CHAPTER 1

CUSTOMARY LAW: A CONCEPTUAL FRAMEWORK

This chapter presents a theoretical framework for the study focusing on the concept of customary law. The first section of the chapter will study the various approaches to customary law in legal and anthropological literature. The second section will analyse the various definitions put forward by social scientists in order to draw conceptual clarity surrounding this concept.

Most research on customary law has centred on the African continent during colonial and postcolonial rule. Given the scarcity of work done in the context of South Asia, the current study will draw insights from the rich mass of work done on customary laws of the African continent. This analogy holds, however, because of the similarity of the situations of the two unique geographical areas: in both there is the action of a colonial power seeking to impose its own order on unique and established polities, and leaving behind a nation-state model of European origin on geographic regions that embraced diverse peoples.

Custom and Customary Law

A distinction must be made between custom and customary law in this study for the purpose of conceptual clarity. They are quite distinct concepts and should not be lumped together. Custom is a usage and a practice, which may or may not have social recognition, and whose violation may or may not result in any sanction. On the other hand, customary law is a usage and a practice which is socially recognized, and the breach of this will result in some penal action. When a custom is practiced over a period
of time and found to be useful in maintaining harmony in a society, it becomes established as customary law (Vitso 2003: 5).

Among legal scholars, there has been an elaborate discussion regarding the status of customary law. The focus of discussion has been to what extent customary law could be considered 'custom' or 'law' (Allen 1961; Hart 1961; Lloyd 1966; Fuller 1969). Since customary law is not written, but passed on from generation to generation orally and allegedly lacks the clarity and certainty of enacted law, some scholars have relegated it to a secondary status vis-à-vis statutory law. But others hold that customary law provides "practical guidance for daily interactions and effective solutions for problematic situation in a more satisfying manner than that provided by the formal legal system."22

However, amidst such division of opinion, many scholars uphold that customary law is indeed law and should be distinguished from mere custom (Elias 1956; Allen 1961; Lloyd 1966). According to Lloyd, custom is not inferior to law. "Broadly speaking, however, the vital contrast between primitive custom and developed law is not that the former lacks the substantive features of law, or that it is unsupported by sanctions, but simply that here is an absence of centralized government."23 Lloyd does not relegate custom to mere practices of a community. He finds custom imbued with the characteristic features of law and substantially as powerful as law. This is a major departure from the mainstream bias against custom as lacking the certainty, clarity and legitimacy of enacted law.

Meaning of Customary Law

The ordinary manner in which laws, as understood in mainstream jurisprudence, come into existence is through the intervention of legislative, executive and judicial organs of the state. The legislature and executive wing of the state may enact a law to guide and govern the behaviour of its citizens. The judicial branch might give birth to laws in the process of resolving disputes. Given such a scenario, one might be tempted to conclude that laws have its origin only in the actions of the state. This is by no means true, since there are vast arrays of human activities which come outside the jurisdiction of the state. As Sheleff puts it,

Thus, although one of the main characteristics of a state is its power to make laws, yet, however extensive its power, however entrenched its sovereignty, however exclusive its claims, there will always be patterns of behaviour that will follow the contours of norms that are extra-legal, there will always be subjects who will respond to obligatory demands that stem from non-governmental sources, there will always be interactions that will be determined and disputes that will be resolved by standards and procedures that emanate directly from the life of the people and the reality of their society.24

Sheleff rightly points out that there are norms of behaviour and patterns of interactions which have non-governmental origin impacting the lives of the citizens of a state. The state has no control over innumerable activities which come under the influence of non-state legal agencies which are procedurally as well as substantially as sturdy as state laws. One such non-state legal arena is the customary law system governing the tribal communities in the world. This body of law is variously defined as customary law, traditional law, indigenous law, native law, living law, people's law or local law-ways.

24 Ibid., p.3.

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A comprehensive and well-accepted definition of customary law is neither to be found in legal literature nor in anthropological writings. It is a disputed term and a glance at the literature surrounding customary law in social sciences will highlight the various contestations and debates that surround it (Allen 1961). Customary law “is generally understood to be that body of law, which is predominantly oral rather than written, and which derives its authority from sources other than the State.”25 It has been loosely defined as non-legislated law in the context of a tribal society (Pospisil 1971: 195).

Customary Law in Western Jurisprudence

Not much effort has been made by western jurisprudence in understanding the dynamics of customary law. Rather, it has concerned itself with defining the concept of law using western concepts and categories. Such an approach used to understand customary law, as will be noticed soon, tends to be lopsided (Bennett & Vermeulen 1980: 211).

Two schools of thought, namely, the analytical school and the historical school, vied with each other to determine the legal status of customary law. The analytical school of jurisprudence did not give customs the status of law. Some even considered customs of tribal societies just a fetish, having no grounding in reason and logic (Elias 1956: 28). On the other hand, the historical school of jurisprudence gave customs legal status even to the extent of making it the precursor of common law (Allen 1961: 2).

According to John Austin, probably the greatest spokesperson of the analytic school, the existence of sovereign will is the absolute requirement for the origin and imposition of law. To him law is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."26 This implies that law is legislated and enforced upon society by a sovereign who is obeyed by people. An authority standing high above society, issuing commands and imposing them on citizenry, is the picture one gets of the Austinian view of law. The approach here is top-down. Customs and customary law have no legal significance because they are not the commands of the sovereign or the legislature. There may be certain rules of conduct set by men in tribal societies but they cannot be called laws. Since a determinate political superior does not issue these rules of conduct, they cannot be given legal status (Allen 1961: 67).

Later thinkers and writers in jurisprudence like Gray (1921) and Salmond (1946) have attempted to modify the definition of law from command enacted by an intelligent being on his subjects to law as enforced by agencies like courts. They emphasized the determining role of courts in recognizing customs and giving it the status of law. What is implied in such an understanding is that law exists only in organized societies, which have a sovereign head and centralized legal bodies like courts to enforce the will of the sovereign. Those societies which lack a centralized political and legal organization must be regarded as having no law. Such a view denies the existence of customary law in many acephalous tribal societies.

On the other hand, for Savigny, the propagator of the historical school of jurisprudence, law has its roots and anchoring in society. It develops within society through the instrumentality of people and has its own vitality. It is spontaneous and grows upwards independently of any sovereign will. The approach here is bottom-up. The rules and norms are deeply embedded in the lives of people; they are carved out from the daily interactions and patterns of behaviour. According to Savigny,

...all law is essentially the product of natural forces associated with the Geist of each particular people, and nothing is more representative of these evolutionary processes than the autochthonous customs which are found to exist in each community, and which are as indigenous as its flora and fauna. Custom carries its own justification in itself, because it would not exist at all unless some deep-seated need of the people or some native quality of temperament gave rise to it.\(^{27}\)

Thus Savigny bestows primacy of position to customs and customary law in the history of jurisprudence. To him, law is a collection of prior existing rules and norms, an expression of the spirit of the people. This view also accommodates itself to a supreme established authority whether it is a sovereign or a legislature. But it is one of the sources of law and is subject to law. In other words, it is subject to society and enforces the will of society.

The above analysis succinctly highlights the pitched battle that has been fought between two diametrically opposed schools of thought on the status of customary law. The analytical school of jurisprudence tends to see law as the property of the so-called 'civilized societies'. It claims that law per se does not exist in tribal societies. Some would recognize the existence of rules of conduct, but relegate them to a secondary position vis-à-vis the common laws and statutory laws. The historical school of jurisprudence, on the other hand, recognizes the presence of customary law in tribal

societies. It sees the origin of law in customs. In customs, they find a rich mixture of rules, norms and laws.

These antithetical views of the analytical and historical schools of jurisprudence have a significant bearing on the relevance and application of customary law in tribal societies. While the analytic school finds nothing of use in customs, the historical school finds in customs the true source of all law, deriving it from the common consciousness of the people. While the former traces the foundations and moorings of law in a sovereign will, the latter school finds law valid only in so far as it makes known and embodies the customs of a society.

**Customary Law in Anthropological Literature**

Three authors, namely, Elias, Pospisil and Chanock, have discussed the various approaches to understanding customary law. Elias, in his book *The Nature of African Customary Law* (1956:29), makes a distinction between earlier anthropologists and later ones. While the earlier ones see little or no law in African societies, the later ones are much more perceptive of the realities of tribal societies of Africa and see a great deal of legal content in the customs of these societies. For earlier anthropologists like Hartland (1924), Morgan (1877) and Hobhouse (1920) everything was custom and there is no distinction between custom and law. Tribal society was depicted as completely steeped in tradition and custom.

The later group of anthropologists, according to Elias, are much more sensitive to the indigenous institutions of tribal societies. They contend that customs do exist and so do laws in these societies. They make a distinction between customs and laws. Some of them find the judicial system in these societies highly developed and even similar to a
western judicial system (Mair 1936: 270; Meek: 1937; Gluckman 1955). Elias quotes Dr R H Lowie to portray the remarkable state of the judicial system of tribal communities in Africa: “Among the Negroes of Africa primitive jurisprudence attains its highest development. In precision and scope their code rivals that of the Ifugao, but unlike the Ifugao the Negroes have almost everywhere an orderly method of procedure before a constituted tribunal. They display a remarkable taste for juridical casuistry and a keen enjoyment of forensic eloquence.”

While the older anthropologists go to one end of the pendulum in denyng the presence of laws in these societies, the later anthropologists go to the other extreme in proving the presence of a full blown judicial system patterned like the western judicial system.

If Elias puts anthropologists in two groups, Pospisil puts them into three. The first and second category of Pospisil and Elias match; the third category is something specific to Pospisil. Writing in the 1970s, he makes the important observation that the tendency of older anthropologists of making custom the king has not died down but still persists, being kept alive by some contemporary authors (1971: 12). He cites Sidney Hartland, who portrays a tribal person as someone “hemmed in on every side by the customs of his people...bound in the chains of immemorial tradition...whose fetters are accepted by him as matter of course; he never seeks to break forth...” Further for Hartland, law would be equal to “the totality of the customs of the tribe.”

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30 Ibid.
As a reaction to the collapsing/dissolving of law into customs there arose second category of anthropologists, whose writings strove to define law rigorously using western legal concepts and categories (Gluckman 1955; Steenhoven 1962). Some laid stress on institutions that administer justice like courts. Those societies which did not have such agencies were by definition lawless. Thus Radcliffe-Brown, influenced by Pound's definition, stated "Some simple societies have no law, although all have customs which are supported by sanctions." Pospisil goes on to quote Van Den Steenhoven (1962) to prove this tendency of analysing the judicial system of African tribal societies through the prism of western jurisprudence, which results in a narrow ethnocentric approach to the question of the concept of law.

Gluckman (1955) maintained that different legal systems can be compared with the help of certain universal terms like "obligations", "rights" and "reasonableness". His effort was at tracing universal characteristics of jurisprudence so as to understand the judicial processes of legal systems in the world (Saltman 1977: 2). According to him there are certain concepts in western jurisprudence which might help in building frameworks within which tribal judicial processes could be analysed (Nader 1997: 3). In his cross-cultural comparative studies he found parallels between principles of western jurisprudence and jurisprudence in other cultures. For instance, he showed parallels to the concept of "reasonable man" as found in English law in other judicial systems under the category of reasonableness. In all this, his effort was to see parallels between western jurisprudence with that of customary law systems, though seen from the lens of western legal concepts and categories.

31 Cited in ibid., p.13.
The third group of anthropologists object to the trend of viewing societies governed by customary laws through western jurisprudential conceptual categories (Bohannan: 1957; Zake: 1962). According to them, this attempt results in the misleading conclusion of finding many similarities between these two systems. They suggest a framework which tries to ‘comprehend legal phenomena in these societies’ through the mediation of their own unique legal structures and content (Pospisil 1971: 15). Bohannan, who worked with the Nuer people of Sudan, in sharp contrast to Gluckman, who worked among the Lozi of Zambia, characterizes this new trend.

Bohannan was against the use of Western terms and concepts in order to understand and analyse customary law. To him, developing native categories in order to understand customary law is crucial, rather than borrowing alien categories to comprehend the folk systems of indigenous communities. “Anthropologists must, in addition, understand and make overt the folk image of the actors in foreign cultures.”32 To Bohannan, an understanding from within a jurisprudential system is vital in order to comprehend the legal concepts of a society under scrutiny. He suggests a new framework to understand the legal system of these societies: “Obviously, the human beings who participate in social events interpret them: they created meaningful systems out of the social relationships in which they are involved. Such a system I am going to call a ‘folk system’ of interpretation, by analogy with ‘folk etymology’.”33 Thus in place of ‘analytical system’, he proposes ‘folk system’ as a theoretical framework to comprehend judicial system of tribal societies.

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The attempt of the third group of anthropologists was to show that there is a distinct system of jurisprudence at work in customary law societies. The terms, concepts and categories used by customary law jurisprudence are unique to them. Bohannan calls it a 'folk system'.

If Elias and Pospisil while surveying the anthropological literature recognize the presence of customary law in tribal communities, Chanock suspects its very existence. In his book, *Law, Custom and Social Order* (1985), he seeks to show that African customary law developed recently, during the colonial period. It arose as a reaction to the specific political, economic and socio-cultural conditions of colonial rule. He thus debunks the theory that these laws are immemorial and are part and parcel of tribal identity. In his own words, customary laws are invented during colonial rule: “I will use the word ‘custom’ for norms and practices existing in the pre-colonial period and for those used in dispute-settlement, not involving governmental agencies, under colonial rule. Customary law refers to the norms and practices recognised by the courts in colonial period. Custom changes: the customary law is what Hobsbawm has called an ‘invented tradition’.”34

According to Chanock these laws were crystallized in a particular historical context by a particular group of men whose outlook had been shaped through the prism of colonial rule (Chanock 1985:22). It was defensive in spirit so as to adapt to the changes that were ushered in by a new colonial economic and political paradigm (Chanock 1985: 4). The result was the invention of a customary law, which was the amalgamation of the past and the present, where the present has a much larger say. In

saying that African customary law is of a recent invention, he is not denying that there was law during pre-colonial times. He characterizes pre-colonial law as norms and practices used during dispute-settlement processes (Ibid: 240). One of the important points that Chanock makes is that it may be impossible to retrieve the pre-colonial laws.

According to Chanock (1978) in Malawi the chaotic, barbaric, and brutal customs of tribal communities were pitted against the humane, refined and just British common laws. Such a representation of pre-colonial customary law was used by African leaders in the post-colonial times to legitimize their authoritarian rule as against the colonial legal system. Leaders in the post-colonial period attributed an authoritarian nature to pre-colonial customary law so as to confer the legitimization of tradition on their pretensions to arbitrary rule and so as to support a cultural nationalism in ostensible opposition to the colonial legal system. A distorted customary law was used also by men, with the aid of the colonial courts, to assert authority over women (ibid).

Thus Chanock’s work has shattered the conception of a customary law as something pristine which can be retrieved in immaculate form from colonial moorings. He holds that customary law was an offshoot of contemporary colonial relationships and not a residue of pre-colonial norms and practices.

Issues Arising from the above discussion

Four general trends emerge from the above analysis on the approaches to understand customary law in legal and anthropological literature. First, a perennial debate takes place between the analytical and historical schools of jurisprudence regarding the presence of law in tribal societies. The analytical school denies legal content in customs, while the historical school finds in these customs a rich treasure-trove of legal wisdom.
This divergence of opinion is due to the different conceptions of the term ‘law’ by the two schools. However, the rival schools agree that prior to the legislation of a king, there existed countless norms and rules regulating societies. While the historical school makes these large masses of unwritten rules legal and binding, the analytical school asserts that these are simply ‘rules of morality’ which have no binding effect.

Second, we find the tendency of dissolving custom and law amongst early anthropologists, versus the tendency of finding a replica of a western judicial system in tribal societies amongst the later anthropologists. This antithetical tendency among anthropologists was largely influenced by their western cultural background. The rivalry between the two legal schools mentioned above seems to have had its impact on anthropologists. The early group of anthropologists, while mapping the history of tribal communities, did not discover anything of legal substance in the tribal justice system. They rolled all the norms and rules of these societies into customs. As a sharp reaction to this tendency, the later set of anthropologists found many similarities between western and tribal judicial systems.

Third, there is some attempt to free the analysis of customary legal systems from western conceptual tools to folk system stressing the fact of cultural relativity. Many anthropological works on customary legal systems were assessed and analysed through the prism of the western legal system. This, according to Bohannan, resulted in sketching an incomplete and incorrect picture of the customary legal system. The customary legal system has its own set of concepts and institutions, arising in a unique context. To analyse it according to the standard of a western judicial system would lead to a biased
understanding. Thus Bohannan attempts to comprehend customary legal systems through native conceptual tools.

Fourth, the study of Chanock, which points out that customary law is an invention of tradition, both by colonial administrators as well as natives themselves during colonial rule. He makes a clear distinction between custom and customary law. To him custom was "rules and norms" that guided tribal communities during pre-colonial times, whereas customary law was something that came into existence during colonial period. He has stressed on the irretrievability of customary laws as they existed during the pre-colonial times.

The above-mentioned issues, culled from the analysis of literature in anthropology and legal studies, pinpoint the varied positions on the existence of customary law. The early group of anthropologists, legal experts and administrators refused to acknowledge the presence of law in tribal societies. Their argument was that pre-literate society was mired in customs and superstitions and there was no scope for law in such a situation. As a reaction to such an extreme stand there emerged a set of anthropologists and administrators who recognised the presence of legal systems in these societies. Even among anthropologists, some argued that customary law per se is irretrievable and what is flaunted as customary law is an invention of tradition by colonial administrators in collusion with the native people.

To summarize, there are roughly three positions regarding the legal status of customary law. The proponents of first position refuse to see any legal content in the customary law of tribal communities. In the second position, customary law is treated as analogous to common law and it is even seen as a precursor of common laws. In the
third position, it is seen as an invention by the elites of a society to meet the vested interests of a dominant group. Each of these positions is based on a particular set of assumptions and concepts surrounding customary law. Perhaps a quick glance at various definitions proposed by various anthropologists and lawyers should help in arriving at conceptual clarity.

**Definitional Analysis of Customary Law**

According to Malinowski, customary law is “the positive law governing all the phases of tribal life, consists then of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society.”\(^{35}\) The legal scholar, Lon Fuller, talks of customary law in a similar vein: “Customary law arises, then, out of situations of human interaction where each participant guides himself by an anticipation of what the other will do and will expect him to do. There is, therefore, in customary law something approaching a contractual element; its underlying principle is reciprocity of expectations.”\(^{36}\)

This definition of customary law underscores the element of reciprocity and obligation. Customary law is not merely a habit. The members of a society consider it obligatory. An element of duty, responsibility and expectation is deeply ingrained in this concept. An element of give and take is inbuilt in the concept of customary law.

Some critics find fault with Malinowski for over-emphasizing the element of reciprocity (Pospisil 1971: 30). According to them reciprocity entails a high degree of rational behaviour which takes a long-range view of a situation and is not influenced by

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reward or penalty in a particular case. They argue that this sense of the balancing of reward and condemnation, keeping the well-being of the community in mind, is seldom found anywhere in the world.

Another aspect of this definition points to the all-pervasive nature of customary law having a say in every stage of the life of an individual and community. This all-pervasive nature of customary law seeping through every stage of an individual’s life gives an impression of hyper-regimentation in tribal society. Such a society may suffer from an over-dosage of norms and regulations guiding every bit of life from birth to death.

According to Pospisil “By customary law, then, will be meant a law that is internalised by a social group. A law is internalised when the majority of the group considers it to be binding, as when it stands for the only proper behaviour in a given situation. If such a law is broken, the culprit has a bad conscience or at least feels that he has done wrong – that he has behaved improperly.”

The fact of internalisation of an appropriate behaviour in a specific situation by a social group, which is binding, is underscored in this definition. An accepted behaviour of a group through some internal mechanism becomes a customary law. An authority, too, can impose such a law, but it has to be gradually internalized by a group. Pospisil mentions of two processes of internalization, namely, psychological internalization and social internalization. The former refers to the response of an individual when confronted with a new response to a given situation. The new response is reinforced on the previous ones, thus altering the behaviour pattern at the individual level (Pospisil 1971: 198-204).

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The latter process, that is, social internalization, takes off from (has its source in) psychological internalization. When psychological internalization has taken place in a large number of individuals this can be properly called as social internalization (Ibid: 204). "An increase in the number of those members [individuals who have psychologically internalized a law] may be called social internalization."^38

According to Dundas "Customary law is the experiences of generations which successively have cast this and that aside, tried many methods and found them to fail, until at last some course remained open which proved itself the most workable and acceptable, not because it met merely one requirement, but because it fitted into all other circumstances. Therefore it is a deeply-thought-out code, and the experience and intellect of generations have worked to make it one link in a chain of usages and ideas."^39 Dundas finds the experience and reflection of generations of ancestors which sifted the best from various alternative behaviours as the backbone of customary law. The chosen path was arrived at after generations of ancestors tested the workability and acceptability of a norm in responding to disturbing circumstances.

The early set of anthropologists belittled the customs and norms of tribal communities as merely a bundle of superstitions and rituals tied to some ancient beliefs. They had failed to see logic and reason behind the norms existing in these societies. Contrary to such an opinion, Dundas, working among the Bantu tribes in Africa, finds in their customary laws an intelligent and consistent code, shaped and moulded by the experience and intellect of generations of ancestors. These norms are to be seen not as

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38 Ibid., p.204.
abstract rules legislated by a sovereign or a body of legislators. These rules are to be found in particular contexts, especially in conflict-resolution situations.\textsuperscript{40}

To J. C. Bekker, “customary law is an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counselors, their sons and their son’s sons [sic], until forgotten, or until they became part of the immemorial rules…\textsuperscript{41}. This definition of Bekker underlines the paramount role played by memory in passing on the immemorial rules of a community from one generation to another. This definition can well apply to cephalous or centrally organized societies, but Bekker has not taken care to pay attention to those societies which are acephalous.

The editor of \textit{Journal of African Law} (1965) quotes a definition of customary law as applied in Tanzania:

Customary Law means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African community and accepted by such community in general as having the force of law, including any declaration or modification of customary law made under the Local Government Ordinance, but does not include any rule or practice which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly or superseded by written law; and references to native law and custom shall be similarly construed.\textsuperscript{42}

\textsuperscript{40} K. Llewellyn and E. A. Hoebel, 1941. \textit{The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence}. Norman: University of Oklahoma Press. This work on the legal system of Cheyenne community of Montana in the US by a legal scholar and an anthropologist using trouble-case methodology demonstrates the laws and norms of this community in regulating human behaviour and maintaining social cohesion. The authors, Llewellyn and Hoebel, discovered well thought out norms and rules guiding the legal regime of Cheyenne people.


This definition assumes the presence of a statutory law which is superior to customary law. Customary law is made subservient to the written statutory law. Most countries in Africa that have given recognition to customary law have some conditions attached to its application such that it should not be contrary to morality or public policy. Here is how the Constitution of Nigeria recognizes customary law: “The courts are directed to observe and enforce the observance of rules of native law and custom (rules of customary law) provided such rules are not repugnant to natural justice, equity and good conscience nor incompatible directly or indirectly with any written laws in force or contrary to public policy.” This definition is negative in tone. Rather than defining the term or enumerating its features, it tends to put limitations and restrictions on its use. The standard is the statutory law against which customary law is measured. If customary law goes against the state law, then customary law is invalid. The existence and legitimacy of customary law is incumbent on its not going against state law.

Yakubu (2005) contests such an assessment of customary law through the lens of state law. “The determination of whether a particular customary law is repugnant or not should not be based on the comparison of the English or Western system with the indigenous system or social value. A customary law can only be justifiably disallowed from being applied where its effect or its content will be an affront to reason, patently immoral or basically unjustifiable.” Whether customary law or western law, Yakubu would have both these laws go through the same test based on reason, morality and justice.

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Some authors have pointed out that many of the tribes of Africa and their customary laws were the creations of colonial administrators as well as of ethnographers (Snyder 1981; Ranger: 1995; Chanock 1985). “The British needed suitable indigenous forms through which to rule, and where these did not exist they might be imagined into existence.” These authors contend that the entire enterprise of customary law is the offshoot of colonial times and it has nothing to do with the age-old rules and norms of the tribal communities. In their opinion it is practically impossible to trace customary law in its pristine form. Customary law per se is irretrievable.

To Hobsbawm, customary laws are creations of a community in order to impose a particular set of values. He calls these laws invented tradition.

‘Invented Tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.46

Selective recapturing of history, even of recent origin, and cultural symbols of a society for the construction of a ‘tradition’ is the contention of this view of Hobsbawm. Thus customary law becomes a weapon in the hands of dominant forces in society to enforce a particular set of laws and regulations which benefit a select group of elites. The elites draw up rules and find in history symbols and values to bolster their claims.

Chanock, Snyder, Hobsbawm, Ranger, and others seem to focus upon the economic and political forces and purposes behind the formation and transformation of customary law. For Chanock, it is the colonial powers in Africa which have had a major

say in the formation and shaping of customary law, while for Ranger it is the dominant
group or the elite in society who are real initiators of rules and norms to control the vast
majority.

Khadiagala (2002: 2) disagrees with Chanock's thesis that colonial officials and
male elites of tribal communities in Africa jointly gave shape to the content of customary
laws. On the other hand, she holds that colonial officials made use of customary laws of
pre-colonial era to maintain law and order situation in a society that was undergoing swift
changes ushered in by colonialism.

Judicial patterns in Kabale District run counter to Chanock's assertion that
colonial officers and African male elders collaborated over the content of
customary law to bolster the authority of men over persons and property. Fearful
that rapid social and economic changes unleashed by colonialism would threaten
their fragile control, colonial officers perceived in customary law the best
possibility of maintaining order and stability.47

She also mentions that customary courts of colonial era upheld the right of
women to property. "The courts accorded women extensive autonomy over land through
the principle of gifting: once a man had allocated property to a wife's "house", the courts
made it difficult for him to take it back."48

Further, this school of thought on customary law, known as invention school, fails
to see the underlying ethnocentric roots and moorings of these laws (Beckman 1984: 28).
They seem to overemphasize sectional and dominant interests being upheld by customary
laws. But customary law is often described as forming part of an holistic worldview of
indigenous communities, suggesting that it can only be fully understood and
comprehensively applied within the community itself. Customary laws can govern many

48 Ibid.
aspects of community life – dispute settlement, land tenure and other rights, inheritance, family law, and political and social relations generally. This ethnic rootedness of customary law and its communal dimension seem to be sidelined by scholars of the invention school who hold that customary law is the work of dominant interests in a society.

The above survey of definitions has highlighted various dimensions and characteristic features of customary law. It has brought out the varied strands of thought among scholars in legal studies and anthropology regarding the meaning, application, and reach of customary law. In the rest of the section, effort will be made to draw out some essential attributes of customary law from the survey of definitions above so as to distinguish it from statutory law and to highlight its unique features.

**Attributes of Customary Law**

The definitional analysis of customary law has highlighted the difference of opinion among anthropologists and legal scholars regarding its meaning, origin, application and reach. Since there is disagreement among authors regarding the definition of customary law, an exercise which can help provide greater conceptual clarity could be drawing out certain attributes of the customary law from the perception of the authors discussed above.

By attribute is meant a distinctive mark, property, trait or characteristic of customary law. It is desired that by drawing out certain important attributes of customary law from the above discussion, a deeper understanding of the concept is reached.

In common law tradition, a custom to be treated as customary law should have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must
be certain; (4) it must be continuous since its immemorial origin (Callies 2005 :160). The well-known legal scholar Blackstone has a longer list of attributes of customary law\textsuperscript{49}. These attributes of customary law are well articulated, but are in the context of the western legal system. To that extent, such an understanding of the attributes of customary law is entangled in the web of western concepts and perceptions of law.

In this section, the discussion on the attributes of customary law will offer a different approach. The definitions discussed above are overwhelmingly from the discipline of anthropology. Their perspective, largely that of an outsider, has a different implication altogether. No doubt that the work of many an anthropologist has been critiqued as a product of collaboration with their colonial sponsors (Asad 1973). Yet their contribution to the understanding of the then nascent field of customary law is immense.

It has to be noted that the intention of a different approach to the attributes of customary law is not to belittle the contribution of legal scholars but to enrich it with the insights of anthropologists and other social scientists. With this as our backdrop, the following attributes can culled out from the discussion of approaches and definition of customary law.

**Customary Law is Oral in Nature**

Dundas, Pospisil and Bekker seem to stress the collective memory of a community as playing an important role in the retention and transmission of customary laws from one generation to the next. These laws were retained in the memories of the

tribal chiefs and his or her counselors and elders who passed them on to their sons and
daughters. They in turn passed them on to the next generation and this process continues
to this day.

When a community does not maintain documents of its spiritual, political, social,
and cultural values and ideals, does not keep records of certain crucial events that turned
its course of history, and does not maintain documents of certain crucial judgements
arrived in resolving some conflicts, the community in question is compelled to pass on
this vital information to future generations by word of mouth. The mode of
communication might often find expression in the narration of songs, stories, epics,
myths, tales and legends. These stories and myths contain instructions and guidelines
regarding the use and ownership of land, regarding the organization of familial, social
and political structures and regarding the highest values and ideals upheld by the said
community.

According to Borrows (2002), First Nations in Canada record their indigenous
knowledge and ancestral wisdom in stories and myths. “First Nations use an oral tradition
to chronicle important information, which is stored and shared through a literacy that
treasures memory and spoken word. The transmission allows for a constant recreation of
First Nations systems of laws.” These stories are narrated on various occasions like
religious ceremonies around birth, marriage, death, and during the resolution of conflicts.

The constant recounting of oral accounts helps the listener in inculcating the
cultural values and ethos of the community and in transmitting the customary laws of the
community to future generations. Spoken word and memory plays a crucial role in this

exercise of retention of information and its transmission. The laws contained in stories are orally passed on by elders from generation to generation. Different tribal communities use various forums to transmit these laws to the younger generation. Among the Nagas and Garos of Northeast India, there were bachelor dormitories for the proper education of youths in the spirit of their elders.  

Since the mode of communication of customary law takes the form of songs, stories and myths, some critiques have pointed out that it might lack clarity, uniformity and precision which are so much sought in western jurisprudence (Bennett & Vermeulen 1980: 212). Borrows (2002) rebuts this charge of lack of clarity and uniformity of indigenous laws. He holds that lawyers of mainstream legal system tend to mistake the fluidity and re-interpretation of customary laws for lack of uniformity and consistency.

This system of law does not depend on finding the ‘authentic’ first telling of such an event, uncorrupted by subsequent developments. In fact, the reinterpretation of tradition to meet contemporary needs is a strength of this methodology, although it purportedly distinguishes indigenous law from the common law. While the common law is itself continually reinterpreted to meet contemporary demands, the degree of fluidity is arguably greater within aboriginal oral cultures than it is within the common law.  

Another lacuna in the oral nature of customary law according to some legal professionals is its inability to apply the formal doctrine of stare decisis. They point out that since written records are not maintained, distinguishing precedence is practically impossible (Bennett & Vermeulen 1980: 212). Borrows counters this accusation by highlighting the sui generis nature of indigenous law vis-à-vis the state law.

The application of indigenous memories and words can thus be quite different from the application of common law precedent. But while non-ceremonial stories can change from one telling to another, such changes do not mean that the story's truths are lost. Rather, modification recognizes that context is always changing, requiring a constant reinterpretation of many of the account's elements. The fluidity of First Nations stories reflects an attempt to convey contextual meaning relevant to the times and needs of the listeners. While the timeless components of the story survive as the important background to the event being heard, its ancient principles are mingled with the contemporary setting and with the specific needs of the hearers.  

Borrows makes it clear that songs, stories and myths do take the place of precedents in conflict resolution forums. Constant reinterpretation of songs, stories, myths and practices might give an impression of inconsistency and discontinuity in the application of law which come in the way of recording precedence but this lacuna is overcome by the constant presence of timeless components of story and myth surviving as an important background.

The presence of stories, songs, and myths do take care of the Blackstonian attributes of customary law like immemorially and continuity to a large extent. The wisdom and knowledge of a community passed on through word of mouth in tales, songs and legends for generations satisfies the criterion of indelible roots and continuous usage in a tribal community.

**Customary Law and Mechanism of Reciprocity**

Malinowski and Lon Fuller stress the dimension of reciprocity as the hallmark of customary law. According to them, behaviour in tribal communities is largely based on mutual expectations. These mutual expectations take the form of obligations which are reflected in the behaviour patterns of the members of the community. These patterns of

53 John Borrows, op.cit., p.15.
behaviour take the form of obligatory customs and practices which gradually attain the status of law. Further, the behaviour of the members of a tribal community is guided by a long-range view of the situation.

It was noted above that Pospisil has critiqued such a mechanism of reciprocity in customary law as 'superrational behaviour' among people (Pospisil 1971: 30). According to him, the idea that the anticipation of rewards and penalty work as a guiding mechanism for daily actions is too much of a rational behaviour among human beings.

Yet as Malinowski and Fuller point out, it cannot be denied that the element of mutual benefit and punishment play out as mechanisms of social control in many societies. A society governed by customary law is not an exception to this rule. This does not mean that the mechanism of reciprocation can be applied to all circumstances and at all times. This could be equivalent to a society in which its members would be constantly vigilant of their obligations to each other all the time and in all situations leading to legal and moral suffocation.

Another aspect to be noted in the Malinowski and Pospisil exchange on customary law is their varying emphasis on the aspect of human interaction. While Malinowski tends to stress the communal dimension of human society, Pospisil has the solitary nature of human beings in mind. The stress on the communal aspect leads Malinowski to underscore the importance of the mutual exchange of beliefs and convictions in the creation and formation of customary law (Bjarup 2005: 351). On the
other hand, stress on the solitariness of human beings might lead to conclusions in the opposite direction for Pospisil (ibid).

**Customary Law as Internalized Norms**

Pospisil’s definition of customary law underscores the significance of an appropriate behaviour in a particular situation being internalized by individual members first and then by the members of the community. The internalization of behaviour becomes well accepted within the community and, in turn, becomes obligatory. Once it reaches the obligatory status, sanctions are imposed in case of violation of such an obligatory behaviour.

**Customary law lays stress on Reconciliation**

An essential attribute of customary law is its holistic and reconciliatory approach to the process of conflict resolution. Many anthropologists underscore the fact that the approach of conflict resolution in tribal communities is generally aimed at repairing relationships rather than deciding the rights of the parties involved in the conflict (Nader 1990; Bohannan 1957; Pospisil 1971). “Tribal courts, in many cases, consider it essential that the parties to a dispute be reconciled in order that they may discover a new *modus vivendi* and that the dispute and its harmful effects to the community may be erased. To achieve this goal, application of rules of law is not of primary concern.”^54^  

The focus in this system is reconciliation and rehabilitation of the affected parties. The aim is to find a solution, not to condemn the guilty. The effort is to set right the disturbed equilibrium in the community by trying to reconcile the warring parties. “In the case of dispute resolution, since the parties from rural indigenous communities must face

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each other in their small community after the dispute is settled, efforts are almost always made to produce two winners instead of a winner and a loser.\textsuperscript{55}

Unlike civil and common law, in a customary law system the application of a particular code of rules is not the crucial thing. No doubt that there are rules, norms, laws, and precedents to be followed in a customary law system, but the stress is not on their rigid application as in civil and common law system.

In civil and common law tradition, law implies a code of rules to be applied to a specific disturbing situation on the basis of appropriate facts and evidences which are tested and proved during the trial in the court. There may be, and indeed in practice there often is, a considerable degree of flexibility in the application of the rules but the ideal of western systems is to ensure that the rules are applied as consistently as possible, in an impersonal and unbiased manner. One party is judged guilty, the other innocent; penalty or compensation is awarded accordingly. This is not to deny the significance of compromises, settlements out of court and the other techniques of western litigation, but it does highlight the profound difference in the attitudes of European and African tribunals. Bohannan, in his work on the Tiv, observed that Tiv are concerned, primarily, with the settlement of disputes which arise in the community. He noted that, while Europeans emphasize in their legal systems the elaboration of codes of rules determining social conduct, the Tiv emphasize, rather, the counteraction of breach of the rules.\textsuperscript{56}

The flexible approach in the application of rules and norms in customary law is quite useful in finding a solution which is amicable and to the satisfaction of both parties to the conflict. This does not mean that customary law does not punish the guilty.

\textbf{Customary Law as Product of Gradual Evolution}

Dundas and Becker's definition stresses the gradual emergence of a well-thought-out code coming into existence in a trial and error fashion. This code of norms is not the product of one generation of members of a community but rather spread over many generations. Since it is evolutionary in nature, changes gradually accrue to a law which

\textsuperscript{56} T. W. Bennett and T. Vermeulen, op.cit., p. 212.
might get a different shape and meaning over a period of time. In the context of Nigeria, Yakubu, thus describes the evolutionary character of customary law:

> It is clear that customary law is not a prescriptive system of law. It is evolutionary. It grows with the people. The people to whom a particular customary law relates give it shape and determine its content. Customary law is not static, it may therefore change. This is what gives it dynamism. It is not a set of rules of by-gone days but it reflects the rules of conduct accepted by a set of people in the regulation of their affairs within the permissive extent of the law.\(^{57}\)

An understanding of customary law which comes into being not at one moment of history but over a period of time might come into conflict with the common law attributes of customary law, which underscores the importance of immemoriality and continuity. In fact in common law system, a custom to be valid has to be immemorial and continuous (Callies 2005: 166-173). Such an emphasis on continuity while tracing the roots of a custom may also resurrect certain old customs which might be irrelevant from the perspective of changes a community has undergone over generations.

The stress on continuity and immemoriality in common law is to check the distortion in customary law as well as to detect the sudden emergence of customary law which has no foundation in a specific community. These are noble intentions of common law system should be kept in mind while trying to incorporate the idea of gradual and evolutionary growth as one of the attributes of customary law.

**Customary Laws are Diverse**

Customary law has its origin in the interactions of people it purports to govern (Bjarup 2005: 151). To a large extent, it has its foundation in the collective will of a group of people living together in a specific habitat, though it could also be handiwork of

\(^{57}\) John Ademola Yakubu, op. cit., p. 209.
an authoritarian leader (Pospisil 1971: 208-232). Since customary laws originate in relatively decentralized forums, there is scope also for far greater diversity.

According to Lloyd (1966), from the point of view of substance customary laws are as solid as state laws. It is the lack of central authority which insists on uniformity, clarity, certainty and consistency that is missing in customary law. This in turn leads to diversity. Each tribal community will have its own set of customary laws woven and strewn around its creation myths and countless tales and stories. In acephalous societies each community evolves its own laws at its own pace dictated by the vagaries of time and place.

Another reason for diversity in customary laws is their area-specific origin. Most of these laws have their origin in the use of land and resources by a community. It is the prolonged use of certain practices and norms surrounding the natural resources that has led to the emergence of diverse customary laws specific to a habitat (Krishnan 2000: 49). Endorsing Krishnan’s view, Sangma (1981: 134) also emphasizes the distinct habitat and isolation from each other as one of the reasons for the diversity in customary laws.

Diversity of customary laws at an inter-tribal level within a nation is well documented. But it is not well recognized at the intra-tribal level. Sangma points out that diversity can exist at sub-tribal and village level (ibid). Customary laws differ because they are tied to a particular mass of land, to a particular culture and to the wisdom of particular group of human beings.

**Customary Law as Invention**

The traditions and customs can be newly constructed to serve political and social interest of dominant groups. In Ranger’s words “what men called customary law,
customary land-rights, customary political structure and so on, were in fact all invented by colonial codification." Thus customary laws are made in a particular historical context according to the whims and fancies of a ruling group.

The practitioners as well as supporters of customary law would argue that customary law is created by people. It has its origin and growth in the interactions of people within a consensual community. But there is also the other side, as argued by invention of tradition scholars, that customary law is quintessentially the creation of colonial rulers. In the African context, such an argument makes good sense. As argued by Chanock and Ranger, customary law was re-designed by colonial powers to suit their administrative needs. As Ranger (1995) argues the dominant economic and political forces from the native community themselves shaped and reshaped customary laws to suit their interests. Thus customary law has to be seen in both these ways, as creation by people as well as by colonial powers.

As the invention scholars argue, customary law as it exists today has been designed and re-designed by colonial powers with the full support of leaders and chiefs of a tribal community who wanted to maintain the status quo that they enjoyed. Chanock’s research (1985) among the tribal communities in Malawi and Zambia has borne ample proof to such a thesis.

**Conclusion**

In this chapter an attempt was made to arrive at a conceptual framework in order to understand customary law. Literature surrounding customary law in western jurisprudence and in Anthropology was analysed to draw out a theoretical framework.

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Since there was no unanimity among scholars on the meaning and definition of customary law, an alternative method of drawing out attributes of customary law from their definitions was followed.

The attributes, mainly drawn from the anthropological understanding of customary law, highlighted that these laws are oral in nature; to some extent they are based on the principle of reciprocity; they are internalized by individuals and communities; they are diverse; they aim at reconciliation rather than nailing down the guilty; they are evolved over a period of time and that some of them could be inventions of dominant groups in a society.