CHAPTER I
THEORETICAL BACKGROUND

1.1. Introduction

Law has traditionally been regarded as the property of only the 'higher' cultures and civilization (Pospíšil, 1971: ix). Roberts (in Ingold, ed., 1994: 962) has pointed out that the very concept of 'law', with its claimed separation of the cognitive and normative domains, its identification with a discrete sphere of the 'ought', may not always find counterparts in the small scale and technologically simple societies (which anthropologists have traditionally studied). According to some adherents of this restricted view of law, 'unless there are official agencies to decide disputes by interpreting and applying legal rules to given situations- that is, unless there are courts- there is no law as defined here' (Davis et al., 1962: 45). Western normative legal philosophy has traditionally perceived law as an 'internally coherent and unified body of rules' (Vincent in Barnard and Spencer, ed., 1996: 330) and those which did not strictly conform, were excluded from the purview of law. It has been pointed out that such a Western biased definition of law leaves no room for consideration of any but the law of Western Europe and countries colonized by Europeans; not only excluding tribal societies from the benefits of law, but also denying the existence of law in many non-European and even in some ancient European civilizations like that of Greece and Rome (Pospíšil, op.cit.: ix-x).

According to Pospíšil (op.cit.: ix-x), anthropology of law or legal anthropology avoids such ethnocentric bias and has several advantages over such disciplines as jurisprudence, political science, and sociology. First, it is not culture bound. It studies societies comparatively, no matter how 'primitive' or 'civilized', and does not, as a rule, discriminate qualitatively in favour of one type of human society against another. Second, in contrast to some of the other social sciences, it does not arbitrarily carve out
from human culture a segment such as the economy, political structure, law, personality structure, or social relations, but conceives and studies human culture as an integrated whole. Law should be studied as an integral part of the cultural whole, not regarded as an autonomous institution. Third, modern anthropology does not concentrate upon the study of social forces and the super organic to the exclusion of the role of the individual. Both are taken into consideration. Fourth, society is no longer viewed as in a static social equilibrium, which is disturbed by derelicts. Rather, it is conceived as a dynamic phenomenon, so that the social role of law is not limited solely to maintaining the status quo. As a consequence, the claim is not made that all law has to be supported by public sentiment or that it emanates from an inevitable course of social change that an authority-lawyer or tribal chief can interpret but not alter. Fifth, anthropology of law is a science of law and, therefore, empirical.

According to Roberts (op.cit.), since the mid and later nineteenth century, which may be regarded as the beginning of anthropology of law, there has been an unbroken succession of quite different 'anthropologies of law'. In the mid and later nineteenth century, 'customary', or 'primitive', or 'folk' law featured prominently in efforts to characterize, and provide an ancestry for, 'modernity'. Under Malinowski and Radcliffe-Brown, these evolutionary studies were replaced by 'anthropology of order'. After the Second World War, legal anthropology became the study of dispute processes. This focus gave way in turn to a new legal anthropology which examined the part played by law in the imposition of colonial domination, and which has now itself been transformed into legal pluralism. However, the above compartments are not watertight and the interest of nineteenth century scholars in 'primitive' or 'customary' law has survived up to the present day, with the realm of legal studies trying to embrace the study of 'suppressed discourses' of 'non-state law' in the present. Thus, it may be concluded that interest in customary law has constituted an important focus of the anthropology of law, right from the mid and later nineteenth century up to the present, albeit for different reasons and with varied perspectives.

As per the Macmillan Dictionary of Anthropology (1986), the term 'custom' refers to cultural traditions or habitual forms of behaviour within a given social group. The concept of custom implies not only the statistical occurrence of a given behaviour
but also a prescriptive dimension: customary behaviour is that which is required or expected of the members of society under any given circumstance. It has been pointed out that customs in stateless or pre-state societies perform the functions of social control attributed to law in state systems. To behave contrary to custom may attract sanctions ranging from social disapproval to ostracism or other forms of punishment. According to the *Black's Law Dictionary* (1968), when custom by its common adoption and long varying habit has come to have a force of law, it may be termed as customary law. Sapir (in Seligman and Johnson, *ed.*, 1954: 658) defines custom as the totality of behaviour patterns which are carried by tradition and lodged in the group, as contrasted with the more random personal activities of the individual. There is, however, considerable divergence among the main schools of legal thought regarding the legal validity of customs. The Austinian school regards law as the command of the sovereign backed by sanction and hence, stress that custom cannot become positive law unless it is recognized by a court or expressed in a statute (cited in Bandyopadhyay, 1994: 91-92). On the other hand, the Historical School of Savigny claims that custom is the main vehicle of legal development, propounding that law is not made, but evolved from the bottom of the society and imposed from the top. Customary law is followed because it is convenient, conducive and helpful to society and is reflective of societal norms and values (*ibid.*).

In traditional Indian jurisprudence and Hindu law, however, custom has always been regarded as an important source of law and the right of a community to govern itself by its own customary practices and laws has been treated as sacrosanct. The British rulers of India also recognized this right of the communities and acknowledged that Indians should be allowed to govern themselves by their own laws in matters of family, marriage and inheritance (Barpujari, 2007). For the first time in 1872, a legal statute officially recognized and provided legal validity to customary rights in the form of the Indian Evidence Act. In Independent India, customary laws have constitutional validity with Article 13 expressly stating that the term 'law' includes customs and usages having the force of law with the proviso that such custom or usage having force of law cannot infringe any of the fundamental rights conferred by the Constitution. However, not all customs have the force of law. Certain tests or essentials have been laid down by the jurists, which a custom must satisfy for its judicial recognition. These are the tests of
antiquity, continuance, peaceful enjoyment, obligatory force, certainty, reasonableness and conformity, with statutory law (Krishnan, 2000).

Though customary laws have long been the focus of legal anthropological studies; in recent times, they have assumed particular significance in indigenous societies brought under a legally pluralist regime, owing to attributes such as proximity, accessibility, speed, credibility, and responsiveness to changing needs.

1.2. Statement of the Problem

The North-Eastern region of India encompassing the eight states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and Sikkim is a legal pluralist region. Indigenous communities inhabit this region and indigenous customary law governs different spheres of their lives within the society. After independence and with the adoption of the Constitution in 1950, the tribal areas of the North-Eastern region were given a special status and placed under the Sixth Schedule thereof to provide for the administration of tribal areas by creation of Autonomous District Councils. According to the provisions of the Sixth Schedule, village councils or courts established or recognized by the Autonomous District Councils could try certain categories of criminal offences and civil disputes, according to customary laws. In the Sixth Schedule areas, on the one hand, there are the formal modern laws that are extended to these states. Besides, there are traditional customary laws of the community, which are being recognized by the modern institutions as well. In addition, with the Sixth Schedule states creating the District Councils, which have been empowered to enact laws for this region within their jurisdiction, there is a third set of laws enforced within the same region. The laws made by the Autonomous Councils are closer to customary laws and social practices of local communities and are applicable in cases where both the parties in a dispute are tribal.

In the present day, the Sixth Schedule status is applicable to four states of the North-East, viz., Assam, Meghalaya, Mizoram and Tripura. In the hill areas of Assam, the Karbi Anglong Autonomous Council and the North Cachar Hills Autonomous Council have been constituted under the Sixth Schedule. Following the Bodo Accord in 1993, Bodoland Autonomous Council (BAC) comprising contiguous geographical areas
between the Sankosh and Pansoi rivers was constituted in the Assam plains by an Act of the Assam Legislative Assembly. Granting of autonomy to the Bodo tribe paved the way for the establishment of similar autonomous councils for other plains tribes also. In the wake of rising ethnicity, the Government of Assam adopted a flexible attitude towards the growing movement among different plains tribal groups seeking autonomy within the State. The year 1995 witnessed a series of accords and legislations for constituting autonomous councils for the Tiwas, Misings and Rabha-Hasong plains tribes of Assam under state legislation.

The Tiwas (previously known as the Lalungs) form part of the great Indo-Mongoloid ethnic stock that migrated from their original abode in Tibet and Western China to the north-eastern part of India prior to the birth of Christ. They constitute a scheduled tribe (plains) of Assam, concentrated mostly in the districts of Nagaon, Morigaon, the Nartiang Elaka of Jowai sub-division of Jaintia district of Meghalaya, Dhemaji sub-division of Lakhimpur district, Titabar area of Jorhat district and Sonapur area of Guwahati sub-division of Kamrup district. A section of them, known as the Hill Tiwas, resides in the foothills and hilly areas of Karbi Anglong district. According to the 2001 census, the total population of Tiwas in Assam is about 1,70,622 individuals. Goswami (1972) has said that the Tiwas themselves categorise their different sections as sajwali, that is, highlanders and thalwali, that is, plains dwellers. Gohain (1993) has pointed out that the distinguishing feature of the Tiwas of the plains is that unlike the matrilineal Hill Tiwas, the group of Tiwas who left the hills and came down to settle in the plains did not like the matrilineal system which started when they were under the subjugation of the Jaintia king, Banchere and became patrilineal.

As already mentioned earlier, autonomy has been granted to the Tiwas (living in the plains) with the passing of the Tiwa Autonomous Council Act, 1995 in the Assam Legislative Assembly (with amendments in 2008), enabling them to preserve their ethnic identity and managing their affairs in tune with their customary laws and traditional practices. The Hill Tiwas, who continue to live in the Karbi Anglong district, are under the jurisdiction of the Karbi Anglong Autonomous Council.

The Tiwas traditionally have their own customary laws governing all aspects of their lives, which are administered by organisations and institutions of two categories: the
secular and religious. They have a secular village organisation composed of the elderly male members, which is headed by the *gaonburha* (village headman). The *gaonburha* decides cases (civil and criminal) in a *mel* (an assembly of persons come together to decide questions; also used to denote the village council) and inflicts punishment upon the offenders (Sarma Thakur, 1985). The village councils constitute but part of an elaborate three-tiered structure of secular administration, at the top of which is the Tiwa *raja* (king), followed by the council of village headmen and the village councils with a headman. According to their traditions, in the plains of erstwhile Nowgong, there were originally twelve Tiwa chiefdoms, namely, Nelli, Khola, Gobha, Mayang, Monoha, Kumai, Khaigar, Mikir, Barapujia and Tapakuchui. It appears that these chiefdoms were like feudatory units, under the ruling Ahom power between 12th and 18th century (the Tiwas had also lived under the suzerainty of the Jaintia kings). The chief or king of Gobha was called the *Deo Raja*. The other chiefs were called *Powali Raja*. The *Raja* had a number of hereditary office bearers to help him. This apart, the non-secular or religious organisation administering customary law was headed by the head of the individual clans- the *gharburha* or *bar zela*, assisted by other functionaries from within the clan itself. Besides, the *deori* (priest) presided over the worship at the *than* (centre of religious worship in the village).

It is in this background that the present research has sought to study the customary laws and traditional institutions administering these among the Tiwas of Assam, in the context of a legally pluralist regime characterized by overlapping between the laws imposed by the state, the administration of the newly constituted Tiwa Autonomous District Council and the centuries old customary laws, emanating from within the community. An attempt has been made to study the continuity as well as changes in the customary laws, assess their relevance in being amenable to modern needs and also analyse their role in the present day society. At the same time, it has also sought to achieve a comparative picture of the customary laws and institutions among the Tiwas residing in the plains (under the jurisdiction of the Tiwa Autonomous Council) and the Tiwas residing in the hills (most of which fall under the jurisdiction of the Karbi Anglong Autonomous Council).
1.3. Objectives and Rationale

The main objectives of the present research are as follows:

(i) to document the customary laws and practices prevalent among the Tiwas today in the realm of personal law dealing with family, marriage and inheritance, laws in the socio-religious sphere, and laws dealing with civil and criminal offences. These laws have been compared with those existing in the past, with the objective of tracing the changes in customary law in response to the changing needs of the times. For the purpose of understanding customary law in the past, case studies and interviews of elderly people of the community and folk narratives have been relied upon;

(ii) to analyse the present day role and relevance of traditional institutions which administer justice in accordance with customary law and ensure its enforcement. Attempts have been made to document the manner in which these institutions decide civil and criminal matters, restrictions on these powers, if any, by the modern legal regime and overlapping or conflicts with modern institutions;

(iii) to study customary laws and traditional institutions as part of a complex legal system which is also inclusive of formal state made laws and those made by the Autonomous Council. The functioning and powers of the newly constituted Tiwa Autonomous Council and the place it accords to customary law has been a key area of focus;

(iv) to evaluate the relationship between customary law and women, with the research seeking to look into laws which limit women’s participation in a wider society, the role of women in traditional institutions and system of administration etc.;
to examine the role of customary laws and practices in natural resource management and environmental protection. Here, attention has been devoted both to the secular and sacred spaces which are sought to be managed by customary laws.

The rationale of the research derives from the fact that while the customary laws of neighbouring tribes like the Karbis have been minutely documented by anthropologists as well as in projects combining anthropo-legal approach, not much work is available on this aspect of the Tiwas. This study is very much necessary due to the significance which customary laws of indigenous communities have come to hold in international and national fora in recent times. It has been pointed out that customary law and indigenous village institutions have an edge over the modern formal institutions and more specifically in legally plural societies (Pant, 2001). The main advantages being that since customary law emanates from within the community, the local people are more versed with the social norms and thus, they elicit better compliance. Again, justice is speedy in local and traditional courts. Customary law is more suited to the needs of the local communities even in the face of rapid changes. This is because customary law, contrary to popular belief, is not a static legal system but is flexible and adjustable to the needs of the times. Therein lies the significance of customary laws in traditional societies which have been brought under the modern legal regime.

Also, in-depth study of customary laws are imperative if policy changes are to be affected to provide customary laws a status at par with statutory laws as well as to facilitate the setting up of an empowering gender sensitive climate and to ensure that they do not strengthen old inequities fostered by certain customary laws. The present research is also significant in the wider context, with it being internationally debated that participatory development programmes and natural resource management is best successful where customary law prevails. Others have again sought to view it as a means of protection of indigenous knowledge and to link it to the modern intellectual property regime.
1.4. Theoretical Perspectives and Developments in Anthropology of Law

The anthropological interest in law is almost as old as anthropology itself, going back to the evolutionary speculation of Sir Henry Maine followed by Malinowski’s fieldwork in the Trobriand Islands. Anthropology of law, as we know it today, encompasses ‘an enormous diversity in the range of issues investigated, the theoretical orientations advocated and the research methods used’ (Danet, 1990: 538). In this section, an attempt will be made to trace the development of anthropology of law through its various stages, its leading works and the theoretical orientations that has shaped its evolution up to the present day.

1.4.1. Evolutionary Focus in Late Nineteenth Century

In the later half of the nineteenth century, when public interest in human evolution was at its peak, a diverse assortment of professional academics and amateur scholars began to converge around such issues as the defining characteristics of civilization and the nature and origins of human society (Conley and O’Barr, 1993: 41). At the time, the colonial period was also at its peak, when the colonial governments, for reasons of expediency, set up a dual system of government. While the national law provided the regime of norms in the superior courts and the magistrates’ courts, ‘native’ or customary law provided it in the local courts. All this provided an impetus for a large number of empirical studies of customary legal systems during late nineteenth century, with missionaries, travellers and civil servants providing a host of widely diverse descriptions of the customs that they encountered (Benda-Beckmann, 2001).

Many of the anthropologists of the nineteenth century began as lawyers or were drawn into anthropological study by their interest in ‘primitive’ law and the history of legal institutions. The German scholar Bachofen and his contemporary, the British scholar Sir Henry Maine, each published a comparative study of legal systems in 1861—Das Mutterrecht and Ancient Law respectively—works firmly rooted in an evolutionary perspective.
Maine traced the evolution of society via the evolution of legal regimes: he mapped out a broad transition from small, kin-based groups (where the steering role was exercised by the senior male agnate), followed by chiefdoms (where collections of these small groups of agnates became clustered together under chiefs) followed by large, territorial units. According to Roberts (*op.cit.*), for Maine, the story of society is a story of decision-making. The very origin of social life is identified in the steering role exercised within a group of kin by the senior male agnate. These old patriarchs made decisions on an *ad hoc* basis, no consistent rules underpinned the decisions they took, yet government was supposed to be by adjudication by the senior male, before whom all disputes were brought.

When collections of these small groups of agnates became clustered together under chiefs, the assumption of shared kinship remained the basic organising principle. Next came the territorial stage, when members started to identify themselves through their common occupation of a defined tract of land, rather than through kinship. Around the end of the second stage and the beginning of the third, law developed as rulers began to pronounce the same judgements in similar situations, providing their decision-making with an underlying set of rules. In the third stage, the settlement of disputes fell into the hands of specialised elite, who alone had access to the principles to be followed in their resolution. In the words of Maine, 'what the juristical oligarchy now claims is to monopolize the knowledge of the laws, to have the exclusive possession of the principles by which quarrels are decided' (1861:7).

The fact that most of the key protagonists in early anthropology had professional training and experience as lawyers is significant for several reasons. The most important among them being that this initial line of inquiry helped established law as a core cultural element that anthropologists should seek and study, a development in the earliest anthropological theory significant, if for nothing else, because it stood as a counterpoint to prevailing perceptions of indigenous peoples at the time (which may not have suggested law as the most likely field of inquiry). Maine, Morgan, and other nineteenth century scholars' association with the branch of inquiry that would later become anthropology helped positioned law at the forefront of substantive topics for future research, and legitimised legal training as relevant to the work of an anthropologist.
1.4.2. Beginnings of Modern Anthropology of Law - the Problem of Order

From the beginning of the twentieth century, a large number of empirical studies began to appear on customary legal systems. Until then, the focus had been on a description of the rules of a particular society. But due to scholars like Malinowski, the focus shifted towards a study of the working of the law in society. Malinowski's *Crime and Custom in Savage Society* (1926), based on fieldwork in the Trobriand Islands, became one of the most famous examples in this tradition where he viewed 'primitive' law as the rules which curb human inclinations. Malinowski adopted a functionalist approach that came to define his work; more importantly, his approach, assumptions, and research questions established a contrast between the anthropology of law and socio-legal inquiry in other disciplines (setting aside, for example, the traditional preoccupation of legal studies with defining law and characterizing its various forms):

'In looking for 'law' and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid. We shall see that by an inductive examination of facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organisation of savages' (Malinowski, 1926: 11).

Roberts (*op.cit.*) refers to this stage in the anthropology of law as the stage devoted to contemplating the problem of 'order'. As sustained attention came to be directed to the small-scale, relatively simple societies, it became clear that many of these societies had no obvious centralised authority, let alone the differentiated institutional arrangements associated with government in the West. For observers coming from cultures where 'order' had become linked to the accomplishments of kingship or some
other form of self-conscious administration, this seemed problematic. Malinowski’s response to the problem of ‘order’, at least so far as the Trobriand Islanders were concerned, was that compliance with socially approved norms was ensured through the complex of reciprocal economic obligations which bound members of the society to each other.

Malinowski argued that Maine’s evolutionary scheme rested on a ‘fundamental misunderstanding of the nature of governance and social control’ in ‘primitive’ societies. (Malinowski, 1926: 56). Malinowski’s ethnographic observations revolved around three main points: (i) Trobriand society was generally orderly; (ii) this order was maintained not by ‘codes, courts, and constables’, but rather through ‘a body of binding (reciprocal) obligations’ whose enforcement was undergirded by economic reality: a ‘keen self-interest and watchful reckoning’ and ‘rational appreciation of cause and effect’; and (iii) individuals frequently tested their social order through self-interested acts of deviance and resistance, demonstrating that Trobrianders were not ‘slaves to custom,’ as earlier theorists had characterised ‘primitive’ societies. Malinowski ridicules Durkheim for envisaging people in ‘primitive’ societies as virtual automata, blindly and unthinkingly complying with long-standing customs. In De la Division du travail social (1893), Durkheim had claimed that in societies characterised by ‘mechanical solidarity’, order is primarily secured through a shared repertoire of common understandings which are comprehensively internalised by the societies’ members- a position which Durkheim partially reiterated in his last book, Les Formes élémentaires de la vie religieuse (1912), where he described the inhabitants of the primitive world as more embedded in society than their modern counterparts.

Malinowski regarded law, essentially, as anything that produced and maintained social order; Crime and Custom in Savage Society’s central project was to discern what behavioral patterns control antisocial deviance. Malinowski drew criticism for employing vague and inconsistent definitions of the term ‘law’ throughout his career. Moore suggested that ‘the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships. It could almost be said that by its very breadth and blurriness of conception,
Malinowski’s view made it difficult to separate out or define law as any special province of study. Law was not distinguished from social control in general’ (1970:278).

Malinowski’s contemporary, Radcliffe- Brown, adopted a position much closer to that of Durkheim. According to Roberts (op.cit.), Radcliffe- Brown’s *The Andaman Islanders* (1922) had a rule- centred quality; and although he stressed the need for sanctions to ensure compliance with rule, his theoretical work was largely focused at the level of structure. In his entry on law in the 1933 edition of the *Encyclopedia of the Social Sciences*, Radcliffe- Brown explicitly followed Roscoe Pound, the American jurist in identifying law as ‘social control through the systematic application of force in politically organised society’ (1933:202). By defining law in terms of organised legal sanctions, he concluded that in some societies, there is no law. He described the Andaman islanders whom he studied as a people without any law at all.

In summary, this period in the history of anthropology of law was characterised by a divide between those who have held to institutional definitions derived from Western legal and political theory (like Radcliffe- Brown) and the Malinowskian conception of law, which does not distinguish it from social control in general.

1.4.3. Anthropology of Law as the Study of Dispute Processes

During the 1950s, British, South African and American Scholars doing research in Africa developed a rich research tradition in the study of customary law with a strong focus on case histories of disputes. Hoebel (1954), Gluckmann (1955), and Gulliver (1963), disregarded the colonial state and its representatives, and did not consider it necessary to deal with complex normative structure. Bailey (1960), Bohannan (1957), Fallers (1969) and Turner (1957) were the other major figures in post-war social anthropology who concentrated their attention on the study of disputes.

Perhaps the earliest work in this regard which influenced the vast majority of the above mentioned authors was *The Cheyenne Way* (1941), which was the result of a collaboration between Karl Llewellyn, an American law professor and leader of the ‘Legal Realist’ movement, and Adamson Hoebel, a young social anthropologist. Llewellyn and Hoebel elicited oral accounts of nineteenth century disputes from
Cheyenne elders. They hoped to develop substantive areas of Cheyenne law (or ‘law-ways’) by closely analyzing ‘trouble-cases’—instances of hitch, dispute, grievance, (or) trouble’ (1941. 21) where individuals’ deviant behaviour strained the social fabric in such a way as to reveal the Cheyenne’s norms and procedures for handling disputes. The principal appeal of the case method for Llewellyn and Hoebel lay in its potential for facilitating a comparison between stated norms and actual behaviour in Cheyenne society.

In a chapter titled ‘Marriage and Sex’ of the book for example, the authors presented brief descriptions of several wife-absconding cases, from which they discerned six ‘principles’ or ‘patterns of action’ on the part of an aggrieved husband in response to ‘the violation of his marital rights’:

(i) ‘There is the basic and ideal norm according to which the husband made no move, but waited for the emissary, usually a tribal chief, to come from the aggressor bearing the pipe…’
(ii) The wronged husband may send a chief with a statement of his demands.
(iii) The aggrieved husband might steal a horse from the aggressor’s herd.
(iv) The aggrieved husband might shoot a horse from the aggressor’s herd.
(v) ‘Rarely’, the husband kills the absconded wife ‘without any attempt at legal settlement’. However, ‘this must be regarded as illegal’.
(vi) ‘The husband could demand the return of his wife’.

(Llewellyn and Hoebel, 1941: 201-202).

Today, Llewellyn and Hoebel’s findings invite reanalysis from a number of different perspectives. According to Synder (1981: 143), ‘Llewellyn and Hoebel’s pioneering application of the case method yielded, in the end, some famously muddled conclusions about Cheyenne law-ways and law-stuff’. However, he acknowledges that their work provided a methodological model now considered the standard research method in legal anthropology.

According to Conley and O’Bar (2004: 208), this generation of research may generally be noted for two fundamental characteristics best addressed separately. All but a few studies from this era shared in common (i) a primary focus on identifying societies’
legal rules and basic jural postulates by drawing inferences from actual cases; and (ii) the assumption that law, in the cultures studied, constitutes a discrete, bounded, semi-autonomous domain analogous to what had typically been found in Western societies.

A celebrated work belonging to this period is Hoebel's *The Law of Primitive Man* (1954). According to him, 'a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting' (1954: 28). In stressing the legitimate use of physical coercion, Hoebel deemphasized the traditional association of law with a centralised court system (Haviland, 1989: 499). He wrote of a time when the notion that private property should be generously shared was a fundamental precept of Cheyenne Indian life. Subsequently, however, some men assumed the privilege of borrowing other men's horses without bothering to obtain permission. When Wolk Lies Down complained of such unauthorised borrowing to the members of the Elk Soldier Society, the Elk Soldiers not only had his horse returned to him but also secured an award for damages from the offender. The Elk Soldiers then announced that, to avoid such difficulties in the future, horses were no longer to be borrowed without permission. Furthermore, they declared their intention of retrieving any such property and administering a whipping to anyone who resisted their efforts to return improperly borrowed goods.

According to Haviland (*op.cit.*), the case of Wolf Lies Down and the Elk Soldier Society clearly illustrates three basic functions of law. First, it defines relationships among the members of society, determining proper behaviour under specified circumstances. Knowledge of the law permits each person to know his or her rights and duties in respect to every other member of society. Second, law allocates the authority to employ coercion in the enforcement of sanctions. In societies that lack centralised political control, the authority to employ force may be allocated directly to the injured party. Third, law functions to redefine social relations and to ensure social flexibility. As new situations arise, law must determine whether old rules and assumptions retain their validity and to what extent they must be altered.

In 1955, Max Gluckman published an ethnography of law based on the observation of actual cases in a non-Western society. Gluckman's *The Judicial Process*
Among the Barotse (1955) focused principally on the nature of judicial reasoning among the Lozi, a 'very litigious', partially state-integrated social group in Northern Rhodesia (now Zambia). In his studies of Barotse judicial reasoning and legal process, Gluckman’s analyses relied substantially on Western jurisprudence as, variously as an analytical model, a source of terms and concepts, and as the target of expansive comparative generalisations. Most memorably, Gluckman reported that the ‘reasonable man’ standard found in Anglo-American tort law was central to Barotse jurisprudence, as well — a conclusion for which Gluckman received a great deal of criticism and derision.

By the late 1960s, a number of anthropologists, chief among them being Bohannan, were calling into question the appropriateness of using Anglo-American-derived legal concepts to understand non-Western cultures. Bohannan’s Justice and Judgment among the Tiv (1957) convincingly argued that cross-cultural comparisons based on Western understandings of law is inappropriate, if not impossible. His analysis further underscored the need to attend to the details of language in ethnographic context. His analysis of dispute cases among the Tiv, an acephalous group of northern Nigeria, made extensive use of Tiv terms, which he was reluctant to translate based on an insistence ‘that Tiv institutions be understood in their own terms’ (1989: xvi). As his goal, Bohannan sought to represent the totality of the Tiv legal system — the substantive issues involved, as well as the procedures for adjudicating them — as understood and described by the Tiv themselves. He wrote of Gluckman’s comparative approach: ‘I was convinced in 1957, and I still am, that filling Tiv data into a model of Western jurisprudence is squeezing parakeets into pigeonholes and not a way to go about ethnography’ (1989: vii). Gluckman regarded Bohannan’s commitment to close emic description and refusal to translate Tiv words as ‘overly cautious and an impediment to comparative analysis’ (1969: 349).

Bohannan (1967) stated that all societies have some form of legal institutions whereby disputes are settled and breaches of norms are sanctioned. For him legal institutions are part of the political framework which is distinguished by the fact that they ‘reinstitutionalise’ or restate customs or rules derived from other institutions. Thus, according to him, a law is a custom that has been reinstated in order to make it amenable to the activities of the legal institutions. Further, there are established procedures whereby
these legal institutions are themselves conducted. In pre-state societies, no one centralised authority can impose a consistent code of law, so law itself is less codified and less consistent than in state society. But roles of legal authority may nonetheless be well-defined, as in the case of the Nuer ‘leopard-skin chief’ who creates a compromise solution between parties to a dispute. Disputes among the Nuers are frequent, and under the segmentary lineage system, can lead to widespread feuds. The ‘leopard-skin chief’ or holder of a ritual office of conciliation stands outside the lineage network and tries to persuade feuding lineages to accept payment in ‘blood cattle’ rather than taking another life. More common than formal courts in pre-state societies are other procedures such as moots, oracles and divination, contests or ordeals and self-help.

Both Bohannan and Gluckman, despite their differences, had one thing in common: they viewed law as rules used in the settlement of cases and as a system or conceptual framework rather than as a social process. Following an influential review article by Nader (1965), the ‘process-oriented paradigm’ gained preeminence. Nader emphasized the need to locate legal processes in their wider social context, and envisaged an anthropology of law that used disputes as its operative concept, aimed at both empirical and explanatory generalizations (1965: 17-18). Gulliver’s (1963, 1969) detailed studies of the Ndendeuli of Tanzania compared various forms of out-of-court dispute settlement, and emphasized the importance of viewing disputes as part of more general social processes. Gulliver (1969: 14-15) gave a widely accepted definition of dispute as ‘the public assertion, usually through some standard procedures, of an initially dyadic disagreement’. According to Comaroff and Roberts (1981: 13-14), Gulliver’s definition introduced ‘a much broader view of what might constitute legal phenomena, treating conflict as an endemic feature of social life, which is to be placed in a total social context’, thereby effecting ‘a shift away from judge- (and judgment-) oriented accounts…of dispute settlement’.

### 1.4.4. The Anthropology of Law as Legal Pluralism

A recognition that several categories of law exist in most post-colonial societies led to a focus on what anthropologists call legal pluralism. It constituted the principal
agenda and approach for the anthropology of law during the later part of the 1970s and the 1980s. According to Roberts (op.cit.), with the imposition of a nationally, formally dominant legal order upon the diversity of pre-colonial indigenous communities, the central question confronting anthropologists was the relationship between what was going on at the centre and what was happening on the periphery. One way of looking at this was in terms of what Kidder (1979) has called the 'static hypodermic model' which involved a vertical, top-down, command view of the operation of the law in the colonial world. Also referred to as legal centralism, this theory placed law made at the centre superior to existing customary regimes.

This extreme positivism was rejected by Pospišil, who propounded the idea of 'legal levels'. He argued that such an approach to law ignored the complex societal structure within which legal phenomenon occurred. In his words,

'Society, be it a tribe or a 'modern nation', is not an undifferentiated amalgam of people. It is rather a patterned mosaic of subgroups that belong to certain, usually well-defined (or definable) types with different memberships, composition and degree of inclusiveness. Every such subgroup owes its existence in a large degree to a legal system that is its own and that regulates the behaviour of its members... This multiplicity of legal systems, whose legal provisions necessarily differ from one to another, sometimes even to the point of contradiction, reflects precisely the pattern of the sub-groups of the society—what I have termed 'societal structure' (structure of a society)' (Pospišil, 1971:125).

No society, he argues has 'a single consistent legal system, but as many such systems as there are functioning sub-groups' (1971:98). Pospišil's model of the particular way in which legal pluralism manifests itself in society he calls 'legal levels'.

'Since the legal systems form a hierarchy reflecting the degrees of inclusiveness of the corresponding sub-groups, the total of the legal systems of sub-groups of the same type and inclusiveness (for example, family, lineage, community, political confederacy) I propose to call legal level (1971: 107). Legal systems can be viewed as belonging to different legal levels that are superimposed one upon the other, the system of a more inclusive group being applied to members of all its constituent subgroups (1971:125)'.

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The most prominent example Pospisil gives of the analysis of socio-legal structure in terms of 'legal levels' concerns a Kapauku society built up of households, organised in villages, grouped in sub lineages, lineages, sub-sibs, and finally sibs (1971: 108-109).

According to Griffiths (1986:17), despite all the cogent objections Pospisil has himself made against it, his analysis remains implicitly dominated by the whole-society perspective. His 'legal levels' within which the self-regulating subgroups of a society are arranged are conceived of as an orderly – one is tempted to say, an idealized-structure of the whole society, and the subgroups are conceived of as more or less inclusive building blocks within that structure. This conception of a legally pluralistic state of affairs, according to Griffiths, is far too limited and idealized to do justice to social reality. How could one deal, within such a model of socio-legal structure, with the laws of groups within a society which are not a part of an overall hierarchical arrangement and cannot be assigned to a particular 'level'- groups such as clubs, guilds, churches, factories and gangs. In Griffiths' opinion (op.cit.), Pospisil plainly wants to regard their internal self-regulation as 'law' but he does not give us any other, more accurate and useful instrument than the concept of 'legal levels' for doing so.

Another approach to legal pluralism was proposed by Moore in her seminal essay, 'Law and Change: the Semi- Autonomous Social Field as an Appropriate Area of Study' (1973). Here, Moore substitutes the concept of 'social field' for that of 'legal level'. Normative orders, including that presented by the national legal system, are best seen as partially discrete, but nevertheless overlapping and interpenetrating social fields, within which meaning is communicated on a two-way, interactive basis. According to Moore, the social field is identified in terms of its 'semi-autonomy', by 'the fact that it can generate rules and customs and symbols internally, but... is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' (Moore: 1978: 55).

'The semi-autonomous social field is defined and its boundaries identified not by its organisation (it may be a corporate group, it may be not) but by a processual characteristic, the fact that it can generate rules and induce or coerce compliance to them...Many
such fields may articulate with others in such a way as to form complex chains, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains’ (Moore, 1978: 57-58).

Moore applied her conception of a semi-autonomous social field to two concrete examples, the garment industry in New York and the Chaggga of Tanzania. In each case, her central point was that external legislation has not had, and could not be expected to have, the apparently intended effects, precisely because of the semi-autonomy of the social field in which it has to operate—the fact that the ties of mutual obligation there are frequently stronger than, and in any case, deflect the operation of, external law.

According to Griffiths (op.cit.), the strength of Moore’s approach lies in her appreciation of the complexity of the social situation in which law finds its working, in the freedom of her approach from hierarchical, centralist, whole-society preconceptions, and in her emphasis on the dynamic aspect of partial autonomy, that is, the tendency of a self-regulating social field to fight any encroachment on autonomy previously enjoyed and the way in which the structure of the whole society at any given moment can be seen as a pattern and network of areas of autonomy and modes of self-regulation. According to Roberts (op.cit.), Moore’s approach proved immediately congenial to legal anthropologists, by its depiction of change as a fluid, interactive process, full of imponderables and unintended consequences.

Following Pospisil and Moore’s seminal works, the anthropology of law became virtually the study of legal pluralism, how several normative regimes may coexist in the same social field. Legal anthropologists formed themselves into a professional association under the title of the Commission on Folk Law and Legal Pluralism; the journal African Law Studies re-emerged as the Journal of Legal Pluralism and Unofficial Law; a conference was held at Bellagio in 1981 to inaugurate this movement, and a large literature emerged which sought to re-present the anthropology of law as legal pluralism and to delimit this new field. Following Moore’s lead, societies of the West became as much a focus of attention as did those of the post-colonial world. According to Fuller (1994), two fundamental and indisputable facts underlie the study of legal pluralism, as it is developing today. First, everyone in the world today is formally subject to a national legal system. Secondly, as it is most plainly true in post-colonial nations but not only
there, state law—which itself is often a pluralistic amalgam of western law and other systems such as Islamic law—normally co-exists within non-state law; over these customary, indigenous, folk or informal legal and normative orders, state law, contrary to its own ideology, never enjoys unambiguous and unchallenged dominance. The interaction between state and non-state law, or more precisely, the dialectic, mutually constitutive relation between state law and other normative orders, most succinctly defines the current research agenda in relation to legal pluralism.

Merry (1992: 360) has sought to make a distinction between 'classic' and 'new' forms of legal pluralism. The analysis of classic legal pluralism focuses on the relation between indigenous and originally foreign (European) law in colonial and post-colonial societies. On the other hand, the concept of new legal pluralism pertains to the existence of plural normative orders within modern, western societies in particular.

According to Merry (1988: 889), viewing situations as legally plural leads to an examination of the cultural and ideological nature of law and systems of normative ordering; for law is not just a set of coercive rules but also a system of thought by which certain forms of relations come to seem natural and taken for granted. In cases of legal pluralism, there are, therefore, two or more such systems of thought, and they and the relation between them are important subjects for investigation. According to Fuller (op.cit.), all judicial processes, to a greater or lesser extent, are characterised by distinctive and often powerfully self-validating systems of thought whose analysis and interpretation ought to be central to legal anthropology. This, more or less, is the perspective of Geertz (1983), who argues that we should look at law as a cultural system of meanings. In his view, legal reasoning is one of the most significant ways in which people try to make explicit sense of their world and it is itself partially constitutive of that world, notably through law's capacity to relate general concepts to particular cases. In his words, 'law is part of a distinctive manner of imagining the real, a culturally variable system of ratiocination about the relationship between facts and norms, rights and duties, truth and justice' (op.cit.: 184). Thus, law for him is not simply a codification of explicit norms or a mechanism for social control; it is also a species of social imagination that lets people work out for themselves how they are going to live, how they can imagine principled lives they can practically lead (Fuller, op.cit.).
1.5. Recent Trends

According to Roberts (op.cit.), it is significant that the field of the anthropology of law today has become almost exclusively occupied by lawyers rather than anthropologists. However, Fuller (op.cit.), while admitting that it is a domain of scholarship increasingly dominated by academic lawyers, asserts that anthropologists certainly can contribute something valuable and different to it. By using their detailed ethnographic data about the local workings of non-state law or normative orders, anthropologists are able to illuminate the elusive ways in which legal thought is constitutive of social realities rather than merely reflective of them. According to Merry (1992:379), legal anthropology today can no longer be a distinctive sub-discipline standing apart from the study of legal pluralism in its many dimensions. Fuller (op.cit.) argues contrary to this that law is too important to be left entirely to academic lawyers and it cannot be neglected by anthropologists. According to him, the urgent need of the hour is the subdiscipline’s reintegration into the anthropological mainstream, so that legal anthropology can anew benefit from and vigorously contribute to the development of the subject as a whole. According to Griffiths (2004: 15-16), the uneven nature of globalisation and of its differential reach and impact require analysis that is based on empirical studies which document how states, communities, groups and households are enmeshed in global networks and flows in a whole variety of ways that highlight the enormous variation in control over, as well as the impact of the process within societies, as well as among them. All this requires the expertise of the anthropologist.

Apart from the theoretical developments in the realm of anthropology of law, a lot of work is going on in the field of customary law, which combines an inter-disciplinary as well as an activist (civil society) approach. In the context of globalisation, application of the intellectual property rights regime and its impact on the indigenous knowledge, life and culture of local and indigenous communities, organisations like the World Intellectual Property Organisation (WIPO) view customary law of communities as playing a vital role in the protection of traditional cultural expressions or expressions of folklore, traditional knowledge and genetic resources etc.
In addition, scholars in the present day are increasingly looking into systems of natural resource management of indigenous communities, vested in the communities themselves, regulated through customary laws and practices and operationalised through local authorities, which have been effective in protecting the environment and conserving natural resources. An abundance of documented evidence and experience on successful models of customary and community based resource management practices, have illustrated that customary practices and laws are of contemporary relevance in protecting bioresources and the associated IK. According to Griffiths (2004: 23), natural resource management and environmental protection presents one pressing area for research in the present times, where indigenous groups and their representatives are trying to develop ‘indigenous’ forms of management of forests, land, and water by calling for recognition of local communal rights. The ways in which they formulate their claims, in terms of participation, self government, good governance and sustainability, derived from the language of administration and international law, would make for a fruitful area of study.

Social scientists in the present day are also looking into the gender dimension of the issue. Feminist scholars have long been critical of the ways in which mainstream legal discourse fails to take account of gender in its analysis of law. According to Griffiths (op.cit., 17-18), a legal pluralist perspective provides a means of giving recognition to those normative orders that impinge on women’s lives and so factor them into analyses which can take account of the conditions under which women and men find themselves, silenced or unable to negotiate with others in terms of day-to-day social life, or the converse, and how this shapes their perceptions, access to and, use of law. Her own Kwena ethnography (2001) drawn from detailed life histories and extended case studies highlights the gendered world in which women and men live and how this affects women’s differential access to law, empowering women in some contexts while constraining them in others.