similar interpretive approaches for understanding a culture, a past, and the law respectively. The binary interplays between the two-dimensions, Taylor's unfamiliar and adjacent or familiar cultures, Gadamer's past and present horizons, and Dworkin's descriptive and evaluative considerations, create understanding. That is, the theoretical framework, comprising the three conceptual strands, commonly privileges interpretive approaches for understanding.

Also, the exploration of the 1986 Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws has revealed the significance of evidence on Aboriginal customary law claims. The Aboriginal customary laws are bereft of the general law's standardized and legislative statute characteristics. Accordingly, due to the recognition that the Aboriginal customary law claims are "questions of fact and not of law," the evidentiary aspects are crucial in Aboriginal lawsuits. The evidentiary features require unique judicial approaches

for determining the Aboriginal customary laws in a lawsuit. The theoretical framework, comprising Taylor, Gadamer, and Dworkin's ideas, thus, is suitable for understanding courts' decision-making in such Aboriginal lawsuits (Recognition of Aboriginal Customary Laws ALRC Report par. 614).

The research on the effect of the theoretical framework on evidence laws and the proof of the Aboriginal customary laws has shown that the theoretical framework uncovers the judicial understanding of the Aboriginal customary laws in lawsuits. For example, the relevance of Taylor's politics of difference critique is supported by the current findings: in acknowledging the disparities between the general law and the Aboriginals customary laws, the Australian Report rejects the "assertions or assumptions" based-understanding of Aboriginal customary laws. Also, the Australian Report's emphasis on the need for unique evidence tactics for verifying the Aboriginal customary laws is consistent with Taylor's moral requirements, which comprise both "admission" that cultures have value and exist at a distance as well as "willingness" for verifying cultures' worth in "actual study." Likewise, Australian Report's requirement for verifying the anthropological framework with the supporting Aboriginal testimonies, and the Report's stress on the time and dispute specific evidence over customary law's "antiquity" upholds Gadamer's fusion of horizons idea. Besides, the Australian Report's insistence on valuing anthropological and Aboriginal witnesses in the face of formal restriction on hearsay evidence supports Dworkin's hybrid descriptive-evaluative of fit-

substantive conception. These analyses confirm the generalizability of the theoretical framework on the study of Aboriginal customary law disputes and the broader range of meaning-making in court opinions on tribe custom. (Taylor 64 and 70-71, Recognition of Aboriginal Customary Laws ALRC Report pars. 614, 626 and 642)

The second significant finding involves the recognition of the Oraon tribe customary laws in the various reported court opinions in twentieth-century India. The study of the court opinions on the Oraon inheritance custom has found that generally, the courts in India consider Sarat Chandra Roy's Oraon account, published in 1915 and 1928, as evidence of Oraon inheritance practices in the Chota Nagpur plateau region to construct the inheritance custom. For example, the Jharkhand High Court's opinion, in *Matius*, relies on Roy to determine the Oraon widows' and daughters' inheritance and succession rights. Justice Patnaik, in *Matius*, locates the Oraon inheritance content in Roy's description and decides that an Oraon married daughter has neither the maintenance nor inheritance rights in her father's property. Also, due to his reliance on Roy, Justice Patnaik skips the family-specific intentions of inheritance practice as evident in the official Revisional Survey records that differ from Roy's Oraon inheritance description. Likewise, in the illustration concerning Oraons' adoption practices, the Jharkhand High Court's judgment, in *Anjalus*, cites Roy on the issue of adopted son-in-law's inheritance rights. Besides, comparable to the *Matius* interpretation above, in *Anjalus*, Justice

Narayan disregards the family-based tradition, which, as apparent in the official Survey records, refutes Roy's adoption and inheritance descriptions.

The results of this research display that Roy's Oraon account is a prescription for the Oraon customary law disputes in the courts. The courts privilege Roy and ignore the unique dispute and local specific evidence on the Oraon custom. Also, the Oraon claimants never disprove Roy's Oraon custom description. As this study has also shown, the limitation statute's adverse possession principle, which grants ownership title to a person occupying adversely someone else's land continuously for a period, is the only challenge to Roy's description. However, a few other reasons too limit the generalizability of Roy's Oraon custom account.

The examination of Roy's Oraon account has indicated that the socio-economic and governmental regulatory factors emerged as reliable predictors of the Oraon custom development. As an example, Roy points to Oraons' yearnings for recognition of the legal will or testament in their inheritance custom. Accordingly, the general application of Roy's account to the specific Oraon custom lawsuits at different periods and locations is problematic.

Another significant finding to emerge from a more in-depth investigation of the Oraon custom court opinions is that courts in India view the law's custom and the tribe custom contrarily. As the *Kishwar* judgment analysis has shown, while the

theoretical custom description underscores the “ancient” or “antiquity” and “invariable” or “certainty” conditions, the application renders the custom, and especially the tribe inheritance custom, unique and non-generalizable. While the law’s conception requires evidence to point to the custom’s ancientness and static qualities, such evidence is impracticable as regards the tribe custom. The analysis has also shown that to overcome the conceptual and practical impasse, Justice Ramaswamy’s opinion, in *Kishwar*, privileges the workable custom evidence: in relating the “invariable” or “certainty” requirements with custom evidence unique to tribes circumstances, Justice Ramaswamy discounts the “ancient.” Accordingly, due to the lack of specific evidence by the petitioners in *Kishwar*, Justice Ramaswamy is unable to ascertain if their inheritance custom discriminated against women factually. The significant theoretical implication of this finding is that the judicial understanding of a customary law formulation lies in its application. However, the tribe customary laws that exist in general law’s standardized or statutory forms limit the generalizability of the theoretical implication.

The research on *Kishwar* has also identified that both the minority and majority opinions use divergent substantive considerations for determining the Constitutional gender equality questions in the tribe inheritance custom. Drawing on the substantive natural justice principles of justice, equity, and good conscience claims, Justice Ramaswamy’s dissent interprets the Tenancy clauses’ phrase "male

descendants" to include female descendants and allows equal inheritance between tribe men and women. That is, Justice Ramaswamy, through his "reading down" constructive interpretation, upholds the constitutional validity of the Tenancy clauses and, thus, reconciles the impasse between the Constitution and Tenancy Act. In contrast, the substantive political and moral understandings sway Justice Punchhi's majority opinion. Accordingly, as opposed to the gender equality claims, Justice Punchhi considers gender as a right to livelihood question and refuses to annul neither nor amend the Tenancy clauses in question. This analysis demonstrates that tribes customary laws are mostly a question of fact and, thus, the substantive considerations are significant in court opinions on tribe customary disputes.

Overall, these findings suggest a role for the proposed theoretical framework, involving Taylor, Gadamer, and Dworkin's concepts, in explicating the nature of how courts construe the Oraon custom, and tribe custom generally, in its published court opinions. A significant theoretical implication of this study is that the formal structural and substantive moral arguments have an impact on the courts' interpretation of the tribe custom, the examples above point to such an interpretation process. Accordingly, this dissertation study has been one of the first attempts to provide such thorough investigation and clarification of how courts construe the Oraon custom in its published court opinions. Although this dissertation focused on the Oraon custom, the research offers some insight into the

nature of courts' interpretation of tribes customs in general. The findings of this study may have practical implications for law-makers and the judiciary. What is now needed is a cross-national study involving court opinions on aborigines, tribes, or the natives' customary laws in Australia, India, Canada and the United States.

Bibliography

“Aboriginal Land Rights (Northern Territory) Act 1976.” *Federal Register of Legislation - Australian Government*,
www.legislation.gov.au/Details/C2016C00111.

Advisory Committee Report on the Revision of the Lists of Scheduled Castes and Scheduled Tribes. Department of Social Security, 1965, *Advisory Committee Report on the Revision of the Lists of Scheduled Castes and Scheduled Tribes*,
tribal.nic.in/writereaddata/AnnualReport/LokurCommitteeReport.pdf.

Allen, Carleton Kemp. *Law in the Making*. Clarendon Press, 1964.

Appiah, Anthony. *Identity against Culture: Understandings of Multiculturalism*.
 Doreen B. Townsend Center for the Humanities, University of California,
 1994.

Archer, William G. *Tribal Law and Justice: a Report on the Santal (in 3 Vol.)*.
 Concept Publ., 1984.

Arendt, Hannah. *The Human Condition: a Study of the Central Dilemmas Facing Modern Man*. Doubleday and Co., 1958.

- Baviskar, Amita. "Indian Indignities: Adivasi Engagements with Hindu Nationalism In India." *Indigenous Experience Today*, by Marisol de la Cadena and Orin Starn, Berg, Oxford, 2007, pp. 275–303.
- Bederman, David J. *Custom as a Source of Law*. Cambridge University Press, 2010.
- Béteille André. *Caste, Class, and Power*. University of California Press., 1965.
- Béteille, André. "The Concept of Tribe with Special Reference to India." *Eur J Soc European Journal of Sociology*, vol. 27, no. 02, 1986, p. 296.
- Béteille, André. "The Idea of Indigenous People." *Current Anthropology*, vol. 39, no. 2, 1998, pp. 187–192.
- Binder, Guyora, and Robert Weisberg. *Literary Criticisms of Law*. Princeton University Press, 2000.
- Carter, Ian. "Respect and the Basis of Equality." *Ethics*, vol. 121, no. 3, 2011, pp. 538–571., doi:10.1086/658897.
- Clifford, James. *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art*. Harvard University Press, 1988.
- Das, Veena. *Life and Words: Violence and the Descent into the Ordinary*. University of California Press, 2007.

- Devy, G. N. *Between Tradition and Modernity: India's Search for Identity: a Twentieth Century Anthology*. Altamira Press, 1998.
- Dworkin, Ronald. "Law as Interpretation." *Critical Inquiry*, vol. 9, no. 1, The Politics of Interpretation, 1 Sept. 1982, pp. 179–200.
- Dworkin, Ronald. *Law's Empire*. Harvard University Press, 1986.
- Elwin, Verrier. *The Tribal World of Verrier Elwin: an Autobiography*. Oxford University Press, 1964.
- Fanon, Frantz, et al. *Black Skin, White Masks*. Translated by Charles Lam Markmann, Grove Press, 2008.
- Fraser, Nancy. *Justice Interruptus : Critical Reflections on the "Postsocialist" Condition*. Routledge, 1997.
- Fraser, Nancy. "Rethinking Recognition." *New Left Review*, vol. 3, 2000, pp. 107–120.
- Fraser, Nancy. "Recognition without Ethics?" *Theory, Culture & Society*, vol. 18, no. 2-3, 2001, pp. 21–42.
- Fraser, Nancy, and Axel Honneth. *Redistribution or Recognition?: a Political-Philosophical Exchange*. Verso, 2003.

Fürer-Haimendorf Christoph von. *Tribes of India: The Struggle for Survival*.

University of California Press, 1982.

Gadamer, Hans-Georg. *Truth and Method*. Translated by Joel Weinsheimer and

Donald G. Marshall, 2nd ed., The Crossroad Publishing Company, 1989.

The General Clauses Act, 1897, indiankanoon.org/doc/905940/.

Ghosh, Sri Kanta. *Law Enforcement in Tribal Areas*. Ashish Pub. House, 1987.

Ghurye, G. S. *The Scheduled Tribes*. Popular Prakashan, 1963.

Guha, Ramachandra. *Savaging the Civilized: Verrier Elwin, His Tribals, and India*.

University of Chicago Press, 1999.

Hall, Stuart, et al., editors. "Taking Identity Politics Seriously: 'The Contradictory,

Stony Ground...!'" *Without Guarantees: in Honour of Stuart Hall*, by James

Clifford, Verso, London, 2000, pp. 94–110.

The Hindu Succession Act, 1956, indiankanoon.org/doc/685111/.

Honneth, Axel. *Disrespect: the Normative Foundations of Critical Theory*. Polity

Press, 2007.

Honneth, Axel. *The Struggle for Recognition: the Moral Grammar of Social*

Conflicts. Polity Press, 1995.

Indian Evidence Act, 1872, National Informatics Centre,

indiacode.nic.in/bitstream/123456789/2188/3/A1872-1.pdf#search=evidence.

Jharkhand High Court. *Anjalus Uraon and Anr. v. Kamil Uraon*. 6 July 2004.

Indian Kanoon, indiankanoon.org/doc/1484894/.

Jharkhand High Court. *Budhu Oraon v. Biras Mani Minz And Ors.* 11 Oct. 2001.

Indian Kanoon, indiankanoon.org/doc/1211308/.

Jharkhand High Court. *Matius Tirkey v. Jusuphin Lakra*. 14 Sept. 2007. *Indian*

Kanoon, indiankanoon.org/doc/1638512/.

Legal Information Institute. *Adverse Possession*. Legal Information Institute, 23

June 2017, www.law.cornell.edu/wex/adverse_possession.

The Limitation Act, 1963, indiankanoon.org/doc/1317393/.

Markell, Patchen. *Bound by Recognition*. Princeton University, 2003.

Moodie, Megan. *We Were Adivasis: Aspiration in an Indian Scheduled Tribe*. The

University of Chicago Press, 2015.

The Passports Act, 1967. Ministry of External Affairs, Government of India,

portal1.passportindia.gov.in/AppOnlineProject/pdf/passports_act.pdf.

Patna High Court. *Sinta Munda and Others v. Jonathan Munda and Others*. 1 Oct.

1968. *Manupatra*.

The Rajasthan General Clauses Act, 1955. Law and Legal Affairs Department, Government of Rajasthan, law.rajabasthan.gov.in/content/dam/law-justice/Law%20%26%20Legal%20Affairs%20Department/PDF/ActsRules/6.pdf.

Rajasthan High Court. *Jani Bai v. State Of Rajasthan and Ors.* 21 Nov. 1988, indiankanoon.org/doc/54591/.

Ramaiah, P. *Issues in Tribal Development.* Chugh, 1988.

Recognition of Aboriginal Customary Laws (ALRC Report 31). The Australian Law Reform Commission, 11 June 1986, www.alrc.gov.au/publications/report-31.

Redemption of Mortgages (Punjab) Act, 1913, www.lawsofindia.org/pdf/haryana/1913/1913HR2.pdf.

Reports of cases heard and determined by the Judicial committee and the lords of His Majesty's most honourable Privy Council, on appeal from the Supreme and Sudder dewanny courts in the East Indies. By Edmund F. Moore ... 1836[-1872]. *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar.* Vol. 14, 20 Apr. 1872, pp. 570–595.

Roy, Sarat Chandra. *The Mundas and Their Country.* Jogendra Nath Sarkar, 1912.

Roy, Sarat Chandra. *The Oraons of Chota Nagpur: Their History, Economic Life, and Social Organization.* Sarat Chandra Roy, 1915.

Roy, Sarat Chandra. *Oraon Religion and Customs.* K.M. Banerjee, 1928.

Scanlon, Thomas. *What We Owe to Each Other*. The Belknap Press, 2000.

Singh, Bhupinder, and Neeti Mahanti. *Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa*. Ministry of Welfare, Government of India, 1993, *Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa*.

Sinha, Anand Prasad. "Crime and Custom in the Tribal Society." *Tribal Development and Its Administration*, edited by Lalita Prasad Vidyarthi, Concept, 1986, pp. 297–311.

Skaria, Ajay. *Hybrid Histories: Forests, Frontiers, and Wildness in Western India*. Oxford University Press, 1999.

Statistical Report on General Election, 1985 to the Eighth Lok Sabha. Election Commission of India, *Statistical Report on General Election, 1985 to the Eighth Lok Sabha*, eci.gov.in/files/file/4119-general-election-1985-vol-i-ii/.

Statistical Report on General Election, 1985 to the Legislative Assembly of Bihar. Election Commission of India, *Statistical Report on General Election, 1985 to the Legislative Assembly of Bihar*, eci.gov.in/files/file/3896-bihar-1985/.

Statistical Report on General Election, 1990 to the Legislative Assembly of Bihar. Election Commission of India, *Statistical Report on General Election, 1990 to the Legislative Assembly of Bihar*, eci.gov.in/files/file/3897-bihar-1990/.

Statistical Report on General Election, 1991 to the Tenth Lok Sabha. Election

Commission of India, *Statistical Report on General Election, 1991 to the Tenth Lok Sabha*, eci.gov.in/files/file/4121-general-election-1991-vol-i-ii/.

Sundar, Nandini. *Subalterns and Sovereigns: an Anthropological History of Bastar, 1854-1996*. Oxford University Press, 1997.

Supreme Court of India. *Bhau Ram v. B. Baijnath Singh and Others*. 16 Mar. 1961, indiankanoon.org/doc/250624/.

Supreme Court of India. *Harbans Singh Etc. v. Guran Ditta Singh Etc.* 20 Feb. 1991. *Indian Kanoon*, indiankanoon.org/doc/511537/.

Supreme Court of India. *Madhu Kishwar & Ors. v. State Of Bihar & Ors.* 17 Apr. 1996. *Indian Kanoon*, <http://indiankanoon.org/doc/1216671/>.

Supreme Court of India. *Maneka Gandhi v. Union Of India*. 25 Jan. 1978. *Indian Kanoon*, indiankanoon.org/doc/1766147/.

Supreme Court of India. *Sant Ram and Ors. v. Labh Singh and Ors.* 15 Apr. 1964, indiankanoon.org/doc/1792958/.

Taylor, Charles. *Multiculturalism and "the Politics of Recognition"*. Princeton University Press, 1993.

“Wills.” *Legal Information Institute*, Legal Information Institute, www.law.cornell.edu/wex/category/wills.

Young, Iris Marion. "Five Faces of Oppression." *Oppression, Privilege, and Resistance: Theoretical Perspectives on Racism, Sexism, and Heterosexism*, edited by Lisa M. Heldke and Peg O'Connor, McGraw-Hill, 2004.