

Customary Law and Women
A Sociological Study of the Tangkhul Naga of Manipur

Dissertation submitted to the Jawaharlal Nehru University in partial fulfillment of the requirements for the award of the Degree of

Master of Philosophy

Annis Pharung Awungshi



Centre for the Study of Social System

School of Social Sciences

Jawaharlal Nehru University

New Delhi-110067

India

2009



जवाहरलाल नेहरू विश्वविद्यालय
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110 067

Centre for the Study of Social Systems
School of Social Sciences

Declaration

Date: 29/07/09

I declare that the dissertation entitled *Women and Customary Law: A Sociological Study of the Tangkhul Naga of Manipur* submitted by me in partial fulfillment of the requirements for the award of the Degree of Master of Philosophy of this University is my original work. This dissertation has not been previously submitted for any other degree of this or any other University.

Annis Pharung Awungshi

Certificate

We recommend that this Dissertation be placed before the examiners for evaluation.

Prof. Tiplut Nongbri
Chairperson CSSS

Chairperson
CSSS/SSS

Jawaharlal Nehru University
New Delhi

Dr. Nilika Mehrotra
Supervisor

Associate Professor
Centre for the Study
of Social

School of Social Sciences
Jawaharlal Nehru University
New Delhi

Acknowledgement

My heartfelt gratitude first goes to my supervisor, Dr. Nilika Mehrotra who has forever motivated and inspired me. She has been the guiding force throughout the process of writing this dissertation, patiently tolerating with all my problems. Without her valuable insightful comments, criticisms and materials that she personally provided me with, this dissertation would not have been possible. There are no words to describe how grateful and indebted I am to her.

Secondly, the impetus to write on this present topic of the dissertation is an off shot of Prof. Tiplut Nongbri's, Chairperson, Centre for the Study of Social System suggestions to me in the initial stage of my M. Phil first semester. She has been forever kind and helpful in all the stages of my academic career in JNU. I will be forever thankful to her for her unceasing encouragement and support.

My sincere gratitude also goes to the Rajiv Gandhi National Fellowship (UGC) committee for selecting and providing me the necessary funds in obtaining materials and other material needs of this research endeavor. This has made the research easier to complete and cope with.

My fervor thanks also goes to my seniors and friends who have been extremely helpful in providing me with materials and also for always being a steady source of support and affection. I take this opportunity to thank and name a few of them whose name cannot be avoided mentioning- Shimreiwung Awungshi, Shomi Brian Raikhan, Jubilee Shangrai, Rovizo Marza, Chubatila. You will always be remembered by me for your trust and expectation in me. And to my true friend Manonithya, who despite her other engagements consented to do my proof reading and formatting at such a short notice. And to Valley Rose Hungyo, a member of Naga Women's Union, Manipur, for sparing me her precious times and providing me with NWUM articles and publications.

And to my brothers Ramsem Chihankui and Yurmi, and my sisters Rumreila, Chuimeila and Thermila who have always inspired and encouraged me throughout my life. Your love and faith keeps me going even during the lowest phase of my life.

Lastly but not the least, it is to my mother and father, P. A. Areiwon and P.A. Ringson that I dedicate this dissertation to. Your strong reassurance to take life as a battle keeps me going through out. Indeed, without your constant reassurance this dissertation would not have seen the light of the day.

And to God for sustaining my life, it is him and him alone that I live to see and make this Dissertation a reality.

Annis Pharung Awungshi

July, 2009

Abbreviation and Glossary

| | |
|---------------------|---|
| NNC | Naga National Council |
| TNL | Tangkhul Naga Long |
| <i>Awunga</i> | Headmen/King (equivalent to King in English) |
| <i>Hanga</i> | Village Council |
| <i>Riyan</i> | Constitution |
| <i>Shiya Chikan</i> | Customary Law |
| <i>Shimluikat</i> | Law of inheritance applied in the absence of male inheritor |

| Contents | Page No. |
|---|-----------------|
| <i>Acknowledgement</i> | <i>i</i> |
| <i>Abbreviation and Glossary</i> | <i>iii</i> |
| Chapter-1: Introduction | 1-36 |
| 1.1 Introduction | |
| 1.2 The Concept of Law | |
| 1.3 Theoretical Perspectives on Law | |
| <i>1.3.1 Functionalist Approach</i> | |
| <i>1.3.1.1 Durkheim, Law and Division of Labour</i> | |
| <i>1.3.1.2 Malinowski and Law</i> | |
| <i>1.3.2 Perspectives on Parson's Systems Theory of Law</i> | |
| <i>1.3.3 Weberian Approach</i> | |
| <i>1.3.3.1 Traditional Domination</i> | |
| <i>1.3.3.2 Legal Domination</i> | |
| <i>1.3.4 Perspectives on Marx and Law</i> | |
| <i>1.3.5 Perspectives on Foucault and Law</i> | |
| 1.4 Nature of Primitive Law | |
| 1.5 On the Evolution of Law | |
| 1.6 The Definitions of Custom | |
| <i>1.6.1 Taboo</i> | |
| <i>1.6.2 Norms and Values</i> | |
| 1.7 The Concept of Customary Law | |
| 1.8 Objective of the Study | |
| 1.9 Methodology | |
| 1.10 Outline of the Chapters | |
| Chapter-2: Feminist Perspectives on | |
| Women and Law | 37-73 |
| 2.1 Introduction | |

- 2.2 Conceptual Categories
 - 2.2.1 *Patriarchy*
 - 2.2.2 *Gender and Sex*
- 2.3 Perspective on the Production of Gender Roles and Relations in the Society
 - 2.3.1 *Functionalist Perspective*
 - 2.3.2 *Marxian Perspective*
 - 2.3.3 *Women and Reproduction*
- 2.4 Masculinity and Femininity
- 2.5 Some Theoretical Perspectives on Women and Law
 - 2.5.1 *Protectionist Approach*
 - 2.5.2 *Equality Approach*
 - 2.5.3 *Patriarchy*
 - 2.5.4 *Substantive Approach*
- 2.6 Distinction between Public and Private
- 2.7 Right, Law and Women
- 2.8 Women, Law and the State: In the Context of Tribes in India
 - 2.8.1 *The Myth of Gender Neutrality*
- 2.9 Customary Law and the Question of Women's Citizenship
- 2.10 Conclusion

Chapter-3: Tangkhul:

History and Customs

74-101

- 3.1 Introduction
- 3.2 Topography and the People
- 3.3 Historical Accounts of the Nagas
 - 3.3.1 *Theories of the Origin of the Nagas*
 - 3.3.2 *Theories of Migration*
 - 3.3.3 *Legends and Mythologies Relating to their Origin*
 - 3.3.4 *Origin of the Word 'Tangkhul'*
- 3.4 Tangkhul Naga Social Institutions and Organizations
 - 3.4.1 *Family*

| | | |
|-------|---|--|
| 3.4.2 | <i>The Clan/Shang</i> | |
| 3.4.3 | <i>The Village Administration and Econmoy</i> | |
| 3.4.4 | <i>Dormitories: Longshim and Ngala Long</i> | |
| 3.5 | Head Hunting | |
| 3.6 | The Role of <i>Pukreila</i> or the ‘Neutral Lady’ | |
| 3.7 | Religious Belief and Practices | |
| 3.8 | Social and Cultural Changes | |
| 3.9 | Naga National Movement and the Article 371 A | |
| 3.9.1 | <i>Changes in Women’s Role in the Society</i> | |
| 3.10 | Conclusion | |

**Chapter-4: Tangkhul Customary Law
and Women**

102-127

| | | |
|-------|---|--|
| 4.1 | Introduction | |
| 4.2 | Gendered Division of Labour and Gender Relations | |
| 4.3 | Customary Law of the Tangkhul Naga (<i>Shiyan Chikan</i>) | |
| 4.4 | Citizenship | |
| 4.5 | <i>Shiyan Chikan</i> /Customary Law | |
| 4.6 | Law of Divorce, Adultery, Defamation and Rape | |
| 4.7 | Gender Relations in Customary Law | |
| 4.7.1 | <i>Patriliny and Women’s Subordiantion</i> | |
| 4.7.2 | <i>The Notion of Inclusion and Exclusion with Regard to TNL</i> | |
| 4.8 | Dissenting Voices | |
| 4.9 | Conclusion | |

Conclusion

128-131

Bibliography

132-141

Chapter-1

Introduction

1.1 Introduction

Any known society, the so called ‘primitive’ or the industrially ‘advanced’ societies, all exhibit one or the other forms of inequality. Inequality is pervasive across different cultures and different regions, so much so that even among the hunting and gathering band, preferential treatment based on heroic action of an individual or a war hero; age of an elderly man or by virtue of person’s biological sex (male and female) can demarcate the society into strata’s. Again, being a part of a particular social class or group, both men and women faces different predicaments, however, when women are place juxtaposed to men in any society, women have always played the subordinate role. It is only until recently with the feminist critique of the gendered nature of the society that the concept of women empowerment is increasingly gaining momentum taking up the matter of women’s marginalization in different aspects of society and policies initiated to rectify this problem from the state level by engaging law as an instrument of change. However, the use of law for uplifting women is again heavily contested because in viewing gender relation in legal system or the law, it has been found that women suffers the most, be it in marriage, divorce, inheritance, and again this discrimination is exacerbated by customary law, a powerful force in many countries that reduced women to the perpetual status of second citizens which regulates – inheritance and land rights, public and the private spheres, village authority, family relations, marriage, divorce etc.

Looking into law in different cultures reveals unquestionable similarity that proves that law since antiquity has always been biased towards women. Among the Hindus, the great sage Manu’s dictum declared that women should forever be the property of man. Before marriage, she is the property of her father, after marriage she is under the authority of her husband and as a widow she is under the care of his sons. As the Hindu text vividly declares “there is no higher world for woman than that of her husband. She who

displeased the husband cannot go to his world after death. She should never displease the husband.”¹ Ancient Hindu text legitimized the discrimination of women which can be reflected in the practice of dowry, sati, female infanticide etc. Again, subordination of women can also be clearly observed in the Jewish law that upheld that a woman was not a person but a thing. She has no legal rights and was treated as a possession of her husband. William Barclay sums up the law wield on women expressed in the Talmud as “In the Jewish form of morning worship/prayer, a Jewish man every morning thank that God had not made him a gentile, a slave or women.”² Ancient Greeks treats women as property to be bought and sold. Philosophers such as Plato and Aristotle hold the lowest opinion of women. Plato suggests that the fate of an evil man would be reincarnated in the form of woman. Aristotle regarded women as “a kind of mutilated male” body. Similarly, Christian law demands women to obey her husband and revered him in the form of god. Muslim law although bestow women to inheritance of property, their practice of polygamy and purdah system proves that women are taken as sexual objects. Thus, the image of women beginning with antiquity suggests that women never had any law favourable to them. Since time immemorial, law has been always in the hand of man who made random laws for the benefit of man.

This argument is strengthened by the tribal society customary law that denies women basic citizenship rights. As the title of the study suggest, the Tangkhul Naga society has the strong influence of patriarchy that is again pronounce strongly in their customary law. Besides isolated cases of women challenging the system, there has been no organized movement at any point of time in history to question such laws. Thus, the gendered nature of customary law is the central theme of the research paper. This chapter will examine the different perspectives in law and explain the usage of concept such as law, customary law, customs and legal theories to grasp the complexities of what customary law constitute.

¹Freepaathing, Z. V. 1994. p. 2

²ibid. p. 2

1.2 The Concept of Law

Law has been considered by sociologists as a one of the several social codes since the primary function of social codes is to sustain the social order by upholding the basic values and norms of the society. However, the definition of law has been regarded by scholars in various social sciences streams alike as an area where a clear cut definition is next to impossible. Max Radin, thus, remarked “for those of us who have learned humility have given up the attempt to define law”.³ Lawrence M. Friedman also maintains that “no definition of law could satisfy everyone”⁴ and H.L.A. Hart too observed that there is nothing ‘concise enough to be recognized as a definition could provide a satisfactory answer’⁵ to the question of what law constitutes.

However, contrary to this skepticism, Indra Deva opined that one of the major difficulties in defining the concept of law can be attributed to the way in which western scholars generally tend to think of law in terms of the framework of modern centralized state and its instrumentalities.⁶ Such a conception pose an obstacle to the understanding of legal processes in traditionally organized primitive societies where the modern legal set up are not practiced like those of the peasant civilizations and tribes. August Comte (1830), like the majority of the early sociologists, identified law with written law or legislation; Karl Marx too opined that law was one of the “superstructures” characteristic of the “bourgeoisie” order and was to “wither away,” together with the state after the establishment of classless society. Early sociologist were skeptical of the presence of law in the so called primitive society, therefore, custom was the main objective of investigation because custom was seen as the expression of social organization. Thus, following such approach Herbert Spencer (1880) remarked that law is nothing more than a “hardened form of custom” and as custom it “formulates the rule of the dead over the living”.⁷ Contrary to this approach, D.N. Majumdar and T.N. Madan opined that intensive ethnographic field work surveys has shown that law is very much a part of

³Radin, Max. 1938. pp. 1145

⁴Friedman, Lawrence M. 1977. p. 3

⁵H. L. A. Hart. 1961. pp. 16

⁶Deva, Indra. 2005. pp. 1

⁷Timasheff, N. S. 1976 (1939). pp. 45-46

primitive societies either in fully developed form or in embryonic form. The fact that, when a society existed within time and space, “it becomes obvious that such existence must have been made possible by the previous existence of some kind of internal order and stability”.⁸

This existence of order and law can be seen in the work of A.S. Diamond who studied primitive law to discover the existence of law at the earliest stages of social development, he writes, “Among the tribes which have not yet evolved courts....we may observe ...settled rules of conduct as to marriage and inheritance and perhaps property, and these...might well be described as law” because these rules “are in the direct line of the history of law.”⁹ For Max Weber rules are law if “it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves especially ready for that purpose.”¹⁰

In the next section, an overview of legal theories is briefly examined to get the idea of law. In examining the interface between sociology and law, conceptual understanding of different sociologists and legal theorist are provided. Further, conceptual definition of customs and customary law is also briefly touched upon to understand the formation and crystallization of customary law as law in tribal societies.

1.3 Theoretical Perspectives on Law

Different sociologists and anthropologists have identified various approaches in their attempt in studying society and its forms of authority and law. Some of the major perspectives are discuss below.

⁸Majumdar and Madan. 1986. p. 205

⁹Timasheff, N.S. 1976 (1939). p. 276

¹⁰Friedman, Lawrence M. 1977. p. 4

1.3.1 Functionalist Approach

1.3.1.1 Durkheim, Law and Division of Labour

Durkheim's conception of law stems from his understanding of division of labour in different societies. He identifies two distinct societies, firstly, the segmental society or society that possess the characteristic of mechanical solidarity and secondly, the advanced industrial societies or society that is characterized by organic solidarity. According to him, societies whose solidarity is mechanical are based on common roots of identity and similarity. In these societies, the individual is directly linked to society through various point of attachment which binds all the member of the group equally. The forces of these 'social links' discourages individual autonomy so much so that the social whole envelops the individual so completely that there is no distinction between the individual conscience and the collective conscience. As he puts it, "the totality of belief and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the collective or the common conscience."¹¹ Another dominant social institution is the kinship group that served as a domestic (familial and political) activity and forms the basis of social cohesion. The division of labour is rudimentary and divided up so that individuals perform tasks for collective purposes. Beliefs are primarily religious in nature and common conscience is rooted in religious law. Thus, collective rules and social practices are predominantly religious in nature and pervade all aspects of social life.¹² Offences against the common beliefs are punished by repressive sanctions which act to reaffirm the beliefs and social rules or law of the community with deliberate punishment. The individual's relation in the society is such that the individual is inseparable from the social whole and any individual differences are subordinate to the solidarity of the group.

In direct contrast to the mechanical solidarity, in societies that is characterized by organic solidarity, labour is specialized and individual are linked to each other more than to society as a whole. As Durkheim reasons, this nature of 'social links' stems from the development of division of labour, where individuals become more reliant to perform

¹¹Durkheim, Emile. 1964. p. 79

¹²ibid. pp. 92-93

separate economic functions which they are not able to carry out themselves. Social bonds between individuals are enforced by contracts rather than by the force of prevailing customs and religious beliefs. The system of law is based on restitutive sanctions in which judicial rules redress social wrongs by restoring things to their original state. What is central to Durkheim's understanding of law is the collective conscience that the member of the society shares. Essentially, the term 'collective conscience' refers to body of beliefs, practices, customs and collective sentiments that the society upheld. The collective conscience is less resistant to change and becomes weaker as society becomes secular and economically advanced. These societies are characterized by increase in the density of population in the society, and the development of the means of transportation and communication.

1.3.1.2 Malinowski and Law

Malinowski who carried out an intensive ethnographic work among the Trobriand islanders states "By defining the forces of law in term of central authority, courts, codes, and constables, we must come to the conclusion that law needs no enforcement in primitive community and is followed spontaneously".¹³ Malinowski thus rejects Durkheim's conception of law and remarked, "We may therefore finally dismiss the view that 'group sentiments' or 'collective responsibility' is the only or even the main force which ensures adhesion to custom and which makes it binding or legal."¹⁴ Malinowski writes:

'Civil law' the positive law governing all the phases of tribal life, consist then of a body of binding obligations, regarded as a right by one party and acknowledge as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society. These rules of civil law are elastic and posses a certain latitude. They offer not only penalties for failure, but also premiums for an overdose of fulfillment. Their stringency is ensured through the rational appreciation of cause and effect by the natives combined with a number of social and personal sentiments such as ambition, vanity, pride, desire of

¹³Malinowski, Bronislaw. 1926 (1970). p. 24

¹⁴ibid. p. 55

*self enhancement by display, and also of attachment, friendship, devotion and loyalty to the kin.*¹⁵

Such rules, as Malinowski opined “are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force based upon mutual dependence.”¹⁶ Malinowski argues that law should not be seen as working necessarily through modern types of courts or police or the use of sanctions of legitimized physical coercion which is a necessary condition for the existence of law, rather in savage society, primitive man spontaneously obeyed customs and adhere to customary practices. This conception of law is a departure from Durkheim’s theory of ‘collective conscience’ as the binding nature of law. Malinowski in his field work attempted to put forward that law does exist in a tribal society in a distinct form. Though deviation does exist and many breaching of law occurs, there exist a stronger binding force of law which was carried out through reciprocity where everyone in the society render adequate services to each other lest other may withdraw or reduce their services to him. Malinowski’s theory of law propounded that law is equal to the sum of rules of conduct which creates corresponding rights and duties of parties which are sanctioned by social machinery.

1.3.2 Perspectives on Parsons’s Systems Theory of Law

Parsons whose approach is known mostly as a system theory in sociology did not work out in length on the theory of law or legal system per se. Like the work of Marx, Parsons thought on law are scattered widely throughout his writings. Sharyn L. Roach Anleu writes that law is an important component in Parsons overall systems theory and at the same time he paid attention to legal actors and the everyday dilemma confronting legal professionals deriving from their institutional location.¹⁷ Parsons upheld that law should be treated as generalized mechanism of social control that operates diffusely in virtually all sectors of society. He argues that “law being one type of social control, is located primarily at the institutional level and following Weber’s conception of law asserts that law as a set of prescriptions, permissions and prohibitions bearing on social action and

¹⁵ibid. p. 58

¹⁶ibid. p. 55

¹⁷Anleu, Sharyn L. Roach. 2000. p. 41

more or less systematically organized”.¹⁸ Parsons maintains that every society confronts sub-system problems, they are: Adaptation, Goal attainment, Integration and Pattern maintenance or Latency. According to him, the primary function of the legal system is integration. In other words, law mitigates conflicts and facilitates social interaction; it regulates the relations of differentiated parts to each other. His theory holds that only by adhering to system of rules can social interaction occur without breaking down into overt, chronic conflict. Parsons maintains that legal system becomes especially significant when society becomes highly differentiated and plural like the modern societies because law can “mediate between normative and cultural orders which have become so important in a complex society”.¹⁹

Parsons pointed out four main problems that have to be solved before a rule system can regulate social interaction:

1. It must have a basis of social legitimating in order to obtain compliances or conformity.
2. It must solve the problem of interpretation, regarding which abstract legal rules govern particular situation and define specific rights.
3. It must provide sanctions to follow non-conformity, specify by whom they are applied, which can range from pure inducement to coercion.
4. It must establish jurisdiction to determine at what circumstances a given rule or complex set of rules applies.²⁰

Parsons holds that law has its strongest place in a pluralistic, liberal society where different kinds of institutions must be balanced against each other to co-exist.

Parsons further expounded that a certain type of law flourishes when a certain type of equilibrium is obtained in the society especially when the most fundamental questions of social values are not in conflict and when the issues of enforcement of law is not acute. Following Durkheim, he observes that this happens when there are strong informal forces

¹⁸ibid. p. 41

¹⁹ibid. p. 41

²⁰ibid. pp. 41-42

working in the society with the mainline of the legally institutionalized tradition. Borrowing from Weber, Parsons recognizes pre-modern laws especially religious law which resisted the generalization of legal principle because of its failure to integrate the immense variety of people and culture.²¹

1.3.3 Weberian Approach

In studying the emergence of nation state with its complex legal and political structure, Weber believed that signified major changes took place in the history of society especially the way in which the state was governed. He identified different types of domination and central to this topic of dissertation is his understanding of traditional authority. Weber upheld that traditional authority as form of domination existed before the rise of modern capitalist states. According to him, authority is traditional when its legitimacy is based on tradition, customs or on the 'sanctity of age-old rules and powers.'²² Owing not to the system of objective legal rules, in traditional authority, individuals are bind by obligations and personal loyalties. The leaders obtain the right to powers from inheritance and legitimated in the light of customary practices and traditional norms.

1.3.3.1 Traditional Domination

Weber while formulating his theory of traditional domination identifies two types of traditional administrative authority: patrimonial and patriarchal authority. In the first system of authority which is largely common in feudal societies where traditional authority is prevalent and where landlord may rule entirely without administrative staffs. Here, rulers rely on family members, dependents and in some cases, on slaves to perform specific tasks for the master. This type of domination tends to be based on 'system of favorites' who perform functions out of loyalty or obligation.²³ Thus, individual who occupy official positions are invariably personal followers of the masters. This form of administration leads to arbitrary decision making which follows the personal discretion of

²¹ibid. p. 42

²²Weber, Max. 1978. p. 226

²³ibid. p. 231-6

the masters rather than adhering to a strict set of administrative rules which apply equally to everyone in general. In such circumstances, masters may find themselves compromised between their own interests and the pressure from outside interest who constantly seeks favour, incomes, privileges and the 'granting of grace' or other forms of remuneration and advantage.²⁴ As a result, Weber reason that such form of domination resist bureaucratic development which is rationally organized with an established hierarchies of offices, technical training for functionaries and a clearly delineated jurisdiction of powers and responsibilities.²⁵

Weber's second form of traditional domination is patriarchalism which he says is a variation of domination that does not have a clearly defined administrative staff. Usually, this form of administration is found in households in which the master obtains legitimacy and governs by rule of inheritance. What is central to this form of authority is the belief that authority is exercised by 'joint rights' and in the interest of all members.²⁶ Weber reasons that, owing to the monopolistic nature patriarchal authority, this system similar to patrimonial domination, tends to obstruct the development of capitalism because their economic monopolies do not produce enough freedom to encourage private enterprise and also because of the absence of contract and binding legal norms, this type of domination discourages the development of rationally oriented means and ends of action.

1.3.3.2 Legal Domination

In direct contrast to Weber's traditional authority is his understanding of legal domination which is characterized by legal authority. In this type of domination, legitimacy is based on 'legal grounds' and on the belief in the inherent legality of enacted rules and the right of those in the position of authority under these rules to issue commands. Here, individual compliance is owed to those issuing commands on the basis of principles of law rather than the personal authority of the leader. Thus, in this type of system, authority rests in a system of rationally determine judicial rules. A key characteristic of legal domination is that officials in power are themselves subject to laws and therefore must orient their

²⁴ibid. p. 232

²⁵ibid. p. 229

²⁶ibid. p. 271

action to an impersonal order of legal rules in their disposition of commands. Weber essentially view this system of rules and domination as a form of bureaucratic set up since this system is oriented towards the organization of offices, staffs and official files that is highly impersonal in nature.²⁷ Weber further argues that bureaucratic organization were technically the most rational means of exercising authority over people and that its development was at the basis of modern democratic state because the power was organized in a pattern of hierarchies related to office in term of rank. This system also decreases the arbitrariness in power and eliminates forms of authority in which individual wield power by virtue of status privilege or appropriation of power through sheer physical force.

1.3.4 Perspectives on Marx and Law

Neither Marx nor Engel have a normative legal theory of law, crime or deviance, in fact they never identified law as a major theoretical problem²⁸ rather Marx's jurisprudential thought is often premised upon a critique of law per se and what he writes tends to be “overwhelmingly negative in character”.²⁹ McLellan writes that for Marx, “Religion, family, state, law, morality, science, and art are only particular form of production and falls under its (capitalism) general law. The positive abolition of private property and the appropriation of human life is therefore, the positive abilities of all alienation, thus the return of man out of religion, family, state, etc into his human, that is, social being.”³⁰ Marx does not propose that economic relations determine law or that laws are subservient tools of the bourgeoisie, but he argues that legal relations are rooted in ‘material condition’. The key to understanding the legal superstructure lies within the production relations themselves which are essentially class relations in capitalist society. Thus, in other words, Marx argues that the law in capitalist society favour bourgeoisie interests as they are in direct relation to the goals and condition of capitalism. The relations of production are the foundation of legal, political institutions and ideology.³¹ The concept

²⁷ibid. pp. 215-19

²⁸Spitzer, Steven. 1983. p. 104

²⁹Vincent, Andrew. 1993. p. 371

³⁰Anleu, Sharyn L. Roach. 2000. p. 33

³¹ibid. p. 34

of ideology is an important concern in Marx writing and the Marxist conception of law. For Marx, ideas including law, morality, religion and metaphysics are produced by human actors within the condition of the definite development of the production forces in a society. The concept of ideology refers to the ideas or forms of consciousness that are shaped by material conditions.

Ideology holds major significance in Althusser's conception of law which developed a theory that simultaneously accommodates the traditional socio-economic concerns of Marxism at the same time has concern for human subjectivity. While this result in some of the most difficult and opaque discussion in Marxist theory, one element is especially important for the analysis of law. Althusserian tradition holds that human being has three "instances": as a biological being, as a "subject," and as a participant in social relations. Here, the "subject" is created by and through a range of different discourses. For instance, political discourse produces the individual as "citizen," with its consequent images of atomized but equal citizens existing in a common relationship to the state.³² Legal discourse transforms both human beings and social entities; that is, corporations become "legal subjects". Legal subjects as the bearers of rights and duties are the primary constituents of the "form of law," which will figure large in my subsequent discussion. The creation of legal subjects involves the recognition of "the law" as the active "subject" that calls them into being. It is by transforming the human subject into a legal subject that law influences the way in which participants experience and perceives their relations with others. Thus, legal ideology provides a constituent of what Althusser called the "lived relation" of human actors. Hunt opined that one important implication of this type of construction of law encourage us to view law not merely as an external mechanism of regulation but as a constituent of the way in which social relations are lived and experienced. This approach perceived ideology not as a form of consciousness, which is the conventional view, but as a constituent of the unconscious in which social relations are lived.³³

³²Hunt , Alan. 1985. p. 15

³³ibid. p. 16

In understanding law from Marxist tradition, Hunt points out that Antonio Gramsci's theory of "hegemony" is the most important figure in the development of the theory of ideology which has a profound impact on the general direction of contemporary Marxist discussions. Gramsci's concern with the concept of "hegemony" which is a process, through which the dominance of capitalist power is secured within civil society, provides both the theoretical and political framework for the ongoing Marxist debate. The issues raised by the idea of "hegemony" go to the very heart of the problems facing the Marxist analysis of law in that this concept poses as central issue the dialectic of coercion and consent.³⁴

Similarly, Marxist thinkers like Poulantzas, building on Gramsci's metaphor of ideology argues that ideology is the "cement" of society, and he proposes the general thesis that "Ideology, which slides into every level of the social structure, has the particular function of cohesion". His analysis of the theory of ideology leads him to view that juridical-political ideology is the "dominant region" within the dominant ideology in capitalist modes of production. He thus, concludes that in capitalist societies law fulfills "the key function of every dominant ideology: namely, that of cementing together the social formation under the aegis of the dominant class".³⁵

1.3.5 Perspectives on Foucault and Law

Law per se was not a central concept of Foucault though he dealt with various related phenomenon discipline, power, punishment, regulation, government and govern mentality. He examines such legal or judicial institutions as the court and the prison by studying discipline and regulations and holds that social control is diffused throughout society and not just located in the domain of the state or its legal institution. He writes, "We must construct an analysis of power that no longer takes law as a model and a code".³⁶ Writings of Foucault challenge dominant approaches to the analysis of law. For Foucault, law is neither a condition for the liberation of the individual, nor is it solely the result of class domination but rather he sees law as an element of the expansion of power

³⁴ibid. p. 19

³⁵ibid. p. 17

³⁶Anleu, Sharyn L. Roach. 2000. p. 57

or powers. In modern society, law combines with power in various locations in ways that expand patterns of social control, knowledge, and the documentation of individuals for institutionally useful ends. Ultimately, legality and associated techniques of knowledge and control expand to define and to provide empirical knowledge of every aspect of society. Most especially, legality combines with other discourses to form the individual as the locus of ever greater networks of administrative control.³⁷

His study of law began indirectly in his work of madness and civilization. According to him, madness was a way of excluding actions and individuals and making them into negative others because they unreasonably violated rules that were developing in the seventeenth and eighteenth centuries. The asylum was anchored in laws that categorized the insane as minors whose treatment required specialized parental protection in the asylum, an institution modeled on the patriarchal family. Legally sanctioned reforms modeled on patriarchal familialism sought to inculcate reason and moral uniformity into the insane by combining the values of family and work.³⁸

In the early 1970s, Foucault began to write directly on how power and knowledge shape crime, criminal law, and the relationships among legal, medical, and social science discourses. Foucault's analysis of the law/power relationship is complex and often startling due to its rich descriptions and literary force. He focuses on particular institutions and specific historical changes. His studies demonstrate that the interrelationships among legal discourses, various forms of knowledge, political economy, techniques of power, and institutions of social control form logic of power that is most fully grasped by analyzing its detailed application. For Foucault, an investigation of the emergence of the prison in the early 19th century is actually a means of exploring the much wider theme of how domination is achieved and individuals are socially constructed in the modern world.³⁹ Foucault has undertaken a prolonged assault upon what he regards as the myths of "the Enlightenment." "Reason," "science," "freedom," "justice," and "democracy" all these shibboleths of Western culture have been reassessed

³⁷Turkel, Gerald. 1990. p. 170

³⁸ibid. p. 174

³⁹Garland, David. 1986. p. 848

in his determination to leave aside the glorification of the light of Reason and trace instead the oppressive shadows which it throws.⁴⁰

Foucault starts from a study of penal history which brings into focus the way in which violent, repressive forms of government, like the execution gave way at a particular time to the milder reforming techniques represented by the prison. This focus is then broadened out to produce a general picture of the gentler forms of control-inspection, discipline, “normalization”. He represented that the prison is a metaphor or a microcosm of our “disciplinary society” and that the “birth of the prison” which Foucault describes is actually the development of modern society itself to present a general genealogy of power based on the particulars of penal history. In this sense, Foucault’s work is a reminiscent of Weber’s theory of rationality. On a wider scale, these developments represent illustrative models of how power operates in modern society. Open, physical force, the apparatus of violence, and the ceremonies of might are more and more replaced by a mode of power based on detailed knowledge, routine intervention, and gentle correction. The idea now is to regulate thoroughly and at all times rather than to repress in fits and by this means, to improve deviant individuals rather than to destroy them.⁴¹ For Foucault, the human body is the ultimate material that is seized and shaped by all political, economic, and penal institutions. Systems of production, of domination, and of socialization fundamentally depend on the successful subjugation of bodies. More specifically, they require that bodies be mastered and subjected to training so as to render them docile, obedient, and useful to a greater or lesser degree. Some institutions, such as forced labor, master the body from the outside, as it were, using physical force and restraint to make the individual do its bidding. Others, however, aim to have their commands internalized; producing an individual who habitually does what is required without need of further external force. This “self- controlled” body is brought about by exerting an influence on what Foucault calls “the soul” which in turn directs behavior.⁴²

⁴⁰ibid. p. 856

⁴¹ibid. p. 851

⁴²ibid. p. 852

Power for Foucault, is not to be thought of as the property of particular classes or individuals who “have” it, or as an instrument they can somehow “use” at will. Power refers instead to the various forms of domination and subordination that operate whenever and wherever social relations exist. These power relationships, like the social relations they invest, display no simple pattern since, for Foucault, social life is to be thought of as taking place not within a single overarching “society,” but instead across a multiplicity of fields of forces which are sometimes connected and sometimes not.⁴³ Foucault concentrated always on the way these power relations are organized, the forms they take, and the techniques they depend on, rather than on the groups and individuals who dominate or are dominated as a consequence. His concern is thus with power in the abstract matter of structural relationships, institutions, and strategies rather than with concrete politics and the actual people they involve. In this conception of power, power is a pervasive aspect of social life and is not limited to the sphere of formal politics or of open conflict. It is also to be thought of as productive in effect rather than repressive and as acting “through” individuals rather than “against” them.⁴⁴

This relationship between forms of power and the bodies that are caught up in them involves a third element, that is, “knowledge.” Foucault uses this again rather abstract noun to describe the “know-how” on which techniques and strategies depend and, especially, the knowledge of their target which this entails. The successful control of an object-whether it is an object in nature or a human object-requires a degree of understanding of its forces, its reactions, its strengths and weaknesses, its possibilities. Conversely, the more it is known, the more controllable it becomes. For Foucault the relationship between knowledge and power is thus an intimate and internal relationship in which each implies and increases the other. His use of the term “power-knowledge” is a kind of conceptual shorthand used to emphasize these interconnections.⁴⁵

⁴³ibid. p. 852

⁴⁴ibid. p. 853

⁴⁵ibid. p. 853

He develops the notion of subtlety and pervasiveness on social control in his study of discipline and punishment when he elucidates the disappearance of torture as a public spectacle and the emergence of the disciplinary society. This movement from a regime of exceptional discipline to one of generalized surveillance and ultimately to the disciplinary society rest on transformation of the forms of law historically.⁴⁶

1.4 Nature of Primitive Law

Primitive law has been generally believed to be characterized by unbridled violence, anarchy, chaotic, and criminal in nature. Following in this tradition Lowie remarked that “since inter-personal relations are governed by fixed status, inheritance of property by well defined customs, since the contractual basis of interrelationship is unknown; the scope for civil law in primitive jurisprudence was limited.”⁴⁷ He asserted that primitive law differs from modern legal law in three different ways: firstly, primitive law is conceived of in terms of kinship solidarity rather than by territorial ties. Secondly, it is identical to the ethical norms present in the society or public opinion and thirdly, unlike the modern legal law, primitive law does not distinguish between ‘crime’ and ‘torts’ or in other words, between public and private wrongs.

This point is strengthened by Majumdar and Madan who holds that in primitive law, kinship ties are the main cohesive force. Public opinion has a strong influence in the life of its members because usually these groups are small in numbers where each and every member in the society is known to one other leaving no rooms for division among themselves. Here, Durkheim’s ‘collective conscience’ can be evident since each and every member of the society shared the same values and sentiments which originate from the moral and ethical notions of the people themselves. Majumdar and Madan further wrote that wrongs against the state cannot be identified with wrongs against an individual in such societies, thus, wrongs can be categories as personal wrong. For instance, the kin of the wrong person will avenge against the culprit or his kin. However, there are also instances of wrongs which demand the collective attention of the people, for instance

⁴⁶Anleu, Sharyn L. Roach. 2000. p. 57

⁴⁷Majumdar and Madan. pp. 205-6

deviance that has the effect of possibly harming the whole society like breaching of taboos.⁴⁸ Morgan, Maine and other anthropologists have shown that primitive people do not know the concept of state or government and that primitive people are individualistic and atomistic society and that the only bond that unites the people is that of kinship. Thus, Morgan place monarchy late in the process of evolution which is equivalent to the modern day government. As opposed to this tradition, many anthropologists have attempted to show that clan groups among the primitive communities have a spatial aspect. Even amongst the tribal's of India, the notion of tribe or clan is intimately always correlated with a geographical area. Many of the tribes like that of the Nagas have the presence of chief and councilors that act as a court for settling disputes also as the keeper of customary law. And likewise, there are tribes where authority is not vested entire to an individual or two but in a council in which decisions of each and every council men is taken into account.⁴⁹

Manjushree Pathak has shown that human beings gradually learnt a particular mode of behavior and conduct that was conducive for the collective living and as time goes by some particular pattern of behavior emerged into use and by consisting adherence to it such behavior achieved the status of some obligation that is endorsed by the entire group. He discusses the Austinian thought that view law as the enactment by a sovereign nation or a state and only when a custom receives judicial recognition, it becomes part and partial of a positive law. Austinian view upheld that custom is a 'positive morality' which until and unless is expressly ratified by the court it cannot have the forces of law. Paton while writing on customs opined that "Custom is coeval with the very birth of the community itself". He advances his view on the limitation of custom that custom is practice when the society is basically homogeneous. When society becomes more heterogeneous, customs becomes less effective.⁵⁰ On the other hand, Holland argued that custom was law before it received judicial recognition and both customs and statutes are principles or rules which regulate the life and conduct of human society.⁵¹ The master's

⁴⁸ibid. p. 206

⁴⁹Majumdar and Madan. 1986. pp. 210-211

⁵⁰Pathak, Manjushree. 2005. p. 46

⁵¹ibid. pp. 44-45

power remains tied to the 'consent' of other members of the household and adherence to authority is not dependent to the formal apparatus of enforced rules. This domination contrasts with other form of domination because they are entirely dependent on traditional norms and customs. Thus, obedience is own directly to the masters rather than to enacted regulations or laws.⁵²

One of the most concise definitions is that of E. Adamson Hoebel who formulate his concept of law while making comparative legal studies among the Eskimo, the Ifugao, the Comache, the Kiowa, and Cheyenne, the Trobriand islanders and Ashanti discussed the nature of primitive law and its relationship with religion and magic. According to him, law has primarily four major functions and these are: 1. defining relationships, 2. taming naked force and directing power to the maintenance of order, 3. the disposal of trouble cases as they arise, 4. redefining relationships between individuals and groups as condition of life change.⁵³

1.5 On the Evolution of Law

Many anthropologists who worked on the primitive societies have identified a pattern of growth that move from rudimentary law to the present time legal jurisprudence. Sir Henry Maine is one such scholar who studied primitive law of what he calls 'Ancient Law'. Maine remarked that early law was generally patriarchal, the basic legal unit was the family and the father was bestowed fully as the head of the household. In such societies, an individual has few rights or obligations. A person rights and duties were fixed at birth; these can be illustrated by the Hindu caste system where the eldest son in a family will grow up to have rights and duties distinctively different from those of daughter or son of another caste. Maine goes on to elucidate that modern law, in contrast, is a law of free individuals; people shift in and out of legal relations, voluntarily, through bargain and agreement. Maine writes, "Movement of the progressive societies has been uniform in one respect. Through its entire course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligations in its place.

⁵²ibid. pp. 231-2

⁵³Hoebel, E.A. 1964. p. 175

The individual is steadily substituted for the family as a unit of which civil laws take account...we seem to have steadily moved towards a phase of social order in which...relations arise from free agreement of individuals...the movement of the progressive societies has hitherto been a movement from status to contract.”⁵⁴

For Durkheim, law is an indicator of the mode of integration of a society, which progress in a similar pattern of what Maine described moving from fixed statuses to free contract. Durkheim maintains that law can be mechanical, among identical parts, or organic, among differentiated part such as in industrialized societies. Over the course of history, law undergoes a transformation from repressive law or penal law stressing on punishment to contract law or restitutive law. Weber too found modern law to be rational compared to other laws of ancient times.

Thus, in short, it could be held that Law, either in the primitive society or for that matter, even the more advanced industrial societies, is a rule or set of rules enacted or which follows a custom in a community or communities and used as enjoying or prohibiting certain actions and enforced by penalties or punishments as a means of maintaining cohesion and stability in the society.

Recent scholarship has been skeptical about theories of legal evolution. Anthropology rejected Maine’s patriarchal theory of law that premise on the understanding that society was organized in independent households in which power was vested entirely in the hand of one man, the father or grandfather. Durkheim’s dichotomous distinction between mechanic and organic society where the former is essentially penal law has also been declared either wrong or unverifiable. Pre-literate society, if anything more, is more “restitutive” than modern society because often it was possible to pay for wrong, even murder, and the distinction between tort and crime was blurred. Amongst most tribes in India, the main objective is to settle disputes and restore amity rather than to inflict a punishment for wrong done.⁵⁵ In a somewhat similar understanding, Krishna Kumar writes, “the punishment, in most cases, was aimed at compensation for the wrong done;

⁵⁴Friedman, Lawrence M. 1977. p. 43

⁵⁵Kumar, Krishna. 2005. In Indra Deva’s (ed.) p. 84

even in most hideous offences like murder, compensation in kind like giving of few *mithuns* or pigs absolved the guilty of the wrong done by him". The concept of wrong in all society is different; it is more of shame rather than guilt because of the close kin networking among individuals, the members are scared of public humiliation by fellow men rather than the dread of punishment.⁵⁶ In connection to this, Friedman opined that modern law indeed is rational as what Weber has observed. This, he says, does not mean to imply that modern law is better or more effective than other older system of law. But it simply means that the law today is a product of human beings, which in the primitive society would have belief as the making of god or gods of nature.⁵⁷

Adam Kuper, one of the most influential scholars of post colonial approach challenges the eminent sociologist and anthropologist theories of the origins of society and religion that have been debated since Darwin. He writes, "The history of the theory of primitive society is the history of illusion" and that "The theory of primitive society is about something which does not and never have existed".⁵⁸ He wrote in his book *The Invention of Primitive Society: Transformation of an Illusion* (1988) clearly that one of the reasons for writing the book was to "remove the constitution of primitive society from the agenda of anthropology and political theory".⁵⁹ Kuper continues his critique on the theory of primitive society by asserting that the idea of primitive society was sustained by forces internal to the discipline of anthropology. He asserts that since Darwin, anthropologists have tried to define the prototype of human society. Maine and his contemporaries started it and Lewis Morgan and the rest initiated the search and by the end of the century, their findings have been linked to the pursuit of earliest religion. This established primitive society as the object of social anthropology which soon gain importance and established the study of primitive society as a new discipline which "developed a sophisticated quasi-mathematical set of techniques for kinship studies. When this happened, the survival of the idea of primitive society was ensured."⁶⁰

⁵⁶ibid. p. 92

⁵⁷Friedman, Lawrence M. 1977. p. 45

⁵⁸Kuper, Adam. 1988. p. 8

⁵⁹ibid. p. 9

⁶⁰ibid. p. 9

TH-17373

Kuper argues that the theory of ‘totemism’, developed by McLennen, Robertson Smith and Frazer claimed to describe the initial state of religion and society. These Victorian models were later developed further by great theorist including Engels, Durkheim and Freud. In the twentieth century, these findings became the basis of social anthropology which was subjected to increasingly abstract transformations of this mistaken model. According to Kuper, this mistaken assumption would not have persisted within anthropology if it had remained static. Rather, it had the capacity for renewal, facilitated and accommodated various theoretical discourses “a process which allowed generations of scholars to feel that they were making genuinely novel contribution to their science.”⁶¹ He stress that there was no original ‘primitive society’ in the history of the world, the search and its goals were illusory and when we study the construction of primitive society, it is the mirror images of our own society.

1.6 The Definitions of Custom

Customs and society are inseparable and since time immemorial co-existent. The inception of customs is unknown just as the beginning of the earliest societies cannot be traced. To this, Roy opined that it is “impossible to ascertain the precise beginning or the most rudimentary growth of a long established customs. It is such high antiquity that neither human memory nor historical research can trace it.”⁶²

In relation to what customs constitute, Manjushree Pathak writes:

*On the gradual march of the human civilization the human race face various problems and the environment around them had a direct impact on them. When such conducts and behaviour are found to be beneficial to their interest and were followed by the rest of the society, these conducts turn into certain regulatory social norms. These regulatory norms can be known as customs... These varieties of customs as a whole forms the base of the society in order to facilitate the interest of individual and the society as a whole.*⁶³

Ehrlich, one of the exponents of sociology of jurisprudence defines custom as the “living law of people” based on social behaviour rather than the compulsive norm of the state.

⁶¹ibid. p. 9

⁶²Pathak, Manjushree. 2005. p. 48

⁶³ibid. p. 81

He further states that norms observed by the people, whether in matter of religious habit, family life or commercial relations are all law, even if they are never recognized by the state. He writes, “At present as well as at any other time the centre of the gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself”⁶⁴.

N.D. Kapoor and Rajni Abbi opined that custom denote a usage or practice common to many or to a particular place which is a long established practice considered by some as unwritten law. Thus, in other words, a particular act, usage or conduct practiced by group of people for a long period of time becomes custom.⁶⁵ In a similar note, custom has been defined by Adino Vitso as the habitual course of conduct of society that contains dos and don'ts based on its norms, practices and usages, mechanism such as taboos, sanctions, social rituals, culture, public opinion and ethics of each individual thereby controlling the pattern of its behavior. It is the established way of thinking and acting in society, thus, in other words, custom is what that depicts the way of its people. Law on the other hand is the social control mechanism for the people to behave in a particular intended way.⁶⁶

Radcliffe Brown drawing from his field work in the Andaman Islands divided custom into three types: techniques, rules of behaviour and ceremonial customs. It is this ‘ceremonial customs’ that he concentrated his attention, following in the footsteps of Durkheim, Radcliffe Brown states that ceremonial customs are those collective actions conventionally performed on occasions of changes in the course of social life. Their purpose, as he believed, was the expression of collective sentiments relating to such changes. He also asserted that interpreting these customs and beliefs of primitive people was essential, primarily because every custom and belief plays an integral role in the social life of the community, just as every organ of a living body plays some part in the overall general life of the organism.⁶⁷

⁶⁴ibid. p. 47

⁶⁵Kapoor, N.D. and Abbi, Rajni. 1996. p. 11

⁶⁶Vitso, Adino. 2003. p. 2

⁶⁷Kuper, Adam. 1983. p. 58-59

From available anthropology work, customs and law seems to be intrinsically woven together. William Graham Sumner, one of the first to have worked on norms and folkways, asserted that law could never move ahead of customs or mores of the people and legislation that was not firmly rooted in popular folkways was doomed to failure.⁶⁸ The implication was that laws can never shape mores because mores is the one that shaped laws. However, in the Indian context, this assertion is at false since in present times law is sought to be employed as a lever of basic social change bringing alteration in the already established values and norms through measures and enactment of legislation and introducing modification in personal law.⁶⁹ For Indra Deva, sociology of law deals with social relationship, values, norms and attitudes. The established patterns of social relationships, together with values and norms undergoes changes, law also change. Thus, in this sense, “law is the structured and crystallized form of norms and values” which “provide a clue to the social values that are really enforced but remain hidden from the public eye”.⁷⁰

1.6.1 *Taboo*

The word ‘taboo’ derived from the Polynesian word ‘tabu’ which simply means ‘to forbid’, ‘forbidden’, and can be applied to any sort of prohibition.⁷¹ Taboo has been called the unwritten law of the preliterate societies that includes all the restriction communicated through the verbal “don’t dos” generally associated with ritualistic behaviour.⁷² Some scholars hold that taboo is a part of a custom that has a negative effect. It has been referred as ‘holy dread’ by some scholars, an objectified fear of the demonic power thought to be concealed in the tabooed object. Majumdar maintains that taboo is a religious prohibition of safeguarding the ritual operation of protecting religious person, places of worship and that the sanctity of taboo is inspired by the idea of *bonga* which makes the people believe that violation of a taboo will result in disaster.⁷³ Therefore,

⁶⁸Ball, Simpson and Ikeda. 1962. p. 532

⁶⁹Deva, Indra. 2005. p. 3

⁷⁰ibid. 2005. p. 3

⁷¹Radcliffe Brown, A.R. 1979. p. 133

⁷²Majumdar and Madan. 1986. p. 163

⁷³Vidyarthi and Rai. 1976. p. 243

taboos are said to have super natural or magical sanction behind it.⁷⁴ Majumdar and Madan identifies three types of taboos, they are: productive, protective and distributive. Productive taboos are those associated with cultivation; those taboos that restrict women, children and in some cases men are also from particular objects, place or things also falls under protective taboos. And those that prohibit or limit a person's liberty by refraining them from places, actions or restricting their contact with others are the prohibitive taboos.⁷⁵

This fear of tabooed objects has been illustrated by Radcliffe Brown; he writes, "Certain things such as a newly-born infant, a corpse or a person of a chief are said to be taboo. This means that one should, as far as possible, avoid touching them. A man who does touch one of these tabu objects immediately becomes tabu himself..He is regarded as being in a state of danger, and this is generally stated by saying that if he fails to observe the customary precautions he will be ill and perhaps die. In the second place he is also dangerous to the other persons-he is tabu in the same sense as the things he has touched".⁷⁶ Closer home, in the Indian context, one such example can be seen among the Todas of Nilgiri Hills where women are prohibited from entering the diary farm. They are also denied works related to milk because milk is viewed as a sacred for them, even their religious rituals evolved around these.⁷⁷ The Gonds of Madhya Pradesh do not touch a menstruating woman for that is enough to destroy good harvest.⁷⁸ Similarly, among the Tangkhul Naga, women were not allowed to touch weapons associated with the raiding expedition (head hunting).⁷⁹

1.6.2 Norms and Values

Every society contains a large number of guidelines which direct conduct of an individual in the society. A norm is as a specific guide to actions which defines acceptable and appropriate behaviour in a particular situation. The enforcement of norms can be negative

⁷⁴Majumdar and Madan. 1986. p. 163

⁷⁵ibid. p. 163

⁷⁶Radcliffe Brown, A.R. 1979. p. 133

⁷⁷ibid. p. 244

⁷⁸Chauhan, Abha. 1990. p. 28

⁷⁹Paothing, Free. 1994. p. 19

or positive sanctions which may be formal or informal such as approving or disapproving glance or formal such as a fine place against someone by from the body of authority. These served as a major part of social control mechanism with the objective of maintaining order and stability in the society. The Anthropologist, Heobel, defines a norm as a legal “if its neglect or infraction is regularly met, in threat or in fact, by the applications of physical force by an individual or group possessing the socially recognized privileged.”⁸⁰

Values, unlike norms provides specific directive for conduct and are more of a general guidelines. It can be define as a belief that something is good and desirable. It points out what is important and worthwhile and worth striving for. The different norms that exist in the society can be taken as the expression of values placed on human life. Values for Timasheff are the embodiment of human behaviour which is in expression of primary relation of individual to everything not excluding himself. Values are an expression of what is ‘ought to be’ or ‘ought not to be’. In Timasheff’s words, “The contents of “the ought to be” are various, but we do not know of any tribe, how rudimentary its cultural development may have been, which do not possess in its culture as a system of formulas marked by the words “ought to be” or “ought not to be”.”⁸¹

Following the distinction propounded by Clyde Kluckhohn between norms and values, Morris maintains that values are individual or commonly shared conceptions of the desirable, that is, what is proper for an individual to want. On the other hand, norms are generally accepted, sanctioned prescriptions for, or prohibitions against, other’s behavior, belief, or feeling, in other words, what others ought to do, believe, and feel. Values can be held by a single individual; but norms cannot be an individual norms, it is always for collective usage. In his words, “Norms must be shared prescriptions and apply to others, by definition. Values have only a subject-the believer-while norms have both subjects and objects-those who set the prescription, and those to whom it applies.” He further stress that Norms always include sanctions; values never do. Though commonly held values often result in the formation of norms that insure the maintenance of the values, it

⁸⁰Heobel, E. Adamson. 1954. p. 28

⁸¹Timasheff, N.S. 1976(1939). pp. 67-69

is not always true or works that way. Nor does it follow that every norm, at the point of its application, involves a presently held value, even though most norms are based upon established values.⁸²

Thus, norms and values are integral in the formation of customs and practices in the society which again also influences in the shaping of law.

1.7 The Concept of Customary Law

Customary law has been primarily identified, by scholars as those practices that have been followed over a long period of time which became so embedded in the functioning of the society that it existed as a form of law. For D.N. Majumdar and T.N. Madan, laws of a society are a body of principles which underlie its activities as a state and 'state' here denotes that association which has the monopoly of using coercion over its members within a given territory. N.D. Kapoor and Rajni Abbi writes, "In primitive societies, customs used to be the only law that governed the conduct of the people"⁸³ which developed out of necessity or convenience. Thus, when a particular practice was repeatedly followed, it became a custom. They further expounded that traditionally much of the common law of England was premised on the customary practices of the country. The expression of 'Common Law' of England convey those unwritten doctrines embodying English customs and English traditions, therefore, custom is the mother of all institutions. And as civilization flourished, customs value diminishes giving place to a judicial precedents and legislation as the main source of law.⁸⁴ Scholars like Pareto opined that customary law is not limited to the first stage of legal development, it continues to play a vital part even in the legal and written law of states in modern times; he writes, "Customary law is not merely primitive; it goes hand in hand with positive law, creeps into jurisprudence and modifies it."⁸⁵

⁸²Morris, Richard T. 1956. p. 610

⁸³Kapoor, N.D. and Abbi, Rajni. 1996. p. 10

⁸⁴ibid. p. 6

⁸⁵Timasheff, N.S. 1976 (1939). . p. 312

Fernandes, Pereira and Khotso holds that the origin of customary law lies in the habits that grew into customs through and acquiescence in the values they symbolized. A norm becomes a law when the community members respect and adhere to it as integral to their heritage. Customary law is thus set of rules that attain the forces of law because a society observes them continuously and uniformly for a long period of time.⁸⁶

In questioning how customs are recognized as law, Salmond reasons, based on the principle of justice and public utility, “custom is the embodiment of those principles which have commented themselves to the national conscience as principles of justice and public utility.” Custom embodies the principles as acknowledged and approved, not by the power of the state but by the public opinion of society at large. He further expounded that customs that are observed over a long period of time acquires the forces of law and that since it rest on the conviction that it is in the interest of the society at large, it is not found desirable to violate.

This view seems to be endorsed by Harpershad V. Sheo Dayal who defined custom as “a rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from a long usage obtained the force of law.”⁸⁷ Thus, from the arguments, it will be pertinent to say that customary law sprang out of the customary practices or customs of a particular community or a group of people. This view is strengthen by N.S. Timasheff who writes that customary law is a type of social law where rules are created purely (customary and moral) on ethical ground which were later on “recognized by the state and enforced by its tribunals and administrative bodies, though without ever having been promulgated as parts of statute law.” He further goes on that the historical school of jurisprudence exalted customary laws with the principle idea that legislation is only a secondary means of determining social conduct because the chief means of custom which according to them is an instinctive, empirical manner of finding out the best way for

⁸⁶Fernandes, Pereira and Khatso. 2006. p. 24

⁸⁷ibid. p. 11

human beings to get along in the society. Thus, in this view, customary law is the best form of law as this would mean that there will be no conflicts with public opinion.⁸⁸

Yet again custom and customary law is not synonymous concepts because although customs can be violated by an individual, non-conforming to the customary law of a particular group will lead to the punishment of the violator.⁸⁹ Customs are certain norms and the law is the normative science, which lays down rules as to how human beings ought to be in the society. Customary law as a normative element should have socially sanction authority⁹⁰ Therefore, in this sense, customary law can be distinguished from customs and habits only through the recognition of those customs by the state as being customary practices of a particular group of people, that even the act of breaching that particular custom does not incurred the wrath of the society.⁹¹ Scholar like Ferh argues that “customs becomes law when it gains the power to be actualized in the community” and that customs lack such power.⁹²

In clarifying the difference between customary law and custom (usage or conventional custom) Kapoor and Abbi divided customs into two types: legal customs (customary law) and conventional customs or usages. They further distinguish customary law from custom which according to them, the former is “binding force irrespective of the consent of the parties to be bound thereby” whereas a “usage is binding only when it is not expressly excluded by the terms of the agreement entered into by the parties.” For a customary to be valid and accepted, it must have endured for a time period that has no memory of its origin; usage, on the other hand, need not have existed from time immemorial.⁹³

Thus, to sum it up, primitive people or the tribes has a social regulation which is endowed with relatively strong sanctions imposed not by the organized power that exist in the form of court, judicial body or the state but by the society or the community which is later on recognized by the state as the law only for those people who follows the law as their own,

⁸⁸Timasheff, N.S. 1976(1939). pp. 310-311

⁸⁹Pathak, Manjushree. 2005. p. 43

⁹⁰ibid. p. 52

⁹¹Timasheff, N.S. 1976(1939). p. 312

⁹²ibid. p. 147

⁹³Kapoor and Abbi. 1996. p. 13

has been later came to be known as customary law. Below, in connection to how customary law is still adopted by the government of India by narrating briefly the African experience is looked upon.

Martin Chanok writes that customary law has to be understood not just as a law but it also constitutes a way of understanding the past and therefore, the present. The way in which society conceives its traditions is fundamental to the understanding of itself. Tradition symbolizes continuity, cultural identity and orderly existence though the nature of that order may be fiercely disrupted. Chanok while narrating the African experience of imperial intrusion noted that law was the cutting edge of colonialism, an instrument of the power of alien state and part of the process of coercion that came to be a new way of conceptualizing relationships, power and weapon within African communities which were undergoing basic economic, social and political changes. He stated that customary law far from being a survival of traditional order of the past; it was created by these changes and conflict.⁹⁴ Frederick Lugard opined that only by employing customary law in native court it was 'possible to create rudiments of law and order, to inculcate a sense of responsibility, and evolve among a primitive community some sense of discipline and respect for authority'. Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, in order to make colonial rule work with only a 'thin white line' of European administrators, African ideas of custom and of law had to be incorporated into the new state systems. In a very real way, thus, customary law and African courts provided the ideological and financial underpinnings for European colonial rule.⁹⁵ Ada Okoye writes that the appeal of customary law to the colonial authorities was because of its indigenous character and incorporating customary law facilitated the administrators in maintaining law and order.⁹⁶

Brett L. Shadle case study of Kenya is a departure of the experience of African society with colonial ruler. In the whole of Africa the colonial administrators used customary law to legitimize the colonial state and mould the society. Colonial officials naturally

⁹⁴Chanok, Martin. 1985. pp. 4

⁹⁵Lugard, Lord. 1965. pp. 547-8

⁹⁶<http://www.gwsafrica.org/knowledge/ada.htm>.

harbored the ambition of using the law to shape society and to maintain tribal integrity, but an unwritten law fluid in nature had the scope of revolutionary tactics as such customary law was codified based on the information provided by elders, thus instituting rules that permanently favored them to the disadvantage of women and junior men. However, only in the case of Kenya, far from codifying customary law, the administrators fought against it fearing that it would disrupt their control over local African courts. An examination of transcripts from African court proceedings from South Nyanza district demonstrates that elders followed a much more nuanced customary law in the courts than the one spelled out in colonial texts; again, customary law changed to meet altering conditions. Similarly, the administrator thought that customary law would change, but change slowly and under guidance, allowing the vanguard to push forward without completely eclipsing the way of life of their still living grandfathers.⁹⁷ Through continual alteration of a fluid body of customary law, administrators could try to guide these changes and keep a firm hold over African life. Codification also threatened to empower the judiciary in their ongoing struggles with the administration over the control of African dispute resolution. Thus by keeping customary law unwritten helped them to exclude the judiciary from intra-African disputes, since without written codes only administrators (who 'knew' Africans) could decide customary law cases.

These studies illuminate the hold of colonial impact in the tribal inhabited areas which for the purpose of serving their own interest, the colonial master's legitimized customary law as the law governing the land which were tribal inhabited areas. A strong similarity can be drawn here between the African tribes and the tribes of northeast India. In analyzing from this perspective of customary laws as being circuted by the colonial rulers in Africa, though no notable work has been done with regard to tribal inhabited areas in Northeast, it can be reflected here that policy of non-interference that the British adopted especially in the northeast region of India points towards the understanding that customary laws and its inception as law in the tribal societies is a legacy of the British rule in India.

⁹⁷Shadle, L. Brett. 1999. pp. 414-15

1.8 Objective of the Study

The objective of this present study is to understand the problem of women under the realm of law (here being customary law) from the feminist perspective. This study stems from the feminist argument that patriarchal forces deny women not just social rights but also political rights and that women as a full citizen in the society are also entitled to enjoy the full rights that any ordinary citizen profess and dream of within the state. The research began with the key question of how is women treated under customary law? Do women get a fair share equivalent to man under the customary law of the Tangkhuls? The fact that societies which are thought to be simple unlike the highly industrial type are often misconstrued as being gender egalitarian. This is a misconception owing to the fact that superficially tribal society are relatively egalitarian as there are no sharp demarcation of class distinction, but this seemingly gender neutral society breaks down the moment the question of women and customary law is raised. This present study does not include various other customary law governing crimes or torts such as rape, homicide, murder etc into account, rather the study has been narrowed down to the Tangkhul traditional practices of inheritance of property and chieftainship, ascension to public office, in other words, village authority that denies women participation in the decision making process. The whole study is premise on the understanding that it is the unequal gender relation among the Tangkhul patriarchal set up that has successfully produced the gendered form of customary law that has been crucial in denying women the basic rights of women as an equal member in the society. The Tangkhul society follows and traces their descent through the male line that can be seen in the form of patrilineal and patrilocal practice among them which again ensures that property is passed through the male line alone. Owning of property though is not in direct congruent to the authority structure where the head of the family or the head of the clan is always man and in the case of the former, the eldest male of the clan, but again this also prove that property ownership has a great impact on the location of authority in the family. Property here connotes immovable property especially land and house also property that are regarded ancestral which is a mark of birth identification for them. Thus, the study question this practice of inheritance and decision making that has been since traditional times, forbidden women from entering into local political set up.

This study argues that gender stereotypes and construction of masculinity and femininity that influences the formulation of law in the society by constructing images of women as passive and meek being in need of protection and thus to be safeguarded and protected under the purview of law. The central objective of the study lies in the question of how in any given society, be it in the so called primitive or industrially advanced society, in fact any existing society was and is biased towards women and this can be reflected in their law which is again in the hand of man who creates law and treat women as subordinate in relation to man.

The study further argues that tribal tradition is one that is dominated and control by man over their community and society and those who have won the right to follow their customary law have not reformed them in the favour of gender equity. State support deteriorates women's condition further because it is the state that sanctions man as the rightful head of the family. Thus, the present study argues that it is the patriarchal nature of the state that facilitates and perpetuates such practices that recognizes only man as full citizen. This study also explores the feminist problem with law as a contradictory site that simultaneously challenges the established system in the society at the same time perpetuates such inequality.

The study does not explore whether customary law should be accepted or rejected as law in this society, nor does it examines the advantage or disadvantage of customary law for women but the central idea conveyed here speaks of reformation and a more gender neutral law that includes women as equal member in the society.

1.9 Methodology

Available literature and debates on the question of women and law in India heavily pointed towards the experience of non-tribal women. This makes the present study of linking theoretical perspectives to the problem of Naga women's issues under customary law an overwhelmingly difficult task to deal with. Thus, I have deliberately avoided dealing with some certain issues owing to the lack of time and the lingering dilemma and uncertainty among the feminist groups themselves within the domain of law. From the

available materials on tribal women and Nagas, another problem arise especially concerning the usage of Nagas of Manipur and Nagas of Nagaland and their experiences, scholars usually club together vaguely Nagas of different territories, that is, the Nagaland state and the Manipur state as being synonymous. For beginner research student like me and many others, this constitutes itself an issue to be tackled with. Again, though there is plethora of feminist perspectives to choose from and ponder upon the issue of law, none of the perspective captures the problem of male dominance under customary law. In other word, all these perspectives in one way or the other is an important contribution which helped me in understanding the complexity of law and women, yet again failed to explain some of the important issues satisfactorily leaving with more questions than answering them. However, it cannot be denied that this present study is done from the framework of feminist understanding of the society and its problem with the gendered nature of human relations. Thus, in this sense, from the perspective of patriarchy and gender inequality as a resultant process of patriarchy at work is the central argument of the study. The study is inter-disciplinary as the material collected has been drawn widely from different disciplines: sociology, law, anthropology, political science, and, history.

As the title of the dissertation lucidly portray, the present study can be categorize under the realm of sociology of law from the feminist perspective. The present area of study selected, that is, the Tangkhul Naga society is my own society, thus, there is also the chances of subjectivity, however to my best knowledge, every attempt has been made to be truthful and objective in my analysis. At the same time, my experiential knowledge of being a part of Tangkhul society has helped me to percept this society from the insider's view point.

Since the scope of this dissertation does not include collection of primary data, the study is a qualitative analysis that makes use of secondary sources. Secondary sources includes textual and article writings of scholars from diverse field such as sociologists, historians, political scientists and anthropologists. Unpublished articles and dissertations, including government initiated studies and gazetteer has been referred to.

The materials are collected from the Central Library in JNU, the DSA library in the Centre for the Study of Social Systems, Nehru Memorial Museum & Library (Teen Murti House), Ratan Tata Library in Delhi School of Economics, Women Studies Programme Library in JNU, and Exim Bank Library in JNU. Most of the local materials are collected from seniors and friends who are researchers in their own respective field from JNU and Delhi University.

1.10 Outline of Chapters

The dissertation has been broadly divided into three main chapters though the first chapter, that is, *Introduction* examines the different perspectives and conceptual categories of law, customs and customary law. The second chapter, *Feminist Literature in Women and Law* outlines various feminist perspectives in the study of law with special reference to India. The chapter began with the feminist orientation to the body of law as a contradictory site that perpetuates patriarchal ideology at the same time the ability of the law challenge such assumptions. The arguments of this chapter trace the reasons for the gendered nature of law to the unequal gender relation that has resulted in fostering and nurturing such inequalities. The central argument points to the feminist rejection of the law as being impartial, neutral and objective. This chapter also raises the issue of women citizenship especially by bringing in the experiences of tribal women in the Northeast region under customary law. It explores and problematizes the issue of women citizenship due to the way in which tribal customary law functions and executes laws antithetical to the aspiration of the women as citizens. The next chapter, *Tangkhul Naga: History and Customs* examines in general the Tangkhul society by giving a brief account of their customary practices, their traditions, social organizations and structure. It also succinctly provides the coming of British rule in the Naga inhabited areas and there after the tremendous changes both social and political among the tribe. The raise of Naga freedom movement has also been touch upon to give a background of the political and social problems that are still prevalent in this region. An attempt to understand the response of women in this movement has been briefly illustrated from the role of women peace groups working in this region. The fourth Chapter, *Customary Law and Women* will illustrate the Tangkhul customary law especially in reference to their inheritance

(property and Chieftainship) and representation in their Village Authority. This chapter will address the issue of women under the patriarchal nature of customary law and argue that perpetuation of such inequality under law is due to the production of unequal gender relation in the society. The chapter will argue from feminist critic of law as being gender bias and discriminatory in nature. To understand that customary law is pervasive across different culture, attempt has been made for a comparative perspective by bringing in the African customary law and its impact on African women as second citizens and their conflicts within their patriarchal social set up. The last chapter, that is, *Conclusion* will provide an over view of the discussion and various arguments that has been address in the preceding chapters.

Chapter-2

Feminist Perspectives on Women and Law

2.1 Introduction

Feminist literature on the study of law, and its roles and implications on women have made significant changes over the last two decades or so. However, when it comes to customary law and women of tribal societies, one will encounter lack of substantial works and material making the task a difficult endeavour. In this chapter, I do not seek to provide the history of the legal remedies for women nor review the various provisions and policies initiated by government, instead I have simply attempted to look into some of the existing perspectives in the study of law and women in India, also contributions that has been made by the feminist writers in the study of gender relations to understand the complex nature of customs, personal laws, customary law and legal law that often existed as a form of patriarchal system serving the interest of the state resulting in the perennial perpetuation of women as subordinates and how this gendered assumptions highly influence the way in which legal laws and societal norms, customs or practices be in simple societies or highly advance societies exist and functions.

Feminist anthropologist like that of Sherry Ortner writes that women occupy all over the world, in any society a subordinate position. In her words, “The secondary status of women in the society is one of the true universals, a pan-cultural fact” and that ideologies, symbolizations and socio-cultural arrangements pertaining to women vary considerably from culture to culture”.¹ Ortner claims that the cause of this universal devaluation of women is not biological but the way in which every culture defines and evaluates female biology. In every society a higher value is placed on culture than on nature. Culture is the way by which man controls and regulates nature and this universal evaluation of culture as being superior to nature is the basic reason for the devaluation of

¹Ortner, Sherry. 1996. p. 21

women. The notion of women being closer to nature than men is central to their occupying inferior position in the society. Ortner further argued that women are universally defined as closer to nature because their bodies and physiological functions are more concerned with the “natural processes surrounding the reproduction of the species”.² Thus, it has been rightly argued that the formal statutory existing law that are a part of the basic structure of society are influenced by the notion of gender ideas and constructions that perpetuate such assumptions and this is produced in the form of legal laws of the state.

In the history of women’s movements in India or abroad feminists has always turned to law as a way of securing their political goals, also in the hope of transforming their social realities both in public and private realm. Yet again in the work of recent feminist discourses law has also been seen as an instrument of oppression and a complexity possessing two facades: one of protection and at the same time exploiting the vulnerability of women. Thus, law has been identified as a site that reveals contradictory nature, one that of reinforcing deeply gendered assumptions, relations and roles by constructing women as mothers, weak and passive being in need of protection and on the other hand law is also a site where these gendered roles and identities has been challenged.³ Below, some of the key concepts and theories that will constantly be used and drawn reference from for the understanding of law and in this context to the understanding of the complexities surrounding customary law and the government policy of non interference in the tribal societies in general and Tangkhul society in particular have been discussed.

This chapter is an attempt to understand law in the realm of feminist discourse. Feminist has identified law as being highly problematic and thus it is deliberated upon, debated and contested within different feminist perspectives to the nature of law and its impact on women. The preceding chapter has discussed the different theoretical perspectives on law and customary law in general drawing the understanding from the sociological and

²ibid. p. 25

³Kapur and Crossman. 1996. p. 11-12

anthropological point of view. This chapter will shift focus to the feminist engagement with law, its arguments of the gendered and highly bias nature of law and also the dilemma of the fluidity that law is posited with; this will throw light to the highly controversial nature of law per se in feminist literature.

2.2 Conceptual Categories

2.2.1 *Patriarchy*

The concept of patriarchy has its root in the critics by the feminist to denote and explore relations of gender dominations which is used, theorized, and explained in a myriad number of ways. Literally it means ‘rule of the father’ originally used as a concept to describe social system based on the authority of man or the father as the head of the household.⁴ In the radical feminist analysis, patriarchy is seen as the primary and fundamental social division in society regarding the institution of family as a key means through which the domination of men is exercised. Firestone (1974) wrote that inequalities between men and women are biologically based, with the different reproductive capacities of men and women being especially important. Marxist feminist on the other hand, argued that patriarchy is produced out of the working of the capitalist economic system where benefits and gain is derived out of women’s unpaid labour at home. Thus, explaining the subordination of women to men in the society as a by-product of the capitalist subordination of labour.⁵ Sylvia Walby following in this light opined that Patriarchy has its roots in the usages of early sociologist such as Weber who used to refer to a system of government in which men ruled societies through their position as heads of household. Since the time of Weber, the meaning of the word has evolved. It has now acquired a more general usage, especially in some feminist theories where it has come to mean male domination in general. Walby define patriarchy as a system of social structures and practices in which men dominate, oppress and exploit women. She pointed out that the use of the term ‘social structures’ connote the rejection both of

⁴Gordan, Marshall. 2006. p. 485

⁵Walby, S. 1990. p. 19

biological determinism and the notion that every individual man is in a dominant position and every woman in a subordinate one.⁶

Walby's theory of patriarchy claims to overcome the earlier problem of reductionism, ahistoricism, universalism and the tendency to lose agency in social and historical processes. She further stresses that patriarchy as a concept needs to be viewed from different levels of abstraction. At the most abstract level, it exists as a system of social relations. At the less abstract level, patriarchy is composed of six structures, that is, the patriarchal relation in the state, male violence, patriarchal relations in sexuality, and patriarchal relations in cultural institutions. Her theory of patriarchy also allows for change over historical period. Walby argues that in Britain during the twentieth century, patriarchy changed from private to public form. Private is based upon family, household and includes individual men exploiting the labour of individual women. Also in her understanding of patriarchy, women are largely confined to household domain and have no role to play in public sphere.

V. Geetha too uses the term patriarchy to denote the absolute rule of the father or the eldest male in the family which implies that patriarchy is the rule of the father not only upon all women in the family but also over younger and socially or economically subordinate males. According to Geetha, in the writings of Anglo-American anthropologist in the nineteenth century, patriarchy was widely used to refer to social systems where men were family heads, descent was reckoned through father, where men alone were allowed to be priests, and all norms and laws were dictated by what male elders in that community held to be just and right. The use of patriarchy in this sense can be contrasted with 'matriarchy', which referred to social systems in which women exercised political authority over men. Thus, matriarchy in this scheme of things was considered as the 'primitive' stage and patriarchy a more 'advanced' stage of existence. Geetha stated that 'patriarchy' in today's time is not only a descriptive term that explains how specific

⁶ibid. p. 20

societies construct male authority and power but it also has an analytical category.⁷ Thus, she states that:

*Patriarchy rest on the defined notions of masculine and feminine, which is held in place by sexual and property arrangements that privilege men's choice, desires and interest over and above those women in their life and this is sustained by social relationship and cultural practices which celebrate heterogeneity, female fertility and motherhood on the one hand and valorise female subordination to masculine authority and virility on the other.*⁸

Janaki Nair in the same light wrote that Patriarchy is a much contested concept which is used in a variety of ways ranging from the simple understanding of patriarchy as the 'rule of the father' to more complex notions of male power and rule. It also refers to the systematic arrangement of social, economic and political power in ways that benefit male member of the society, and ensure the sub-ordinate status of women. Such a use of term emphasizes that patriarchal systems are basically socially produced systems, and rejects biological explanations for the sub-ordination of women. To her, patriarchal arrangements are universal, and have existed through most period of human history; the specific features of patriarchy have varied across societies and through history. Also central to patriarchy arrangements are kinship system which determines the way women are related to the whole system of production and social reproduction within and outside the family in a particularly sub-ordinate way.⁹

Thus, patriarchy is the ideology and instrument for the subordination of female labour for production and reproduction. She however stressed that the success of patriarchy cannot be attributed to the used of brute force alone but by means of seeking and obtaining consent especially by rewarding certain forms of complicity, or by deploying women themselves in enforcing essentially patriarchal norms.

⁷Geetha, V. 2007. p. 5

⁸ibid. p. 8

⁹Nair, J. 1996. p. 11

Nandita Haksar views patriarchy as a social organization of family, community and state in such a way that male power is reinforced and perpetuated and this is made possible by the control of woman's body by man especially her "productive powers so that he can have control over the children and the family".¹⁰ She writes that society has dual standard on judging morality and sexual behaviour; one for man and another for women. Religion and society ascribe impossible virtues for women confining them in a narrow sphere of societal expectations.¹¹ She cites the examples of Manu, the venerated Hindu sage dictum for women which lucidly expounded that though husband may be lacking in virtuous character or seeking pleasure elsewhere, wife should constantly worshipped her husband idolizing him as god. Thus, the religious believes sanctioned and allows men to exploit and used women. She contended that the suppression of female sexuality within Indian families can be starkly observed in the way women are kept as the property of her father and husband. She further noted that the insistence on virginity and fidelity for the women is the pre-requisite for the inheritance of property through the male lines.

2.2.2 Gender and Sex

The concept of gender as is use today came into common parlance during the early nineteenth seventies. It was used as an analytical concept to draw a line of difference between biological sexes. Ann Oakley (1972), one of the pioneer in using the term 'gender' to sociology denotes the parallels and socially unequal division into masculinity and femininity that differs from "sex" which refers to the biological division between male and female. Oakley defines sex as the biological differences between male and female: the visible differences in genitalia, the related differences in procreative function. Gender, however, is a matter of culture: refers to the social classification between masculine and feminine stereotypes.¹² Thus, gender connotes the socially constructed aspects of differences between men and women. According to Janaki Nair¹³, the term 'gender' was devised especially to avoid biologism, to emphasized the socially produced

¹⁰Haksar, Nandita. 1986. p. 85-86

¹¹Haksar, Nandita, 1994. p. 29

¹²ibid. p. 32

¹³Nair, J. 1996. p. 12

structures, meanings and relations that depend on, deepen and transform, but are fully explained by, or reducible to, biological sex differences. The distinction between 'gender' and 'sex' may be understood as the differences between the oppositions "man" on one hand women on the other hand. Gender is a construction, wrought by human agency rather than emerging from biologically given characteristic. Margret Mooney Marini¹⁴ while writing about the construction of social roles wrote that research on tribal societies indicates that men have tended to be the warriors, hunters, and processors of hard raw materials used for weaponry and tools, whereas women have tended to do the cooking and preparation of vegetal foods. As a result of this gender differentiation in the division of labor, men have been in a better position to acquire and control the valuable resources of their societies. According to her, although there is reason to believe some sex differences in behavior and attitudes have a biological basis, the existence of historical and cross-cultural variation in gender role differentiation and stratification provides strong evidence that social influences play an important role in the determination of differences between the sexes.

Simone de Beauvoir's classic book *The Second Sex* (1972), probably the key theoretical text of twentieth century feminism stated that "one is not born but rather becomes a woman". Beauvoir's argument lays bare the ways in which gender differences are set in hierarchical position where masculine principles are favoured and taken as higher values while feminine aspects are taken as "other" and outsiders. She argued that woman is oppressed by virtue of "otherness". Woman is the other because she is not man who is free, man on the other hand who is the self, who according to her is the free determining being defines the meaning of his existences, woman, on the other hand, is the other, the object whose meaning is determine for her.¹⁵ De Beauvoir's ideas on women as the other was drawn from the philosophical arguments of Hegel and Sartre who saw that relationship between individuals were marked by fundamental contradiction. Each individual self seeks to act freely and autonomously, but simultaneously requires interaction with others in order to define that self. Individuals are forced to recognize the

¹⁴ibid. p. 13

¹⁵de Beauvoir, 1972.p. 295

reciprocity of otherness through our encounter with individuals. However, in the case of man and women relation this reciprocity of otherness is not recognized, instead women become the sole other. Beauvoir attributed the reason of woman 'otherness' is due to her reproduction capacities that limits her status in the eyes of men. She states that women do not regain her status as being 'the one' because they largely accept this state of affairs.

Judith Butler's theorization of gender points to the notion of performativity which emphasized on the involuntary role of gender performances by different sexes within the dominant role of heteroreality. Her conception of gender has been thought to be a radical proposition borrowed from Foucauldian model and contented that all identities categories "are in fact the effects of institutions, practices, discourses with multiple and diffuse point of origin".¹⁶

According to Shulamith Firestone, the system of patriarchy exploits women biological capacity as their essential weakness. She proposed that the only way to escape from this yoke is to use technological advances to free themselves from the burden of childbirth. She also went to the extent of even breaking down the biological bond between mother and children and establishing communes where monogamy and nuclear family are done away with.¹⁷

2.3 Perspectives on the Production of Gender Roles and Relations in the Society

In understanding gender roles, its production and relations, there are several perspectives that attempted to explain the existence of gender relation in myriad different ways.

2.3.1 *Functionalist Perspective*

The Structural Functionalist like that of parsons has attributed the unequal relationship between men and women and the several division of labour as an essential feature of all societies that cannot be done without. Anthropologist that view sexual division as the

¹⁶Pilcher and Whelehan, 2005.p. 58

¹⁷ibid. p. 57

universal phenomenon turns to biology for this unequal gender relation; Fox and Tiger has postulates that human beings behave in accordance with the biogrammer, that is, a genetically based program which predisposes mankind to behave in a certain ways. Thus, women are programmed by their biology to reproduced and care for. Murdock on the other hand went on to expound that the greater physical strength of men and the fact that women are the child bearer are the outcome of sheer practicality of life. Scholars that views inequality from the cultural perspective states that gender roles are not inevitable since values, norms, roles and customs are culturally undermine and socially transmitted, the norms governing gender roles are the outcome of the culture.

2.3.2 Marxian Perspective

Fredrik Engels traced the oppression of women to the historical onset of private property which necessitated a strict control over women's sexuality to ensure that inheritance be guaranteed to the offsprings of the male owner of the property. Monogamous marriages were developed to protect the institution of property bringing to an end previously existing communal systems. The change in the family type brought about changes in the sexual division of labour which added to women's oppression. Engels stated that "the predominance of the men in marriage is simply a consequence of the economic predominance and will vanish with it automatically."¹⁸ He wrote that as long the family continues to be the economic unit of society, the position of women cannot be fundamentally changed. He views family as the instrument of perpetuating women's subordination. Marx and Engels believed that the liberation of women could be witnessed in the nineteenth century capitalist society where demand for female wage labourer would raise the status and power of proletariats women within the family. However, true equality between the sexes could be achieved only in a socialist society where means of production were communally owned. The onerous duties of housework and motherhood would no longer be performed by individual women as all work becomes the

¹⁸Engels, Frederick .1948. p. 117

responsibility of the community. Engels wrote, “Private housekeeping is transformed into a social industry. The care and education of children becomes a public matter”.¹⁹

2.3.3 Women and Reproduction

Scholars who have work on cross-cultural research on women and production seem to be near consensus when it comes to research on the centrality of reproduction and relation of production concerning women’s position in the society. There are scholars who upheld women’s role in reproduction as primary and that this universally caused some degree of female dependence and subordination, while others sees production relations as primary.

According to Meillassoux, women’s reproductive functions are the source of their subjugation by men. Since women are the agents of genetic reproduction women are brought under the subjugation to have control over the progeny. He also emphasizes on how ideology is utilized in the subordination of women. He uses ethnographic materials to show how myths are used to achieve this ends:

Several myths in Africa tell of ancient times when women had power over nature: wild animals obeyed them and they were the mistresses of the world. Then, one day they committed some mistake (either they did not watch the game or forgot to close the door of the kraal) and all the animals fled away and they lost their power. Men took it over and have wisely kept it since. Every sixty years, the dogan celebrate this victory of the males over women by wearing false breast to dance and sing.²⁰

Following in the same light, Leela Dube²¹ also shows how social arrangements or gender asymmetry is justified as a kind of natural arrangement through the ideology of human reproduction expressed in the metaphor of ‘seed and earth’ which symbolizes the respective contributions of the father and the mother. By expressing specific understanding regarding the process of biological reproduction, it provides the

¹⁹ibid. p. 108

²⁰Meillassoux. 1986.p. 15

²¹ibid. p. 23

ideological bases for legitimating of crucial principle of kinship and there operation in respect of property and production.

The metaphor of 'seed and earth' signifies the process of human reproduction whereby man provides the seed contained in the semen, for the creation of offsprings. The child's identity is derived, thus, from the father in so far as group placement is concerned. The woman, like the earth or the field nourishes the seed by nurturing what the womb has received, with her own blood. This act of nurturance continues even after the birth of the child by nourishing the child with her milk. This metaphor of 'seed and earth' has certain implications in the social arrangement of society. One is that of an essentially equal relationship between man and woman is reflected and emphasized through the use of these symbols and the other implication is the utilization of these symbols by culture to underplay the significance of women's contribution to biological reproduction. The more or less invisible contribution of the father contrast sharply with that of the mother's clearly identifiable and sustained contribution. But these symbols almost reverse the two in terms of their significance and help to over shadow the latter. Though the mother's role is indispensable, she cannot give social identity to the offsprings. Dube argued that this symbolism is instrumental in denying her natural right over her own children and in creating and sustaining an ideology in which strategic resources of both type, material as well as human remains in the hands of men.²²

In examining Dube's position in cross-cultural perspective, there are different interpretations for the same metaphor and the same process of reproduction. Drawing the example of Khasi, a matrilineal society in north-east of India, originally inhabiting in the state Meghalaya, for instance, traced the source of life to the mother's blood. The father semen is likened to 'pus' which can be drained out from one's body whereas the mother's blood, which is the life giving force and could never be separated from one self. Blood is

²²ibid. p. 41

transmitted from mother to child, irrespective of male or female and it is on this principle that descent is traced and the clan is formed.²³

2.4 Masculinity and Femininity

The notion of femininity and masculinity are highly diverse aspects of gender which has been historically traced by scholars and social thinkers. It constitutes parts of systems of thought and action which human beings have constructed over centuries. Writer such as V. Geetha has expounded the understanding of gender in historical context that necessarily refuted the upholding of masculine and feminine traits as being biological or physiological by taking into account geographical time and space.

Marxism theory of gender provocatively asserted that gender is not an isolated piece of reality rather it has to be seen in relation to the social whole, to what Engels refers to at totality. The idea is that, masculinity and femininity are neither normative as religious doctrines professes, nor do they exist as categorical imperatives. Male and female roles do not just exist as functional roles carrying out the expectations of society but rather as a result of social and economic system. In this sense, masculine and feminine roles reflects, express as well as influences social and economic realities such as economic power, social dominance and cultural authority.²⁴ Fredrick Engels suggested that early human society were egalitarian in nature with a simple division of labour for men and women. In Engels words, “the men in the forest, the women in the house.....the household was communistic, comprising several and often many families. Whatever was produced and used in common was common property.”²⁵ This began to change when human beings nomadic lives were transformed by settling in one place for longer period and gradually as grouped accumulated wealth, the relation between men and women also changed. Wealth created were necessarily male production while women mind the household. In time, production was valued while domestic work was devalued and women became

²³Nongbri, Tiplut. 1994. p. 33

²⁴Geetha, V. 2002. p. 52

²⁵Engels, Fredrick. 1948. p. 82

domestic slaves. Private property comprises not only of lands, animals, slaves but it soon covers women so that men would gain control over their sexuality for the reproduction of male heir or progeny to inherit. After this process of slowly gaining authority by men, they became the head of the society and household bringing into existence patriarchy or rule of the father. This transformation of women into property is referred to as the 'world-historical defeat of female sex'.²⁶ Engels provide an alternative to this women's oppression that modern industrial production which requires women's labour as well as men's would prove advantages to women because this can provide a means for women to empower themselves economically and work towards reorganization of the household. Thus, the family would cease to be a private institution and become truly social.

Gerda Lerner²⁷ who has worked intensively on the theories of masculinity and femininity formulated her basis from Engels work has outlined the creation of Patriarchy. Her arguments rest on the evidence provided by archeology, ancient law and archaic art and sculpture from Sumeria, Mesopotamia, Egypt and Assyria. She wrote that women were seen as mere commodities or as objects of exchange which is also the objectification of women's sexuality and reproductive capacities. Lerner creation of masculine control began with the appropriation of women's sexuality and reproductive capacity through a complex process that includes abduction and sexual slavery. This created the basis for the control of women's offsprings thereby providing the impetus to the coming of private property. And as the kingdoms spread and consolidated, law and legal structures were established to perpetuate the patriarchal family system. Men learnt to exercise control over women, women would only wield for what they desire through the use of sexual ties they have with men. While women were degraded and devalued, they were still venerated and worshipped for their creative and fertile powers. Women would not transcend their limited situation because they were wield held from education and all other sorts of knowledge. Lerner argued that though patriarchy is a historical product, and though women may have consented to be the victims of such tyrannies and injustices, patriarchy then can be challenged and must be challenged. She contended that it is imperative for

²⁶ibid. p. 82

²⁷Geetha, V. 2007. p. 69

women to bring themselves back to the stage of history, by making their lives and experiences, their submerged histories relevant and central to civilization.²⁸

Uma Chakravarti²⁹ drawing inspiration from Lerner's work provided an understanding patriarchy in the Indian context especially from the Hindus experiences. She argued that understanding of patriarchy in the Indian context has to take into consideration other structures of society. She wrote that caste societies in India in the earlier stage were more egalitarian and gender neutral that valued and worshipped women's reproductive capacity. However, with the emergence and consolidation of hierarchical caste stratification and private ownership, women's status deteriorated remarkably. Women from the upper strata of the society were restricted to four corners of the household and husbanded, simultaneously, sexuality of women which was once feared and awed was taken as wild energy that was in need of control. Thus, to ensure this, women sexuality was channelized into tightly control system of caste purity that ensure mating within the caste group and the practice of patrilineal succession follows forth. Chakravarti opined that the consolidation of patriarchal order were successful partly with the mixture of coercion as well as consent exercised through the husband, the king's law and the priest dictums. Chastity was a priced and highest virtue of all that was needed to be safeguarded failing which would take over their life and destroy them. Chakravarti argument indicates that notion of femininity in the Indian context may be understood as an ethic that women had to practice to belief themselves that they are capable of higher virtues in lives which otherwise was destructive.

2.5 Some Theoretical Perspectives on Women and Law

There are numbers of traditions and approaches when it comes to studying women and law in the society, though not essentially any specific approaches has in totality captured the implications of law on women, understanding and reflecting this existing perspectives becomes imperative for the overall perception of the different mechanism that are at work

²⁸ibid. p. 70

²⁹ibid. p. 96

in making and fostering these complexities of inequalities in the society. Feminist legal theories demonstrate the way in which legal doctrine and practices discriminate against women and reinforce gender inequality. They have argued that law gives an appearance of neutrality when in reality it is deeply gender biased, despite changes, law continues to be male dominated profession and law reflects male concerns and priority. Ratna Kapur and Brenda Crossman identified three distinct perspectives on the literature contributions made by feminists to the discourses on women and law in India. All these approaches have a very different understanding of gender relations as well as the conceptualizations of the role of law in these relations.³⁰

2.5.1 Protectionist Approach

The first is the Protectionist Approach, Kapur and Crossman opined that this approach is the most problematic of all the approaches as the relationship between law and women here has been posited as one in need of protection. In this approach, writers have emphasized for the need of law to protect women who are assumed to be ‘naturally weaker’ than men. J. P. Atray is one such writer who fall under this category as she took the stand point that women are “helpless” being thus in need of protection. According to Kapur and Crossman these protectionist theorists is firmly located within the patriarchal discourses which simply accepted the traditional and patriarchal discourses that construct women as weak, biologically inferior, modest and so on. They argued that the writers following this view does not problematize the way in which law treats women, nor does it considers women’s sub-ordinate status. Also these writers following this approach often attached women’s role within the family, roles that are assumed to be natural and sacred that saw women as mothers are similarly celebrated and naturalized as an inevitable consequence of biological differences between women and men and hence justified the differential treatment given to women under law. Thus, in this literature the view of the

³⁰Kapur and Crossman, 1996. p. 21

law has been unproblematically asserted as protecting women and demand for the greater enforcement of law to protect women.³¹

2.5.2 Equality Approach

The second approach: Equality Approach is the most commonly used view in the literature that sees the relationship between women and law as one of promoting equality. They wrote that originally this literature was developed out of the reviews of laws that affect women. This literature provided comprehensive reviews of the range of legal provisions that effect women, from personal laws to criminal laws to labour laws. The underlying assumption of such this works provides that law can play an important role in advancing women's equality by removing the legal obstacles that have limited women's full and equal participation.³² Here the positive role of law has been much heralded then interrogated and there is a general optimism regarding the extent to which many favorable accomplishments can be overcome in future with the use of law. Kapur and Crossman stated that this view can be found in academic writings as well as government reports. They give the example of the Report of the Committee on the Status of Women in India which has high relevance on the importance of law as social change in India. The report, however noted that be it the judiciary or the executive levels of government have never been able to fulfill the true nature of law thus locating the areas where changes and implementation could be made is the proper way of achieving this purposes. This approach also acknowledge that though law is necessary instrument this alone cannot be utilize in achieving equality for women as such advocated that law should in tandem go with movements to change the socio-economic structure and culture of society.

Kapur and Crossman critique that these writers do not question law's commitment to social change nor does it consider the sub-ordination of women with regard to law. In their words, "It does not interrogate the ideological character of constituting and sustaining unequal power relation beyond the liberal understanding of explicitly

³¹ibid. pp. 22-23

³²ibid. p. 24

discriminatory law”.³³ This literature lays it’s emphasize on both law reforms and law enforcement. Kapur and Crossman saw this tradition as being situated in the domain of liberal feminism which professed law as being discriminatory against women freedom as such law can contribute to the emancipation of women by the creation of legal order that includes women as an equal individual.

2.5.3 Patriarchy

Third approach which has been term as Patriarchy is the one which propagates that law is an instrument of patriarchal oppression. Nandita Haskar falls into this category as her ground breaking illustrative work *The Demystification of law for women* lucidly portrays the biasness and oppressive intentions of law. Haskar pointed out that law perpetually discriminate against women and connected the judiciary and the interpretations of these laws to patriarchal social relations in which women have been oppressed. She wrote that law work at various levels and much of the existing law are not codified. In the name of religious freedom and safeguarding personal law, every outdated anti-woman custom are preserved by not adhering to one civil code in whole parts of the country. These inequalities are evident in the law relating to inheritance, marriage, divorce, custody, succession, guardianship, maintenance etc. she asserted that, at best these laws are designed to preserve the present family system based on male dominance, control of female sexuality and reproduction. In her words, “Gender injustice is built into our legal system; it permeates it and works in various subtle and implicit ways”.³⁴ Following in this tradition, Lina Gonsalves argued that law initiators discriminate between men and women and “unconsciously tends to reflect traditional and rigid attitudes towards women”.³⁵ She examined different areas of law effecting women such as succession, maintenance, dowry, custody, divorce, rape and highlights the patriarchal biasness in the court interpretation of these laws. Though in her analysis she did not in totality negate the importance of law as it effects “daily life” of an individual, she calls for “the need to

³³ibid. p. 25

³⁴Haksar, Nandita. 1994. p. 39

³⁵Gonsalves, Lina. 1993. p. 108

eliminate the patriarchal biases effecting the interpretation of laws".³⁶ This tradition as Kapur and Crossman observed can be loosely related to the radical feminism as they also sees law as the instrument of patriarchy based on male norms, male experience and male domination. Writers such as Boyd and Sheehy³⁷ described that laws governing reproduction, sexual assault, and pornography are viewed as extensions of patriarchy. Radical feminist writers are major contributors in locating women's oppression within boarder structure of gender oppression as well as unraveling the political relation existing in the most personal relationship of individual men, women and society. Kapur and Crossman, however, opined that yet again this approach has been criticized for understanding patriarchy as a universal and ahistorical process and that it fails to take into consideration women as agents of resistance and change. This perspective is also limited in the sense that other forms of oppressions that contributed to inequality such as family and economy were not given importance. The complex nature of relations and oppressions were reduced to monolithic and highly general explanations. Further, this analysis also often lacks to question the role of law in social change without problematizing the role law can play in overcoming this oppression.

2.5.4 Substantive Approach

Kapur and Crossman suggested an alternative approach of what they called substantive approach. This approach does not focus on the equal treatment under the law but on the impact of the law. The idea is to make the law more sensitive to more complex notion of equality which takes into account the comparative disadvantages of persons under existing unequal conditions. This models deals with an understanding of how law ought to be functioning and universalize moral universe through law. This method illustrates the problematic nature on the questions of law itself.³⁸

³⁶ibid. p. 108

³⁷Kapur and Crossman. 1996. p. 29

³⁸Menon, Nivedita. 1998. p. 28

2.6 Distinction between Public and Private

The concept of public and private arise from the most basic political liberal formulation that portrays social relations of largely distinct realms. The public realm is characterized by activities that individuals undertake in the society and in common with multitude of others under the overall jurisdiction of government and the state, while private constitute the realm of activities that are undertaken relatively free from the jurisdiction of the state, for instance, the household, home, family or personal relationship. Feminists have look into this domain of public and private dichotomy that arises from its gendered nature with the association of masculinity with that of public and femininity as the private.

Nivedita Menon wrote that public realm is understood from the liberal perspective to be open to regulation by government where as the private realm such as the family, sexuality is the domain that is protected or restricted from such intrusion. She observed that even in the Marxist understanding, this distinction is central; Engels contented that women are oppressed because “the administration of household lost its public character...it became a private service”.³⁹ The private constituted a site of oppression that can only be destroy when women emerge into public sphere of production. Menon argued that feminist scholarship that emerged from both liberal and Marxist traditions have contested this tradition as being conceptually flawed and politically oppressive. Here, the individual was the adult male head of the household and thus his right to be free from interference of the state or the church included his rights over those in his control in the private realm which included women, children, servants, etc. Menon wrote that Socialist feminist critique the dichotomy of public and private realm produced by Marxist theory of ‘production’ for the capitalist market. They were attacked that the domain of ‘private’ sphere of production was ignored as women are responsible for producing both human and labour power.⁴⁰

³⁹Menon, Nivedita. 1998.p. 31-32

⁴⁰Menon, Nevidita, 2004. p. 10

Juliet Mitchell⁴¹ had strongly argued using the Althusserian notion of over determination to express the complexities of women situation. According to her the key structures of women's situation includes productions, reproductions, sexuality and socialization of children. Thus, she rejected the idea of reducing women's condition to Engels economy and production. Menon pointed out that Feminist scholarship across the political spectrum agreed to the understanding that public and private are not two distinct and separate spheres for the public is enabled to maintain and sustain with the construction of certain areas of experience of private. However, she maintained that the understanding of feminist position on this is unclear as from reproductive rights to protection against sexual harassment are most effectively grounded on claims to privacy.

Feminists who support privacy as a ground for securing rights to women challenges the traditional public and private dichotomy and argued that the virtues of privacy has not been available to women since they did not have the status of individuals in the public sphere. This view proposed for the feminist to transform the institutions and practices of gender and create a genuine sphere of privacy free from governmental and legal intrusion for both men and women.

Again, antithetical to this notion, that arises from the slogan of 'the personal is political' has brought into issues such as domestic violence against women, child abused and marital rape holds that the state is paternalistic and masculine. They however upheld that if the law is designed by the feminists from the standpoint of women, law can be an advantage to women. Therefore, law should interfere to ensure gender justice.⁴² In the Indian context, Nandita Gandhi and Nandita Shah suggested that women have found it easier to fight against the state or against social custom through the state than to fight for their rights within the family or on 'personal' issues because of the existence of inequality in the relationship between man and women in a patriarchal society.⁴³

⁴¹ibid. p. 10

⁴²ibid. p. 12

⁴³andhi, Nandita and Shah, Nandita. 1992. p. 271

2.7 Rights, Law and Women

Feminist scholars who have worked on the realm of law from the political level seem to have a consensus with regard to the existing unease of law as a sexist interpretation and biases of individuals. They have agreed that though law and rights are conceptually as well as politically interrelated, however, in social movements operating in the realm of law, to use the language of rights is constrained.

Nivedita Menon traced the development of the systematic concept of rights in ancient Rome, where rights were created by law. For the Roman jurist, rights, law and justice were inseparable and the law was considered to be the expression of the community's conception of justice. However, this does not mean that right constituted absolute control neither in the realm of state nor in the domain of family and the governed relationships between individuals. From the seventeenth century onwards, rights were begun to be taken as an individual inhering rather than in group or community. These individuals who were the bearers of rights were men for male bodies were constituted perfect being clearly bounded. Female bodies, on the other hand were thought to be permeable, subject to cyclical changes and with limited boundaries. Thus, females were considered irrational, divisible, ambiguous individuals. Most significantly, the scope of rights changed drastically at this time, she wrote:

...everything in the external world was viewed as an object over which men could have rights, not only the external world, but each of his capacities became quantifiable and alienable while at the same time, man had somehow to be considered separable from his capacities so that his 'self' could remain 'his' even as he sold or alienated aspects of himself. Man's 'self' then, was seen to reside in his capacities, as long as he chose freely, he was an autonomous individual, regardless of the ways in which his ability to choose was constrained.⁴⁴

She wrote that men as individuals then were the bearers of rights. In this century, with the expansion of democratic ideals spreading throughout nation states all over the world,

⁴⁴Menon, Nivedita, 1998. p. 16-17

which even have empowered social movements, yet again the real meaning of rights are still contested.

Marxist followers have critiqued rights as juridical conceptions which mask substantial inequality. Thus, right here is viewed as the rights of the dominated class that leave the feminist with the struggle to transform these empty judicial rights into real rights that has the potential to transform structural conditions to empower weaker class or groups.

Menon using Catherine Mackinnon powerful critiqued of law and rights argued that liberalism supports state intervention on behalf of women as abstract persons with abstract rights, while in reality state is male. She wrote that abstract rights only authorize the male experience of the world'. Therefore, feminist understanding of the world is vague, what she calls 'schizoid' because though feminist understood that the world is patriarchal and oppressive yet again they turn to law to make the law less sexist. The state is also viewed as a body that ensures male control over female sexuality even while it juristically prohibits excesses. This argument clearly question the inherent nature of law as men products also radically unearth "the myth of the neutrality of law which continues to have a powerful hold over the feminist imagination".⁴⁵

Feminists who have argued on the moral basis of rights propounded that rights are sanctioned by the moral order. For instance, Angeles Heller argued that rights are 'the institutionalized forms of the concretization of universal values'. Thus, the idea is that freedom is a personal value since every individual wants freedom. She states that rights derived from these values; therefore, the language of rights should be 'lingua franca' of modern democracy. This notion of universal rights is, however, certainly not what feminists are claiming for. Menon state that such a notion "only obscures the power dynamics by which some values are assigned greater status and others are marginalized".⁴⁶ She further states that at the same time when feminist refigures right through morality they invoke what constitute feminist values and these values though at

⁴⁵ibid. p. 18

⁴⁶ibid. p. 20

present are not dominant, they should be and can be made universally applicable through law. Thus, the whole argument seems to rest on the assumption that rights should be and in reality are constituted by shared moral boundaries.

When it comes to the question of rights, Bina Agarwal study of land rights denied to woman, a study carried out on the agrarian based economies of south Asia holds relevance. She stated that arable land constitutes the most valued form of property in communities that are still at large dependent on agriculture for their livelihood. Taking Manipur, for instance, which are predominantly agricultural societies still at large, depend their livelihood by cultivating and harvesting land and forest products. According to her, arable land is the most valued form of property for its economic, political and symbolic importance. In traditional times, land served the purpose of political power as well as social status and for many a sense of identity and belongingness in the village in which land is owned.⁴⁷ Again, ancestral land usually has a symbolic meaning which purchased land does not and within some village communities, continuity of ancestral land stands for continuity of kinship ties and citizenship, while within some other communities, land has a ritual importance etc, thus, in land conflicts, people are willing to spend more to retain the ancestral land than its market value. Hence, land in any form, be it for cultivation or household purposes serve to be the single most significant source of security against poverty in rural south Asia which is likely to remain so for a long time.

Agarwal opined that women in the northwest of India married among stranger's miles away from their natal home often when abandoned or divorced by their husbands return to work as labourers on the farm of their brothers who customarily inherit ancestral land and property. In legal terms, women's issues have been taken up and have won fairly extensive rights to inherit and control land but in actual practice this is not the case. She argued that in some instances woman might own a property but the actual control of that property remains exclusively the onus of man. She emphasized that even property that is

⁴⁷Agarwal, Bina. 1994. pp. 17

under the state, community or clan ownership remains effectively under the supervision and managerial control of men through their dominance in both traditional and modern institutions such as caste or clan councils, village elected bodies etc.⁴⁸ she pointed out that gender ideologies can play an integral part in obstructing women from getting property rights by giving the example of ideological assumptions about women's needs, works, roles, capabilities that in turn influences the framing and implementation of public policies and laws relating to property thereby controlling female sexuality, female seclusion and control of women's mobility.⁴⁹

In the next section, for the understanding of how gendered assumptions creeps into the way society is constructed which ultimately effects the governance and law has been discussed to get the view of women caught under customary law. Rights as elucidated above is nothing more than an illusion when it comes to women rights, the fact that rights has been perceived as man rights made by man becomes sharply visible in the way fundamental rights of a human being is denied in the tribal societies under customary law.

2.8 Women, Law and the State: In the Context of Tribes in India

2.8.1 The Myth of Gender Neutrality

For a long time it was assumed that tribal societies were more or less egalitarian in nature and especially when it comes to the question of gender, man and women were thought to be at equal bar. Thus, such was the apathy towards the study of gender relation among the tribes by scholars that systematic study of tribal women and their problems is a matter of recent concern. Coupled with the lack of exhaustive study, most of the scholars who work on the tribal women were obsess with their 'position' and 'status' and usually equating them with the Hindu caste women. This has lead to the misleading conclusion that scholars has drawn about the so called 'gender neutrality' because examining and

⁴⁸ibid. pp. 14

⁴⁹ibid. pp. 15

narrowing only to the area of whether women enjoy high or low status without enquiring into their other existing gender relation would reveal major loopholes in adhering to such views. Therefore, Mazumdar and Madan opined that it will be scientific error to approach with monolithic concepts assigning high or low 'status', which are regularly used while analyzing the issue of women in the tribal society.⁵⁰ Evans Pitchard has remarked that "to ask women's position in primitive societies is higher or lower than in our own is perhaps not to ask the most profitable question. If we ask rather in what features they may be said to differ it is more likely that we shall learn something interesting, not only about primitive society but about our own."⁵¹ Keeping in mind this, it should also be understood that despite women's major contribution in the tribal economy, they are not taken into account when it comes to inheritance, decision making and so on.

With regard to early literature on women, Virginius Xaxa writes that the assessment of the status of women has been far from uniform, diametrically opposing views were raised. While some scholars were of the opinion that tribal societies generally assigned high status to women, there are still others who upheld that the condition of tribal women are not different from their Indian counterparts.⁵²

Similar observation has been given by Mazumdar and Madan who upheld that some scholar assign high status while other still holds that tribal women were depressed lots.⁵³ The nineteenth century ethnologist believed that women in primitive or tribal society were treated as article or property, referring to bride price; they opined that women could be easily bought and sold and for the same, they were treated as slaves.⁵⁴ Thus, contrasting conclusions are drawn by different scholars while ascertaining the tribal women's position. In the absence of purdah system, sati, dowry and the fact that tribal women participate in the economic process alongside their man often led them to misconstrue that tribal women are free from gender asymmetry. Perhaps, it is in this light

⁵⁰Mazumdar and Madan.

⁵¹Sarana, Gopala. 1988. In J. P. Singh, N. N. Vyas and R. S. Mann's (ed.) p. 35

⁵²Xaxa, virginius. 2004. p. 347

⁵³Mazumdar, D. N. and Madan, T. N. 1986. p. 141

⁵⁴Sarana, Gopala. 1988. In J. P. Singh, N. N. Vyas and R. S. Mann's (ed.) p. 34

that made Furer-Haimendorf remarked while writing about the Nagas that, “many women in most civilized parts of India may well envy the women of the Naga Hills, their high status and free happy life and if you measure the cultural level of the people by the social position and personal freedom of its women you will think twice before looking down on the Nagas as savages.”⁵⁵ Similar observation has been given by Verrier Elwin, one of the pioneer in looking at the ‘status of women’ in tribal society, while studying Nagas social life, he states that Naga women hold an integral position in the society equal to man by partaking in fields and agricultural process as well as making their presence felt in the Tribal council.⁵⁶ In this similar manner J.H. Hutton maintains that women occupies a high position in her husband’s house and treated like any other family members. Women were free to choose their spouse according to their choice.⁵⁷ J. P. Mills writing about the Ao Nagas remarked that “An Ao woman is very far from being a slave and drudge” and that her position is not inferior to man,”⁵⁸ Mashangthei Horam, more recently stated that in traditional as well as contemporary times in the Northeast hills, women, “have the same status as men and suffer no discrimination on account of sex...unlike the so-called advanced women, tribal women do not need liberation and the much publicized women’s ‘lib’ contributes nothing to their lot.”⁵⁹

These assumptions are again expressed by K. S. Singh, he writes, “There is no infanticide. Boys and girls are treated alike. There is no bride-burning. There is no child marriage. They play a more active role in rituals, economy and family affairs. Their economic significance is signified by a high bride-price. Their freedom is within the four wall of the community.”⁶⁰ He writes that this should not mislead people to conceive the tribal women as liberated lots as it can be seen from their practice of customary laws that exclude women in most important areas such as inheritance, decision making, etc. He stated that one of the reasons for the lack of recognition of women’s right to land is due

⁵⁵Furer-Haimendorf. 1933. p. 101

⁵⁶Xaxa, Virginius. 2004. p. 347

⁵⁷ibid. p. 347

⁵⁸Barpujari, H. K. 1996. 11

⁵⁹ibid. p. 11

⁶⁰Singh, K. S. 1988. In J. P. Singh, N. N. Vyas and R. S. Mann’s (ed.) p. 7

to the fact that land is owned by the village, the clan or the community and this obstruct women to claim land when she is married into another lineage or clan.⁶¹ Also, one cannot negate the creation of new forms of inequalities in the form of class based on wealth and power which is making these societies more complex and unequal.⁶²

During the last few decades or so, tremendous changes has swept over in different parts of the country not sparing tribal inhabited areas, even altering their religious beliefs. Whether this is beneficial or harmful is altogether another question which has so far not been systematically explored yet.⁶³ B.K. Roy Burman⁶⁴, drawing his analysis from the existing literature by different earlier scholars done from 1930s to 1960s opined that the process of sanskritisation points to this changes. Among the tribes which otherwise exhibit great gender asymmetry shows that they were increasingly moving towards the upper caste practice of early marriage as a matter of prestige and discouraging widow re-marriage. In the context of Northeast, the tribal's conversion to Christianity has resulted in different changes. Xaxa opined that conversion to Christianity has open up space for women to mingle freely with man in partaking religious practices which were otherwise prohibited by tribal customary laws, also making it accessible for women to modern education, at the same time, it has introduced a variety of other restrictions in the name of ethic and law of the church which is antithetical to the earlier freedom that tribal women enjoyed.⁶⁵ Abha Chauhan echoing the same sentiments stated that unlike the Hindu society, the birth of a daughter in a tribal society was seldom regarded as curse, but in the recent year's tribal people too has started favouring a male child.⁶⁶

Even before the outside influence, writing about Tangkhul early society, Zehol opined that Naga society being patrilineal and patriarchal, the norms and attitudes of patriarchy

⁶¹ibid. p. 9

⁶²Mehrotra, Nilika. 2004. pp. 61-63.

⁶³Xaxa, Virginius. 2004. p. 350

⁶⁴ibid. p. 350

⁶⁵ibid. pp. 351-352

⁶⁶Chauhan, Abha. 1990. p. 32

affects the status of women, thus, “institution and tradition are inspired by belief in male dominance and female inferiority.”⁶⁷ In the same light, Freepaoting stated:

*Tangkhul society being patriarchal, patrilocal and patrilineal, the general concept among them was that women are inferior to men. In Tangkhul traditional law, a woman was completely dependent. As an unmarried girl, she was under the control and perpetual tutelage of her father during his life time, and after his dead of her agnates by blood or adoption. When she marries, she and her whole property passed into the power of her husband. Their traditional law did not allow women to exercise any civil or public office. Like her sisters elsewhere in many part of the world, she had no personal property independent of her husband; she could not a will or a contract. Polygamy was in practice. At certain stage of Tangkhul customary law a husband was given the right to divorce his wife in case of adultery, or theft, or some other serious offences.*⁶⁸

The myth of gender neutrality approach has also been highly critique from the angle of customary law in respect of inheritance, decision making, taboos, marriage and so on. Bride price which was considered a customary payment at the time of marriage is witnessing changes as an impact of money economy. In Tiplut Nongbri’s discussion of bride price among the tribes of Arunachal Pradesh, women were transacted and bought easily merely by means of paying bride price which otherwise is a custom originally indented to compensate the girls family from the lost of a potentially productive member of the household. She argues that this act give justification to the ill treatment that women are subjected to as they were bought as commodities.⁶⁹

As the above illustrations draw attention to the stereotyped ideas and the argument that upheld that tribal women enjoy high position in their societies which if examine from the point of view of their gender roles and customary law, the whole understanding of gender neutrality breaks down existing merely in the form of a myth rather than in actual reality. One is confronted with these false assumptions and ideologies that is entrenched in these societies that bringing in patriarchy approach is extremely essential for understanding the

⁶⁷Zehol, Lucy. 1997. p. 2

⁶⁸Freepaoting, Z. V. 1994. p. 7

⁶⁹Xaxa, Virginius. 2004. p. 355

social order that it is patriarchal order that perpetuates such false assumption. Tiplut Nongbri writes that because of the relative freedom that “women enjoy in economic and personal matters and the seemingly egalitarian ethos of pre-literate small-scale societies led ethnographers to glorify the status of tribal women.”⁷⁰ She goes on to expound that, it cannot be denied from the comparative perspective that tribal women enjoy higher autonomy than non-tribal but again this should not mislead people in believing that there is absolute gender neutrality. She illustrates from the experience of Khasi matriliney that even among tribes who draws descent through the mother’s side, women were excluded from the decision making and public office.⁷¹

In analyzing the forms of inequality in tribal society in its traditional setting, gender inequality has been highlighted as the most pervasive form of inequality irrespective of the stage of its social formation. Evidence from the hunting and gathering band suggests that even in these societies, women were treated as the “second sex”.⁷² Xaxa pointed out, from the analysis of division of labour, how patriarchy took shape among the tribal society and that among some tribe’s if there is gender inequality in one sphere; it gets neutralized in another sphere. For instance, drawing from the Bihors of Jharkand, Dev Nathan shows that man holds great importance in the realm of public domain, however, in case of distribution of meat which is considered as prestige food, the activity is neutralized by women’s engagement in transaction activity and market exchange. This neutralization can also be seen among the Khasi who bestow women with the right to inherit ancestral property but at the same time decision making is man’s prerogative alone.⁷³ Sumi Krishna opined that the misconception is because there is no gender seclusion amongst tribes (Northeast), adolescent boys and girls mingle freely, women and men chooses their marriage partners freely, widows has the right to remarriage and women could also divorce without restriction. Krishna remarked that central to this myth of gender neutrality is because of women’s visibility in the economic life of tribal

⁷⁰Nongbri, Tiplut. 2004. p. 194

⁷¹ibid. pp. 241-242

⁷²Xaxa, Virginius. 2004. p. 194

⁷³ibid. p. 354

villages and their greater freedom of movement, all these has strengthen this myth which was created by the British ethnographers and reinforce by the Indian administrators. To this, Nongbri contended the ‘ethnographers romanticize model’ and critique that tribal women’s greater freedom and independence is “obscured by their poor economic conditions which forces men and women to co-operate and share in joint economic activities”.⁷⁴ Nongbri writes that “deceived by women’s relative freedom of movement, their high participation in economic activities, and high divorced and remarriage rates, many share the view that tribal women are free of gender inequality.”⁷⁵ She further expounded that as a consequence, while the empowerment of women has acquired the status of national agenda in the country, in the tribal states, their political leaders has still yet to realize that gender is an issue that needs attention. She pointed out lucidly that as much as the different personal laws in the country is biased towards women, tribal customary are as prejudiced towards women.⁷⁶

2.9 Customary Law and the Question of Women’s Citizenship

Bringing citizenship into the fold of feminist discourse in the understanding of law and state is indeed a dilemma in itself. For one, when discussing citizenship, ultimately the understanding is drawn from the democratic norm that implies both universal equality and equal participation in government but this view has been declared by disillusion view as being at the best, cherished myth and that elections are nothing but empty ritual and the vote an impoverish expression of power of citizenship rights.⁷⁷ Rajeswari Sunder Rajan states that “citizenship has been for so long exclusively viewed as the domain of men (of property), women’s identity and life has been either excluded from or subsumed within a purview of state-citizen relation.” Jacqueline Stevens invoking “anthropological theory” opined that it is the state which defines marriage by distinguishing between “sacred and profane forms of sexuality and reproduction”.⁷⁸ Sunder Rajan goes on to

⁷⁴Krishna, Sumi. 2001. p. 351

⁷⁵Nongbri, Tiplut. 2004. p. 4

⁷⁶ibid. p. 194

⁷⁷Sunder Rajan, Rajeswari. 2003. p. 17

⁷⁸ ibid. p. 2

expound that by gendering citizenship, attention can be drawn to the way that state constructs “Women” primarily drawn from their difference in relation to men by formulating laws and policies specific to them, also by differentiating among women according to different religious identity or in terms of categories as “good” or “bad”, “normal” and “deviant”, child and adult etc. she asserted that the construction of women in this categories is primarily the work of the state in its governmental function.⁷⁹ In this sense, the concept of citizenship per se is highly problematic because though citizenship may in definition indicate the legal status of membership in a political community or society where the citizen has the right to participate in the process of government, in actual practice this right can be curtail to only a few elite or privilege group.

In a broad framework, since antiquity, citizenship has been understood as a right of someone who is free to act by law, free to ask and expect the laws protection. With the creation of modern state citizenship evolve to denote certain equality with regard to the rights and duties of membership in the society. Sunder Rajan states that “citizenship is a status conferred on the people of a nation-state which within a parliamentary democratic framework, establishes a relationship of equality among them in legal and political terms by constitutional fait and allows them to participate in the government.”⁸⁰ The British sociologist T. H. Marshal sees citizenship as a “status bestowed on those who are full member of the community” and that “All who possess the status are equal with respect to the right and duty which status is endowed” with.⁸¹ He further sees citizenship as being further divided into three parts: civil, political and social. The civil, in his words, is “composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The political element includes rights of the citizen to participate in the exercise of political power, as a member of a body vested with political authority or as of an elector of the member of such body. Social elements includes “The whole range of from a right to a modicum of economic welfare and security to the right to share

⁷⁹ibid. p. 2

⁸⁰Sunder Rajan, Rajeswari. 2003. p. 17

⁸¹Marshall, T. H. 1963. p. 87

to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.”⁸²

Marshall’s definition of citizenship has been critiqued from various angle, it has been argued that it describe only of the English experience without a comparative analysis. Feminist have critique that it does not address gender differences in the experience of citizenship. This definition raises the problem of citizenship, how then can women be citizens if they are not included in any of the so far elements described? This problem of insufficiency and exclusion has been earlier noticed by the French feminist scholar, Simone de Beauvoir, “....abstract rights...have never suffice to assure to woman a definite hold on the world; true equality between the sexes does not exist even today”.⁸³ Joan Scott writes on the view point of Beauvoir who held that “citizenship has made women men’s equal as subjects before the law in a formal, procedural sense, but it had failed to win for them autonomy – social, economic or subjective... In this sense the vote was only a partial victory.”⁸⁴ According to Sunder Rajan, the major failure of the liberal conception of citizenship enshrines the gendered public and private division of women’s lives. Breaking down of this divide was the early project of feminist by questioning the role of justice in every domain of human life, including the familial. The feminist slogan of “the personal is political sought to provide, a continuum between the two sharp dichotomies. This can be seen in the work of Carol Pateman who expounded from “Hegelian equation of citizenship activities with a male public sphere, and of domestic activities with a female private sphere; from this location women could have no access to citizenship.”⁸⁵ Radical feminist legal theorist such as Mackinnon maintains that the liberal state coercively and authoritatively constitutes the social order in the interest of men, through its legitimizing norms, relation to society and substantive policies.⁸⁶ This approach on women ensures male control by viewing women’s sexuality at every level building the notion that male perspective is objective, rational, equity, liberty, privacy,

⁸²ibid. pp. 73-74

⁸³Sunder Rajan, Rajeswari. 2003. p. 18

⁸⁴ibid. p. 18

⁸⁵ibid. p. 21

⁸⁶Anleu, Sharyn L. Roach. 2000. p. 69

and freedom of speech. The adoption to these values in law produces gender inequality under the guise of neutrality and justice. For Mackinnon, the state in part, through law, institutionalized male power. Her concern is not just limited to feminist theory but she calls for practical action and the transformation of power relations through a feminist method.

These discussions pose the inevitable question of the Constitution of India and its take on the issue of women. A.R. Desai in examining gender role in the Constitution (India) noted that the underlying principles of gender role presume by the state is embodied in the constitution, which clearly unravels the intention of the State.⁸⁷ He writes that until as recent as 1981, the index to the Indian Constitution does not contain a category of “women”, and that the “index maker of this government publication does not find “women”, “marriage”, or “family” worthy of being referred to in the index of the constitution.”⁸⁸ He further argues that within the Fundamental Rights, under Article 15, that deals with the Right to Equality refers women as equal citizens. As it goes, “The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” In the same article at sub-article (3) lays down: “Nothing in this article shall prevent the state from making any provision for women and children.” Thus, the Constitution enjoins equal status to women as citizens, however again there are also major disabilities that the constitution takes into consideration. While Part III and Part IV dealing with Fundamental Rights and Directive Principles of State Policy confer women with full citizenship, Article 25 to 28 (Right to Freedom of Religion) in the form of personal laws fundamentally denies women the citizenship rights to equality. As Desai pointed out though Article 23 and 24 speak of Rights Against Exploitation, it does not consider everyday life of ordinary women as surplus labourer in the family as exploitation.⁸⁹ He further argues that the constitution which was formulated with great precision in many other important aspects adopted a casual approach and dismissed the phenomenon of exploitation manifested in daily compulsory forced labour

⁸⁷Desai, A. R. 1994. In Lotika Sarkar and B. Sivaramayya’s (ed.) pp. 42-43

⁸⁸ibid. p. 44

⁸⁹ibid. p. 45

of millions of women who look after the ailing members of the family and kin, elders and numerous other family chores. He asserts that the constitution by permitting the practice of religious personal laws which is fundamentally discriminatory against women reveals the gender biasness of the state. He opined that by narrowing down the issue of women to private sphere through personal laws, the state has “transformed the entire issue of women’s liberation and gender justice into individualized atomized pathologies”.⁹⁰

In much of the Northeast, existing customary law is followed backed by special constitutional arrangements or in the case of Meghalaya or Mizoram; the provisions under Scheduled VI prevail. In the case of Nagaland state, Article 371A provides that no act of Parliament in the respect of Naga religious and social practices, customary law procedure, ownership and transfer of land, etc. shall apply to the state, unless this is adopted by a resolution of the Legislative assembly. Scheduled VI gives similar provisions for district and regional councils which has considerable independence though it does not have complete autonomy over in dealing with local administrative and legislative matters.⁹¹

In the matrilineal Khasi and Garo societies of Meghalaya, descent and inheritance are traced through female line, but again customary practices rightfully sanctioned the mother’s brother as the authority head of the family or the household and that Khasi women have no role in the political front. Nongbri gives the example of the usage of phrase that connotes such gendered assumptions; Khasi says ‘war and politics for men, property and children for women’. Nongbri argues that by and large women are held in any tribal society, subordinate to men, from the developmental perspective she asserts that “women had no role to play in the formulation and/or implementation of developmental policies and programmes.”⁹² Discussing the nature of rights tribal customary law accorded to tribal women, she contended that “tribal customary law which include people’s beliefs, customs, social mores, precepts, rites and usages practiced time immemorial, are not

⁹⁰ibid. p. 46

⁹¹Krishna, Sumi. 2001. p. 309

⁹²Nongbri, Tiplut. 2004

always conducive in the interest of women...customary law and personal laws, particularly those relating to marriage, are highly oppressive to women. She writes that system of customary practice of inheritance among most tribe is in favour of men, however even among the tribes that follow matrilineal principle; there is a strict distinction between 'ownership' and 'control'.⁹³

In discussing law and women citizenship, Ada Okoye writes that customary law prescriptions on women inheritance is still at large highly restrictive with regard to ownership of property by women in most parts of Africa. From the Nigerian experience she argued that until 1954 women were not enfranchised. After on the eve of Nigerian independence in 1960, only women in the southern part of Nigeria were franchised owing to the Aba women's riot and the Egba revolts of 1954. The northern part was given right to vote in 1976. She writes that the improvement of the status of African women have been commonly described as incidental benefits rather than specific goals because, as she explains "the conservative regime of customary law in relation to African women was further strengthened by the complicity of the state, colonial and post-colonial, both for similar reasons. While the former needed allies among the men of the local communities in order to consolidate the hold over local spaces, the later, that is the post-colonial state, could not effort to estrange the majority of their supporters, who in most cases, were the conservative beneficiaries of the patriarchal tradition."⁹⁴ Thus, owing to this affair, many of the laws which were restrictive to women made way into the recognized body of customary law thereby excluding women in various realms of African society that specifically demarcates the society into two divisions, men on one hand, on the other women denying women citizenship rights by their customary law.

Thus, Xaxa remarked that excluding women from right to inheritance and excluding them from decision making bodies will pose an obstacle to women as an individual and a citizen on one hand and on the other hand as a member of the community. He asserts that

⁹³ibid. p. 199

⁹⁴<http://www.gwsafrica.org/knowledge/ada.htm>.

as an “individual and a citizen women is entitled to human rights provisions as well as of citizenship, that guaranteed individual right to freedom.”⁹⁵

2.10 Conclusion

Feminist legal studies have made important contributions in advancing the understanding of the role that law has played in women’s oppression and also the potential role that law can play in challenging this oppression. Clearly from the argument provided by feminist scholarship, law has been seen neither as a simple instrument of social engineering, nor of oppression, but rather as a complex and contradictory force. Further, there seems to be the trend of interrogating assumptions about gender and nature of women’s oppression in law that characterized earlier works. They have also strongly contented the importance of understanding diversity of oppressions experienced by women across border and the way in which the law has been implicated in that oppression. Especially, gendered assumptions and construction of women with their ideal roles and identities as virtuous daughters, passive wife or meek mothers have all contributed to the way in which law has been produced.

Gender relations in the public and private realms and the highly preconceived notions in the society of femininity and masculinity, what and where women ought to be situated in these categories all are the resultant interplay of patriarchy at work and shapes in the legal regulation of women. It is pertinent to point out here that with the interrogation of feminist with regard to the role of law in women’s life and experiences, a significant knowledge has been accumulated that could be utilize in uplifting the hard experiences of women in any given society. The fact that law is an agent of state which is ruled by men as what feminist calls ‘patriarchal state’ makes sense in interpreting from historical experiences that law is indeed bias towards women and their interest. Kanpur and Crossman observation that law’s relationship to women’s oppression is not always the same nor does it operate always in the same way or always produced consistent results speaks of this historicity and experience of women’s struggle. Thus, the conclusion of

⁹⁵Xaxa, Virginius. 2004. p. 364

recent feminist writers that existing law reinforces relations of subordination seems to be true, yet again, at the same time feminists has not in totality negated the importance of law and the role it can play in women's life as it is also an important source of resistances and changes. Thus, feminists has called for legal revision of law and for the deconstruction of this monolithic assumption of law so that the nature of law as it exist today could be change to produced true equality of what has been called 'feminists values' to be applied universally in the society. Feminist legal theorists demonstrated the way in which law privileges certain knowledge and information, perpetuates particular conceptions of gender and disadvantages women.

Chapter- 3

Tangkhul Naga: History and Customs

3.1 Introduction

This chapter has been documented from the earlier ethnographic and anthropological literature, written about the Nagas and the Tangkhuls. The focus of this chapter has been confined to describing the tradition, customs and social changes that has taken place among the Tangkhul Naga, a sub-tribe of Nagas of Manipur. For understanding how customary law as forces of law operates in this society, it is imperative to study the Tangkhul social structure, its basic social institutions and customs, from sociological as well as from the historical perspectives. Also for understanding customary law as the all abiding law (Article 371 A defines special status for the state of Nagaland and Nagas in general) and its implication on women, inquiring into their social set ups, beliefs and practices is paramount. Thus, the aim of this chapter is to underline and study the various social organizations and customs that play an integral part in the functioning of this society.

In order to understand the dynamic and impact of changes in the Tangkhul society, mention has been made in brief of the Naga national movement that gained full momentum after the Independence of India from the British in 1947. Without this, grasping the tremendous changes and upheavals witnessed in this part of the country will be incomplete. Although very few studies have been done on women in intra-state conflicts, to understand the changing facades of women's role in the society, women peace groups have been briefly examined as this will throw light on the changing role of women by their entering into the public domain. In connection to this, Paula Banerjee writes that there has been no analysis of women's lived experiences in the Northeast owing to the fact that it is extremely difficult to work in the Northeast as the region

presents a microcosm of all the problematic postcolonial developments.¹ The next section will briefly outline the territorial situation of Ukhrul district and its villages.

3.2 Topography and the People

The Tangkhul is the largest Naga tribes in Manipur inhabiting the eastern part of the state with its administrative headquarter in Ukhrul district around 83 km from the state capital Imphal. It was first marked out as a sub-division under the British rule in 1919. In November 1969, it was recognized by the Indian government as a district bearing the nomenclature of Manipur east district. According to the CSI publication in 1976, the district covers an area of 8,200 sq. km, however, in 1983, 15th July; the district was divided by forming a new district called Chandel district thus reducing the present Ukhrul district to 4544 sq. km; it comprise of 20.35 percent of the total land area of Manipur (census of India, 2001).

The state Manipur is located between 23.83^o N and 25.68^oN latitude and 93.03^o E and 94.78^oE longitude. The total population of Manipur stands at 2,388,634; Ukhrul district accounts for 1,40,946 heads, with a number of 73,413 and 67,533 male and female populations respectively, which is 6.2 percent of the total population for the state (census of 2001). The literacy rate of district, percentage wise, is 73.1 percent, of this, 80.1 are male and 65.4 females. According to the census report of 2001, the district comes third in the literacy ranking in the state. The area is situated in the north eastern part of India. The Tangkhul country, which consists of about 250 villages, occupies an area of 3500 sq. miles. There are more than 200 dialects spoken by the people of different villages. Its boundary is bordered by Myanmar in the east, Manipur valley on the west and southwest, and Nagaland on the north and northwest. The immediate Naga neighbours include Chakeshang and Angami Nagas of Nagaland, and Mao, Thangal, Kabui, Moyon, Monshang, Anal and Maring Nagas of Manipur and Somra Naga of Burma. The Tangkhul country is divided into eight regional divisions on the Basis of soci-cultural characteristics. They are Raphei (north), Kashungor Somra (north-east), Rem (east),

¹Banerjee, Paula. 2000. p. 137

Raikhang (south-east), Khamo (south), Kharao (west), Khaorui (south-west), and Kharao-Raora (northwest).² In order to capture their society and its customs, both written and oral history that has so far recorded of the Nagas by the outsiders as well as by the Nagas has been looked at.

3.3 Historical Accounts of the Nagas

Without the presence of written past history of the Nagas prior to the advent of British rule, historical past of the Nagas is still shrouded in mystery. The only consolation in otherwise impossible task is because Nagas are endowed with rich legends, traditions, folktales, and folksongs which are the only important source of information for the construction of the early Naga history. Oral tradition which is an important source of Naga history handed down generation to generation is also the only lifeline that connects the Naga early life to the modern day Naga society. Culture, customs and traditions are the unwritten history of mankind in early days before the development of written script.³

3.3.1 Theories of the Origin of the Nagas

It was only till recently that a systematic study of the history and the origin of the Nagas has begun, mostly done by western missionaries, ethnologists, administrators, and Christian missionaries, which was later followed by Indian scholars. There are various theories that have been postulated and debated with connection to the origin of the Nagas. Base on the linguistic, cultural, social, and anthropological studies, western scholars grouped the Nagas to Tibeto-Burman branch of Sino-Tibetan family of the mongoloid stock. Grierson, on the basis of language, assigned the Nagas to the Tibeto Burman who came from the north western part or area of Hoang-Ho river of China. The Tangkhul Naga settled in the present Ukhul district area. According to the history of Manipur,

²Horam, M. 1977. p. 25

³Shimray, A.S.W. 2001. pp. 1-2

before the ascension of the throne by Manipuri King Pakhangba in 33 A.D., the Tangkhul's have already settled in their land.⁴

3.3.2 Theories of Migration

One of the pioneers to have work on the origin of the Naga is J.H. Hutton who remarked that the "Nagas have been connected with the head hunters of Malay and the races of South sea on the one hand and traced back to the China on the other."⁵ While tracing the migratory routes of the Nagas, there is a theory which claims that Nagas must have migrated from the sea coast or at least passed some island in their exodus from their place of origin. This theory is strengthened by the use of cowrie shells in beautifying their traditional attire and the use of conch shells in their ornaments. The fact that Nagas have many customs and way of life similar to the people inhabiting in the remote parts of Borneo, Sarawak, Indonesia, Malaysia, etc., also what is common between these islanders and the Nagas is that the Nagas use long war drum hewn out of huge logs which is similar to that of the canoes these islanders use.⁶

It has also been written that one group of Nagas with pierced ears left Chiang Mai area in Thailand. R.R. Shimray writes, "This group with holes in their ears was again seen by the Burmese who know them as 'Na Ka' - meaning people with holes in their ears-(Na meaning ears and Ka meaning holes in Burmese). Even today there are some tribes in Thailand whose coiffures are quite similar to that of Tangkhul Nagas with special reference to the shaving of the male heads keeping the hairs in the middle of the head like crests of ancient Greek helmets".⁷ He further wrote that in many of the south-east Asian countries where civilization had not intruded, practices very akin to that of Nagas like head-hunting, tattooing, *morung* (dormitory) system, platform burial, looms, terraced farming were found. Mcgovern wrote, 'Nagas are similar to the Dyaks and Kayans of

⁴Freepathing, Z. V. 1994. p. 10

⁵Hutton, J.H. 1969. p. 8

⁶Shimray, R. R. 1985. p. 13

⁷ibid, p. 14

Borneo, Battaks of Sumatra and certain groups of Formosa (Taiwan) and several other groups in the Phillipines.’⁸

Ayo Shimray writes that the Nagas pierced their ear lobes for identification of the tribe when they escaped from south-west china which later became their traditional practice. The Tangkhul calls themselves as ‘Hao’ and give this name to all other Naga tribes. Shimray states that ‘Perhaps, they belong to the Hao tribe of China now living in Yunan province, Thailand and some of the neighbouring countries.’⁹

This theory is strengthen by R. K. Luikham who stated that the Nagas dispersed from Hao city in china (Xian) and came to settle in present habitat. In ancient times, their ancestors lived in Mangolia and later passed through the South west of China. They rendered valuable services even in the construction of the Great Wall of China, but due to the oppression of the ruling dynasties, they escaped from south-west of China.¹⁰

According to a staff reporter of the journal ‘China Reconstruct’ Gao Daxian, during the period of Yin and Shang dynasties more than 3000 years ago, a tribe name called Hao of the origin of the south-west of China escaped the land due to the oppression of the ruling dynasties. Ten young men with an equal number of women escaped to Hainan Island. Among the escapees, a man name Li or Lee who has five sons from which emerged the Li-tribe whose descendants are living in present day China, Vietnam, Laos, Thailand and Myanmar. The Kachin tradition followed that a man of Li-tribe called Jimbo meaning man came in search of settlement in Hanan Island along with his nephew Lengdo who settled at Pauangchuang in north-east of Mytkyina. Jimpo and his second son’s descendants are said to be the Kachins while the first son of Jimpo and his nephew, Langdo went further to the west and established a settlement at a mountain called Ziphyn Taung and formed a group of which constitute Chin-Mizo-Kukis of today. The Kachin

⁸ibid

⁹Shimray, Ayo A.S. p. 305

¹⁰ibid. p. 307

tradition further goes that the Nagas who are the descendants of the elder son of Jimpo increased in their population and expanded to the present Naga-homeland.¹¹

3.3.3 *Legends and Mythologies Relating to their Origin*

The Nagas have their own myth and legend which tells of their origin and migration, and occupation of their present homeland. Although, absolute authenticity of this available myths and legends are questionable since some of them gave an exaggerated narrative, rejecting them will amount to a grave mistake since it is legends and myths that speaks of past in a society especially without written history. R.C. Majumdar stated, “tradition naturally begins with myth.”¹² From the mystical and legendary point of view, several Nagas legends and folktales narrate stories of Nagas emerging from a hole. According to R.R. Shimray, the Nagas in ancient times must have lived in a hole or caves. Mythology of Maring Nagas speaks of a tale of Nagas living in underground city. Legend goes that:

...a Maring Naga called Zirangrangmei saw a squirrel carrying a paddy sheaf. He threw a stone at the squirrel and it dropped the paddy sheaf. Zirangrangmei then picked up and reported the matter to Mungkarung who convened a meeting at Jami as to what to do with the grain, after much deliberations in consultations with the seers and also after performing the tribal divination, it was decided that Samruitar should keep the grain in a safe basket....when sowing time approached, the seer announced that one honest person should....When they saw the paddy growing, the next problem was the monkeys near the paddy. Mungkarung and Tangkarung took the dogs and Tangsaoakhalung a tao (Naga sword) and they all pursued the monkeys to the end of the world and ultimately reached the over ground world.¹³

The Tangkhul Naga legend narrates an identical story. Hudson writing of the origin of Tangkhul Naga states that the Tangkhul's considers themselves to have emerged from a cave at a place called Murringphy which is situated at Marring. The legend goes that when they attempted to leave one after another, a tiger devoured them successively as they emerged. They then threw out an effigy of man which distracted the attention of the tiger. The tiger then seeing their numbers before him fled. The Marring's also speaks of

¹¹ibid. p. 305

¹²Shimray, A. S. W. 2005. p. 7

¹³Shimray, R.R. 1985. p. 17-18

legend of a huge tiger that blocked their route which only after killing the tiger with difficulty they could move on to their present habitat.¹⁴

Aosenba opined that several Naga groups like Angami, Ao, Sema and Tangkhul believe that their ancestor emerged from the caves and stones. Most of the Naga tribes indicate Meikhel, a place at Mao area of Manipur believed to be the place of origin from where Nagas spread to different areas.¹⁵

3.3.4 Origin of the word 'Tangkhul'

The exact origin of the word 'Tangkhul' is unknown as there were no written histories or records of this ancient hills man. However, attempts have been made by scholars to trace the origin of the word 'Tangkhul'. A.S.W Shimray sates that, originally, the Tangkhuls call themselves as Hao. They attached this name to all their attires, songs and day to day articles by calling them Hao-laa meaning Hao-songs, Hao-Sari meaning Hao-dress etc. in this nomenclature, some opined that the word Hao derived from "HO-HO" a tone usually used by a group of two or three in harmony while singing, dancing or even carrying loads and other merry making. Some other scholars are of the opinion that, in early days the Tangkhul came from the Hao city which today is called Xian in China. Hence, they have been called Hao.¹⁶ Hao was the earliest name ever used to the Tangkhul, although in wider use it has come to refer to all the Nagas irrespective of different tribes. The Meities called all the tribes as Hao regardless of the Nagas, Kukis, Mizos and other people of close affinity.¹⁷

Horam writes that the word 'Tangkhul' is said to have derived from a name of a person called 'Tangkhu' who was known for his exceptionally outstanding qualities in the field of dancing, wrestling and art of fighting. People from all neighbouring area, even the

¹⁴Hudson, T.C. 1996. pp. 10-11

¹⁵Aosemba, Dr. 2001. p. 6

¹⁶Shimray, A. S. W. 2005. p. 39

¹⁷ibid. pp. 39-40

Meiteis came to learn such arts from him. The Meities called these people as the people of Tangkhu and thus, these people were referred to as Tangkhul.¹⁸

Another version is given by Shimmi. According to him, the Manipur valley in ancient times were covered with marshes and crops were damage by the frequent floods and thus rendered unsuitable for settlement. Life was so hard that the Meitei which is supposed to be the younger brother of the Tangkhul used to obtain food and other necessities from them. The legend goes that the Hundung village which was the abode of the older brother was referred to as Tangkhul which derived from Meitei words, '*Tang*' meaning 'a rare thing' and '*Khul*' meaning 'village', thus, according to this, the word 'Tangkhul' indicates a 'rare village'.

The most accepted explanation among the people with regard to the origin of the name Tangkhul is given by A.S. Vashi Shimray. According to him when two Naga clans of Kabo-Khari and Chaphang king Hongmalai (who was the king of the Tangkhul) established settlement at Samsok they had a close trade and commercial relationship with the people of Burma. The Tangkhul exported precious stones and gems of different colours, jades, diamonds in plenty available in the Chindwin River and its tributaries including cotton and sesame etc. in exchange for iron from the Avas (Burmese). The demand of irons by the Tangkhul was very high; they used iron for cultivation purpose, war weapons, bride price, and purchase of land etc. Realizing the high demand of iron by Tangkhul, the Avas made it available in large quantity. Since then, the Avas (Burmese) called the Nagas 'Athangpi' or 'Thanpi' meaning 'iron man' or 'iron people'. Later on, Samsok fell under the control of Burmese king and became its vassal state. However, at one point, the influence of the Burmese king in the northern Burma became so weak that the Meitei raja once attacked Samsok and subdued it. The Nagas of Samsok whom the Burmese called Thanpi was adopted by the Meiteis and the village which they lived was

¹⁸Horam, M. 1977. p. 26

known as 'Tang-Khul'. Thus, the word Tangkhul derived from two languages, 'Than' meaning iron in Burmese and 'Khul' meaning Village in Meitei.¹⁹

3.4 Tangkhul Naga Social Institutions and Organization s

3.4.1 Family

In every society, Family constitutes the fundamental social unit of the community. Families are the building block of which the Tangkhul society such as lineage, clan and village are build up. Unlike other nomadic tribe, the Tangkhul are known to settle in permanent dwellings. The Tangkhul family generally is nuclear type consisting of the husband and the wife and their unmarried children. In some cases, the parents of the husband may live with them. The system of joint family which is favoured in most part of India is not practiced among the Tangkhul. Though in some cases joint family does exist but it is rarely practiced except in situation where the family has no alternative due to poverty, physical handicaps, etc.

Unlike the matrilineal societies of Khasi and Garo, the Tangkhul are strictly patrilineal and patriarchal. The father is the head of the family and exerts his authority in the decision making process and he is also expected to provide food, shelter, security and maintenance to the member of the family. After the marriage of each son, they set up separate residence where he is the head of the family.²⁰ The eldest son takes the biggest responsibility in the family. During the old age of parents, it is the responsibility of the eldest son to provide maintenance to the parents. The parental house is inherited by the eldest son after his marriage. Thus, eldest son plays a vital role in the functioning of the family.²¹

Freepaathing write 'Tangkhul concept of family was a little kingdom within itself, over which the father was the supreme ruler. The authority of the father extended to his wife,

¹⁹Shimray, A. S. W. 2005. pp. 42-43

²⁰Horam, M. 1939. p. 60

²¹ibid. p. 51

his children and to his entire household. The wife though held a subordinate position, to that of the husband; exert tremendous influence for good and evil over her husband and family.²² A father who is known for his bravery, intelligence, and eloquence is respected even outside his small circle and may hold an important position in the clan, village or tribe. The head of the family is also the family priest who performs his religious duties during festivals and ceremonies. He takes a leading part in the marriage of his sons and daughters. He also takes the sole charge of dividing land and property between his sons (daughters are not allowed to inherit). He represents his family at the clan meetings and courts.²³

The division of labour in the family is distributed among its members. The strenuous tasks requiring use of physical strength are performed by the male members of the family. Though both men and women equally participate in the cultivation processes, some specific task such as household chores like cooking and cleaning, fetching of water, carrying firewood, maintenance of kitchen garden, preparing tobacco for smoking, making rice beer (*Khor/zam*), weaving, spinning cotton and attending the children are exclusively carried out by women.²⁴

3.4.2 The Clan/Shang

Villages are formed by two or more clans or *shang*. Any clan can be traced back to a single family which have multiplied into numerous families but remain connected to each other even after a particular family migrates to another village. The head of the clan is the descendant of the same head of the original family. The principle of primogeniture is followed with regard to its succession, where the eldest surviving son succeeds to the 'shang' headmanship. In case there is no son or death of the chief, the office goes to eldest surviving son or to his next brother respectively. The clan members performed several duties in times of marriage, death, harvest etc. Roy and Rizve remarked, "The mutual rights and duties of kin group and *shang* members are the stable feature of the

²²ibid. p. 17

²³Horam, M. 1977. p. 61

²⁴Roy and Rizve. 1990. p.129

Tangkhul society.”²⁵ They further elaborated the function of the clan, “The widows, destitute and orphans are maintained by the family members of the kin group. An orphan receives food, shelter and security in the family of its nearest male kinsmen who usually adopt the child as a member of the family. Even if the child is brought up in the house of the deceased mother’s relative, he or she always uses the *shang* name of his/her father. In case a childless couple wishes to adopt an heir they select the child from their nearest relatives since the adopted child will be entitled to inherit the property.”²⁶

3.4.3 The Village Administration and Economy

The villages of the Tangkhul Naga are politically organized association with clear defined territories. Villages are generally ruled by headman locally called ‘*Awunga*’ which is equivalent to monarch; usually the headman is the descendant of the first man under whose leadership the territory was conquered or exploited. The chief is vested with great deal of authority and numerous functions. Chieftainship, therefore, even today constitutes an important place in the Tangkhul political system. The chiefs ascension to the office is either by hereditary or by selection for lifetime. Before the advent of Christianity, tradition demands the king to be sanctioned by gods to his kingship and for this he was expected to perform rites. The first rite consists of paddy sowing. If the paddy failed to produce good crops, the proposed chief had no right to claim chieftainship. The second test was the sowing of kidney beans which is generally believed to be difficult to harvest crop. The third hurdle involves living animal, particularly the cock. If a cock crowed in harmony in full and loud sound, the proposed person was believed to be favoured by the gods. The chief was believed to be chosen by the gods, thus, no men and women in the village opposed his authority, and he passed on his office to his eldest son because divine sanction has been given to his family.²⁷

The headman plays a dual role: one as the secular head, the other his involvement in the religious ritual ceremony was paramount. His presence in the religious functions was

²⁵ibid. p. 129

²⁶ibid. p. 129

²⁷Shimray, R.R.1985. p. 52

imperative and plays an important part in the proceedings of ritual. Horam writes, "As the headman, he opens the village festivals; he is the first to sow seeds, the first to plant, and the first to harvest. His secular duties, however, far outnumber and outweigh his religious duties for in the exercise of the latter he is assisted by the priest whereas the former are his and only his responsibilities."²⁸

As the secular head, his primary responsibility was the defense of his village. With the perpetual state of hostility between villages in the early days, the village has to constantly repair wall and gate in case of any damage. The headman was also benevolent in character because of his duty to provide arable land to villagers in need after consultation with the village council.

Periodical meetings or emergency meetings, whatever the nature of the meeting may be, the headman summons the village councilors, locally called '*Hanga*'. Thus, his task was for the general interest of all his subjects. Folk songs and tales tell the story of a benevolent king, who was looked upon as father by all and feared by all because of his capacities and qualities. However, in the Tangkhul villages, the headman is not always the supreme leader. At times, he is merely a nominal head in the nature of a ceremonial institution and his power in most villages is curbed and controlled by the village council members.²⁹ The councilors are comprised of each of the clans or '*shangs*' in the village who choose their representative which by the practice of customary law allows only man or father as the head of the family to be the representative. The village council plays a pivotal role in the running of the village as the executive representatives, administrators and the judicial body. All the issues related to war or peace settlement, intra-village disputes or inter-village disputes were settled by them in consultation with the monarch. Customary law which is the supreme law of this society governs the councilors in their entire decision making. Freepoathing writes, "The councilors derived their power from the social customs based on age old tradition and it was their duty to see that customs were strictly

²⁸ibid .pp. 76-77

²⁹ibid. pp. 129-130

followed.”³⁰ By the customary laws, women were denied representation in the village council.

Tangkhum villages functions like one big family and the community life was collective in nature where all the activities be it sowing, feasting, raiding and festivals were carried out by the whole village collectively. The village shares the misfortunes, sorrows or happiness among themselves. Durkheimian collective consciousness that exist in the pre-literate society where the division of labour is that of mechanical solidarity complements this form of village life. Every man in the village was an active citizen, a soldier in times of war and a cultivator. This is further elucidated by Verier Elwin, he wrote:

*The basic interest of every Naga is his family, the clan, the khel and his village. This is what he considered as his culture which must not be interfered with. He is passionately attached to his land tenure, the arrangement of the government of his village, the organization of his cultivation, the administration of tribal justice through the village and the village court.*³¹

The village economy was dependent on the subsistence cultivation as well as forest produced for their livelihood. The villagers cultivated crops, hunt animals and fish, collect fruits, herds and firewood from the forest. There was very little reliance on the outside source for their sustenance by relying invariably on the surrounding that nature around them produced. There was also small village industry where the villagers themselves produced pottery, weaving of cloths and baskets, curving of wood and stones and the metals by the blacksmith.³² There are about 250 villages in the Tangkhum country at present which supposedly was formed when the oldest village proved too small to accommodate the ever growing population.³³ The Naga society was basically a classless society where a person is respected for what he's worth then what he has.

³⁰Freepaathing, Z. V. 1994, p.

³¹Elwin, Verier. 1961. p. 1

³²Freepaathing, Z.V. 1994, p.15

³³Horam, M. 1977. p. 26

3.4.4 Dormitories: *Longshim* and *Ngala Long*

The existence of bachelor dormitories is common characteristic among all the Naga tribes. The Tangkhul called it *longshim*. However, unlike other Naga groups that sets up a separate house for the *longshim*, among the Tangkhul like that of the Sema, use the chief's house which was the biggest house in the village. In a big village, if the chief house proved to be small, the houses of influential persons or warriors are served as *longshim*.

The *longshim*, in the early days was decorated with human and animal skulls and other trophies and insignias of war. Playing, singing and dancing are the regular features of the *longshim*. However, *longshim* is also a place where young youths are taught different tasks and responsibilities. A boy, at the age of 12 or soon after attaining puberty, is made to join this place. It was considered shameful to sleep in his parents' house; only after his marriage he leaves the *longshim* and set up his own dwelling. Before the young aspirant becomes a full fletch member, he was on a probationary period and proved his worth which involved physical strength and moral courage.

Some scholar has referred to *longshim* (commonly known as *morung* among scholars) as the 'Naga School'. Shimray writes, "For the Nagas, a *morung* was the pivot around which the social, religious, educational and cultural activities of the young people revolve. The *morung* and the ladies dormitories are, therefore, rightly called the Naga Schools"³⁴ Discipline, obedience and efficiency were the important teachings in the *longshim*. H. Elbert wrote, "it is not book keeping young man need nor instructions about this and that, but a stiffening of vertebrae which will cause them to be loyal to a trust, to act promptly, concentrate their energies to do a thing."³⁵ Not only discipline, but young men were also taught art like basket making, wood carving and war tactics. Horam remarked, "The *longshim* is thus at once a school for teaching of Tangkhul history in the form of folklore, song and dance, sports and games, discipline, hard work, spirits of

³⁴Shimray, R.R. 1985. p. 193

³⁵ibid. p. 195

service in community living, and resilience in all matters of life.”³⁶ At day break, the youths will return to his father’s home, cook his meal and accompany the parents to the field. It was customary for the youths to go visit ‘*ngala long*’ meaning girls group or dormitory at night.

Ngala Long is the ladies dormitory, equivalent to Lonshim. There were as many *ngala long* in the villages as there were clans. All the girls relative of one clan slept in one huge outer room of the clan’s headman. Like the boys, it was shameful to sleep at her parents’ house, though she also shared the burden of household duties with her family. Girls joined *ngala long* as she attains puberty; she would leave the long only when she marries or lose her virginity. This was a training school for girls where all kinds of arts and works like weaving, embroidery, and design works were taught at night. They were also taught social behaviour, manners, and obedience from the seniors in the *ngala long*, thus paving way for them to learn the future responsibilities of motherhood.

Young girls were also taught the art of dancing, singing, eating and drinking. These were social necessity; in fact both boys and girls from a young age were made to learn dancing and singing which was the highlight of all Tangkhul festival. Horam remarked, “Singing comes naturally to the Tangkhuls as breathing. They always sing in mirth and sorrow, when alone and in group, in sunshine and in rain.”³⁷ During the sowing season or the Lura Phanit, there was a form of dance where only virgins were made to dance half naked. Locally, is called *laakhanganui*. The occasions demand that the girls portray their best dances and singing capacity as the whole village would observe and judge the beauty and abilities of the woman. Shimray referred to this festival as ‘beauty competition’ similar to modern day’s beauty pageant.³⁸ However, it has to be noted that though *longshim* existed in all the villages, *ngala long* was not present in every Tangkhul villages. In villages

³⁶Horam, M. 1977, p. 70

³⁷Horam, M.. p.144

³⁸Shimray, R.R. 1985. p. 144-146

where there were no *ngala long*, boys in group will visit different girls in their houses. Individual man and woman selected their own partners.³⁹

Despite this freedom, a great emphasize was laid on men and women moral character and decency. The youths both men and women were encouraged to lead a chaste life before marriage; consequently, pre-marital sex was rarely committed. Girls of promiscuous reputation encounter difficulty in getting a husband, while equal chastity in man is expected, they were more accepted in the society than woman with lose moral standards.

3.5 Head Hunting

Before the advent of British rule, in the traditional Tangkhul society, the people practices the philosophy of head hunting which was deeply rooted in their belief system and conducted with religiosity. Though head hunting is now a thing of the past, yet its importance from anthropological aspects and for the Nagas it once constitutes an integral part of their social and political system. Head hunting was indulged in for several reasons. Freepaathing writes, “To them it was partly religious, partly to show social majority, partly as a proof of success, and partly for fertility and agricultural prosperity”.⁴⁰

As a form of recognition, procuring heads was the only way to prove his competence also to show his triumphed of overtaking the enemy.⁴¹ Thus, a young man, eager to proved his capabilities would long to take heads as a mark of his victory and to be feted as a warrior, gain the privilege of wearing the coveted warrior’s ornaments and having at last proved his worth’s and manhood acquires a bride. Elwin writes:

It stimulated the crops to grow better, especially when the head was that of a woman with long hair. Moreover the Nagas has always been a war like race and the warrior, especially a young warrior, who had taken a head held a great advantage over his fellows in attracting the most

³⁹Horam, M.. p. 72

⁴⁰ibid. p. 11

⁴¹ibid. p. 88, Hutton, J. P. 1908 (1969). p. 157

*beautiful girl of his village for marriage. Indeed, it is said that youth who had not taken a head wife considerable difficulty in obtaining a wife.*⁴²

The heads of women and children were considered higher than men's head as it signifies the mettle of the village warriors in penetrating to the deepest sections of a village. Women and children were guarded by fully armed men since fertility and perpetuation of life line was dependent on women. Indeed it was a *rite de passage* for the young of the society.

The act of head hunting was also fused with religious ceremonies. In the building of the chief's house or *morung* or such similar abodes, a head was needed to appease ancestral ghost. Taking of heads also ensured good crops, fertility in women, and good luck during hunting and general well being and prosperity of all.⁴³ It was also believed that the spirit or vitality of man lies in the head and its possession and by obtaining heads the hunter was strengthened by the spirit.

Head hunting in continuity disrupted the peaceful co-existence of villages; villages were in perpetual state of war with each other. Broadly, two forms of hostility between villages could be identified: feuds between small groups or individuals, and war involving the entire village community. The former is usually clashes of interest be it the result of challenge, rivalry or love of a maiden, or simply a trial of strength. A brother of a divorced woman could also seek revenge upon his erstwhile brother-in-law. It very often culminates the war to a clash involving two clans or even the two villages. In the latter type of war, one could describe it as the order of the day. Horam writes, "Any insult, real or imaginary, was good enough excused for a raid which would in turn bring about another raid and so on almost ad infinitum."⁴⁴ The village which took the maximum head was deemed the most powerful. Thus, not to be part of raiding expedition were thought to be cowardice and absence of virility in man.

⁴²Shimray, R. R. 1985. p. 75

⁴³Horam, M. 1939. p. 88

⁴⁴ibid. p. 91

Land disputes also often culminate into wars between villages and it goes on intermittently, sometimes even for generations. When the population of the village expands, it calls for the annexation of another village territory. War may also arise due to the non-payment of customary tributes to the parent village.⁴⁵ Horam writes that war had often been connected 'by the refusal to give customary feast to a person bound by formal ties of friendship; by a refusal to pay bride price or to give a girl in marriage when it had been arranged; by the divorcing of a chief's wife; by selling the flesh of animals that died of disease and so infecting another village; by the breach of *genna* (taboo), such as taking some prohibited thing into the fields of another village at harvest, or by a gratuitous insult, or any other reasons.'⁴⁶

Gennas such as abstinence were to be observed before undertaking any raids. Sleeping with wife or woman was believed to bring misfortune to the party. It was customary for women to follow certain sets of rules before the raids. They were to refrain from touching the weapons and tools that were to be used in the expedition; also women were to remain chaste, not borrow fire and should not weave or spin before raid. Warriors at war were also supposed to follow rules such as avoiding killing pregnant women; also women belonging to the attacking village who were by the virtue of marriage were residing in the village under attack. If she was killed, her kin would avenge upon the slayer though he might belong to the same village.⁴⁷

Head hunting influenced the life of Nagas so much so that it drove the people and the villages to greater isolation and therefore villages were well fortified and made safe from enemy raid. The Tangkhul remain virtually cut off from the rest of the world for many centuries. The villages were remote and isolated from one another; the villages developed their own code of behavior and standard of administration and because of this culture of head hunting practice each village developed its own dialects that was indiscernible to

⁴⁵ibid. p. 91

⁴⁶ibid. p. 92

⁴⁷ibid. p.92

the people of other villages. Thus, there are as many more than 200 dialects spoken in different villages.⁴⁸

3.6 The Role of *Pukhreila* or the 'Neutral Lady'

The word '*pukhreila*' or 'the neutral lady' refers to the married women who act as mediators and peace ambassadors in the Tangkhul society. She is also referred to as the 'peace maker', the 'bearer of the torch of peace' and the 'Red Cross bearer' of the Naga inter-village war. In the time of war between her husband clan and their enemy, the *Pukhreila* would act as the peace emissary by boldly entering the battle field.⁴⁹ Zehol quoted, "when a party was pressed back very far killing a warrior or two, and the verdict was known, a neutral force come in....The *pukhreila* could not be harm as a rule. She was highly respected for neutrality, and they were called as the ambassadors of peace. In the bygone days, when head hunting was practice, these *pukhreila*'s plays vital roles saving lives of man."⁵⁰ Harming *pukhreila* would mean violation of the inter-village law that calls for another war by all villages attacking the violator of the customary law. Thus, the customary laws demand that the *pukhreila* was kept unharmed and intervened in times of war. Freepaathing elaborated further that nobody was allowed to lay hands on her. He writes, 'the neutral lady' or ladies stepped in between the warring parties with a long 'Y' shaped stick and tried to prevent the winner side from chasing the defeated party. Her intervention means stopping the war.'⁵¹

3.7 Religious Belief and Practices

Before the coming of Christianity in the early part of the twentieth century, the faith of Nagas is generally termed as animism. Nagas in the past followed meticulously religious instructions and observances as they were fearful of the gods. The Nagas believed in the plurality of gods, known as *Kameo* among the Tangkhul. Their concept of god is a negative one because based on the fear of harm that would supposedly be inflicted upon

⁴⁸Freepaathing, Z.V. 1994. p. 11

⁴⁹Shimray, R.R. 1985. p. 168

⁵⁰Zehol, Lucy. 1998. p. 23

⁵¹Freepaathing, Z.V. 1994. p. 67

people if they did not conformed to the religious laws, makes the whole village, in solidarity, observed numerous taboos, rituals and regulations. Further, gods were belief to indirectly communicate with humans through natural living beings like birds, bamboo, and in dreams.

Particularly, two gods were ardently worshipped: *Kokto* or the king of the 'Land of the Death' and secondly, *Phunghui Philava*, the goddess of wealth. The Tangkhul also believed in the existence of a number of deities; the field deity, the river deity, and *Kameo* for every big stones, trees, and so on. These *Kameo* were name after a particular lake, river or place. They have no place of worshipped such as shrine, temple, churches or images. Sacrifices, offering were thus made on the road side, under the trees, by the river side, at the paddy field and other places where spirits were expected to be present or visits.⁵²

In every primitive society, collective solidarity is the inherent characteristic of every religious customs and practices. It was believed that violation of any taboos (*genna*) or religious practices by an individual could bring calamity to the whole village. In the time of sowing paddy, it was customary for the village chief to offer the first sacrifices and performed the paddy sowing rites one day ahead of his subjects. In some rare cases an individual by mistake sow the paddy before the village chief, it was believed that the entire village would suffer from failure of crops and face famine. In the Tangkhul religious and cultural sphere, there were innumerable taboos or *gennas* and breaching of *gennas* was taken as an offence which according to the local beliefs, invites the wrath of the evil spirits in the form of crops failure or spread of diseases. The person who committed the taboo was taken as the enemy of the village and often sent in exile to far off land.⁵³

⁵²ibid. p. 16

⁵³Shimray, R.R. 1985. p. 228

3.8 Social and Cultural Changes

Tremendous and abrupt changes, rather than gradual and slow was witnessed by the Tangkhul society in the turn of the early twentieth century. For centuries, as mention earlier, Nagas have lived in total isolation withstanding the outside forces, even of the neighbouring borders. The Nagas were suddenly exposed to the rest of the world with the advent of British invasion in the later part of the nineteenth century, and as late as the First World War. In 1944, the Naga Hills were used as a battle ground during the Japanese invasion of Asia and it was during this period that the Tangkhul came into contact with the men of three armies: the Azad Hind Fauj, the Japanese Army and the Allied soldiers.⁵⁴ The war served as an eye opener in many ways; they were forcibly made aware of their poor economic standard and their general backwardness. The rigid clan system and the tribal barrier fell apart and strengthen their relationship by uniting together as one.

The Tangkhul's were subjected to 70 years of British rule and with this alien rule, tremendous happenings followed suit changing forever their society. Today, one would find that, the otherwise customs which were integral to Tangkhul's daily existence have completely vanished. The days of head-hunting and warfare was destroyed by the intervention of British through legislation. The missionaries introduced them a new religion, though they were suspicious and reluctant in the beginning, gradually with the consistent effort and patience of the missionaries win them over, thereby embracing Christianity as their new religion. The new religion proved beneficial to them in number of ways: it removed superstitions; introduced schools, hospitals and cleanliness; and turn them away from their harmful practice of head-hunting. Along with the new ruler, came new belief, ideas and practices, thus replacing the old belief with new ones.

On abolishing the culture of head-hunting, Smith noted, "they were abolishing an institution which had its roots in the religion of the people and spread its branches throughout every aspect of their culture, and by this action they deprived the people of

⁵⁴Horam, M. 1977. p. 94

the greater part of their interest in life.”⁵⁵ Horam wrote, “It was all very well to forbid head-hunting by law, it was another thing to provide a substitute for it on which the Nagas could expend all their unused energy.”⁵⁶ With the coming of Christianity, their culture of singing and dancing were suppressed by the missionaries without providing them other alternative to utilize their time productively. Further, the twin process of modernization and westernization has transformed the life of this people. The much egalitarian society now has a small group of educated elite springing up from among them.

After independence of India, The Indian constitution guarantees protection to the scheduled tribes for safeguarding their own interest. The Nagas were offered to be included under the Sixth Scheduled of the Constitution which they rejected it in their demand for a separate sovereign nation. At present, the Nagas of Nagaland falls under Article 371 A of the Indian constitution that guarantees the Nagas to follow their own customary law. In the next section, a brief back drop of the Naga nationalism and demand for separate nation is looked into. Examining the Naga freedom movement is imperative to understand the shaping of Naga society and its consequent recognition of customary law within the constitution.

3.9 Naga National Movement and the Article 371A

It was in the turn of eighteenth century during the Burmese invasion in the Northeast that the British entered this region. Through the Treaty of yandaboo in 1826, the British gained political control over the whole of Northeast India⁵⁷ and gradually Nagas inhabited areas were integrated into the fold of Assam.⁵⁸ There was little effort by the British to either integrate or modernize this area⁵⁹, the British policy at that time was non-interference and tried to keep the Nagas away from the freedom movement of India.⁶⁰

⁵⁵ibid, p. 89

⁵⁶ibid, p. 98

⁵⁷Banarjee, Paula.

⁵⁸Daili, Ashikho. 1992. p. 16

⁵⁹Banarjee, Paula.

⁶⁰Guha, Ramachandra. 2007. p.268

After the Second World War (1939-45), when India was on the verge of grating Independence by the British, the Nagas demanded separation from India, the British ignored their demands and Nagaland has since been marginalized from mainstream Indian politics.⁶¹ Under the leadership of Zapu Phizo, the President of the Naga National Council (NNC), the Nagas began fighting rigorously against the domination of the Indian National Army for realization of independence and full autonomy of the Naga country.⁶² In 1960, as a response to this movement, great changes occurred in the Northeast region with the Naga Hill district and the former Tuensang division of the North Eastern Frontier Administration (NEFA) being constituted into a separate state called Nagaland.⁶³ The Bills for the 13th Amendment of the Constitution was passed, and got assented by the President on 28 December 1962.⁶⁴

The Constitution (Thirteenth Amendment) Act, enforced on 1 December 1963 inserted Article 371 A into the already existing Article 371 and created the state of Nagaland. The Article 371A ensures that “religious and social practices of the Nagas, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, ownership and transfer of land and its resources shall apply to the state of Nagaland.”⁶⁵ In examining the position of Article 371 A, it reveals that the customary law and the practices of the Nagas will remain undisturbed. This is the carry forward of the British colonial administration and thus till late this mechanism of social control remained supreme. Although, special provision for the State of Manipur was laid down under Article 371C it does not provide for the Nagas of Manipur any special rights to follow their customary law. In 1971, *the Manipur Hill Area District Council Act* was introduced however these district councils do not have any provisions to control their customary law. It will be interesting to point out that although the state government has introduced various bills pertaining to village authority within the framework of Panchayati raj in the hills of Manipur including Ukhrul district, till date the

⁶¹Banerjee, Paula. 2000. 137

⁶²ibid. p.137

⁶³Banerjee, Paula. 2000. p. 138

⁶⁴Basu, D. D.1998. p. 433

⁶⁵Bakshi, P. M. 2008. p. 306

traditional structure remains unaltered, their customary law is still the guiding force of the Tangkhul Naga governance system. Tangkhul's rejected the system of Panchayatiraj and followed customary practice of governance as a reaction against the Indian state. It has to be noted that in the Nagas struggle for sovereign state, Tangkhuls has been giving rigorous leadership in the past as well as in the present times. The traditional village councilor has now paved way to the role of village authority since according to the provisions of the Act, the chief would remain ex-officio chairman of the village authority.⁶⁶

Unlike the Nagas of Nagaland where Dobashi courts are considered as customary courts, the Tangkhul follows a unique system of governance and law identical to that of the structure of the state of India. With a well define constitution and customary law in written form; perhaps it is only the Tangkhul's among the tribes who have organized their governing structure with legislature, Executive and the Judiciary. The Tangkhul Naga Long serves as the apex body of Tangkhul's decision making body; it also lays down their constitution and their customary law in written form. The next chapter will shift focus to the coming of TNL and its inception. It will also examine the TNL conception of citizenship under its constitution and the exclusion of women from the definition of citizenship. The chapter will also look into the patriarchal nature of TNL and the resultant production of gendered nature of customary law.

3.9.1 Changes in Women's Role in the Society

It is imperative to mention that customary law is not unchanging and static as it is usually believed to be. In the Naga struggle for sovereign state, one of the oldest movements in India since India's Independence, one can observed the changing role of women among the Nagas by their entrance into the public domain as social workers. There are various women peace groups in Nagaland and Manipur who are working separately within their own respective tribes. Paula Banerjee writes that the coming of women's peace group is

⁶⁶Roy and Rizvi, 1990. p. 135-136

an outstanding feature in the Naga struggle for freedom movement.⁶⁷ These groups were created as a response from women to the political and social problems witnessed in this part of the country that has propelled women to come together and fight against atrocities.

In Manipur, Nagas Women Union Manipur (comprising all Naga women of Manipur) and Tangkhul Shanao Long (Active in the Ukhrul district) have been doing notable work for eradicating social ailments and have been the harbinger of peace promoter in these troubled areas. Banerjee stated, "During the ceasefire negotiations neither the GOI nor the rebel groups could ignore their voice and the women had to be included in the official proceedings. Peace-making allowed the women to carve out a niche for themselves within the formalized political process."⁶⁸

With regard to the formation of Tangkhul Shanao Long, it was triggered by molestation of some girls by a BSF officer in March 1974. A girl name Rose was a part of the molestation. Having marred her reputation and future prospect of marriage, she committed suicide. Her death sparked off a huge protest and to enquire into this crime, a committee was formed and thus began an indefinite hunger strike. This and other such events necessitated the formation of Tangkhul Shanao Long. Their objectives as envisaged in the constitution are: to maintain dignity and safeguard the rights of women, to enhance the cultural life of the society, to promote lively and active participation in community life.⁶⁹

Banerjee opined that one reason for the tremendous success of these organizations is because they do not challenge traditional gender roles but instead negotiate spaces within these roles. Further, she reasons that peacemaking in the family has always been seen as an onus of woman which can be constituted as a part of their traditional role. The Naga women have appropriated this aspect of their traditional role in their present political

⁶⁷ibid. p. 139

⁶⁸ibid. p. 142

⁶⁹ibid. p. 26

purposes. In her words, “They appeal for peace as mothers, wives, and sisters. Their rhetoric is always personal. Their leadership in these organizations is thus accepted without recriminations because they do not appear to challenge traditional gender roles. In reality, however, they do challenge such roles and are slowly beginning to enter public life in a more official capacity. Women's experiences in peace organizations have helped them learn to question, and in certain cases, even to address their absence from decision-making bodies.”⁷⁰ Thus, traditional space which was otherwise dominated by men alone are now accommodating women even embracing them as leaders among the midst of men. This can be seen as a great achievement for women because until recently women were marginalized group when it comes to holding public services.

3.10 Conclusion

The Tangkhul Naga is the largest Naga tribe in Manipur, inhabiting the eastern part of Manipur concentrating largely in Ukhrul District bordered by Burma in the East, Manipur valley on the west and south-west, and Nagaland on the north and north-west. Different scholars and thinkers have attempted to trace the origin of the Nagas. However, the general accepted view is that they migrated from the north-east and had for centuries occupied the present Tangkhul country. The people, on the basis of language, have assigned the Tangkhul as belonging to Tibeto-Burman family. History has shown that, before the ascension of King Pakhangba to the throne of Manipur, the Tangkhul were already settled in their land.

The characteristic of family among the Tangkhul is nuclear type. The father is the head of the family and thus exerts his authority in all the matters concerning the family. The customary law commands that the eldest son is endowed with the biggest share of the family property. The rest of the property is divided between the sons equally; woman in no circumstance can inherit property especially ancestral property. Tangkhul villages are compact villages with well defined territories and self sufficient in its own ways.

⁷⁰ibid. pp. 141-142

For time immemorial, before the advent of British rule, Tangkhul were living in total isolation withstanding the influence of outside forces. The chief or the headman commands the allegiance of the entire population in the village. By the virtue of being the chief, he also served as the head in the village council which is comprise of representative from different *shangs* in the village. They are also the custodian of customary law because base on these laws they preside over any disputes and conflict within the village or outside it. Thus, they served as the executive body, judiciary and administrator of the village.

The Tangkhul believes in the plurality of gods. People were in perpetual fear of the gods least they afflict them with calamities or disease. Thus, numbers of *gennas* and religious rituals were practice to appease the gods. During the head hunting days, the Tangkhuls passionately indulge in raids. Head-hunting was not only warfare and feuds for the Tangkhul, for them it has political, religious and social significance. It was only during the British in the twentieth century that the Britishers abolished the act. Christianity was embraced by this tribe which resulted in replacing the old culture by whole new sets of beliefs, customs and practices. In the twenty first century, the way of life that the Tangkhul exhibit has remarkably changed with the different processes of education, westernization, Christianization and so on. However, till today, their basic structures and features have not altered. Customary law that excludes women from inheritance of property, inheriting the office of the chief, representation to the Village Authority, head of the family are all still govern by the old tribal practices that define exclusive domain for men and women in the society.

The tremendous changes in this part of the country began after the Treaty of yandaboo in 1826, the British gained political control over the whole of Northeast India and subsequently, Naga areas were also annexed. However, there was little effort from the British to integrate the Nagas with the rest of the country. In fact, the British employed the policy of non-interference which later influenced the Nagas to aspire for separatist tendency. After the Independence of India, the Nagas nationalism gain full momentum under the leadership of NNC with Zapu Phizo as its chairman. In 1960, as a response to

this movement, great changes occurred in the Northeast and separate state called Nagaland was created. The Constitution of India (Thirteenth Amendment) Act, 1963 inserted Article 371 A granting Nagas to live and govern according to their tribal traditional practices and law. In fact, the government of India has proposed the Nagas to be under the Sixth Schedule of the Constitution that will grant additional privileges and special status to the Nagas as a hill tribe. The Nagas however rejected the proposition. Even after achieving statehood, Nagas remained recalcitrant and increasingly strong protests were generated from that region.

In the early 1970s, the Indian Army infiltrated to all the Naga inhabited areas especially in the region where the movement was strong and to this day there is a strong army patrolling in this region. The political and insurgency problem has facilitated in the creating of women peace groups working in different parts of Naga inhabited areas. They came into being as a peace initiator and peace makers and have protested against all kinds of violence and human rights abuses and have also made themselves indispensable in matters of drug rehabilitation and many other societal issues. The formation of such a peace group has also paved the way for women to enter the decision-making process indirectly.

The discussion as laid out in this chapter shows that Tangkhul Naga has seen tremendous changes and upheavals that began directly with the coming of the British which changed their society forever. The discarding of traditional religion and head hunting speaks of the unprecedented changes in the society that affect the core of Tangkhul society, changing forever their society. The villages which before the British were isolated and fortified ones paved the way to the coming of different Tangkhul villages together in unity thereby resulting in the formation of Tangkhul Naga Long as the apex body and the custodian of customary law.

Chapter-4

Tangkhul Customary Law and Women

4.1 Introduction

In the second chapter, we have examined the feminist engagements with law as a force which exist as a form of patriarchal system serving the interest of the state resulting in the perennial perpetuation of women as subordinates that in turn facilitates inequality by building the notion of maleness and femaleness in the society and in the process constructing women as a part of the society only in relation to man. Again, the debate on the validity of whether law can be taken as a site that challenges existing gendered assumption or rather liberates women from their bondages cannot be easily ascertain without studying how women in reality and daily life are effected in this gender set up of our social system. The fact that law has played an important role in women's life is undeniable, the larger problem is whether the role that law plays has been beneficial to women is altogether a different take. Thus, for understanding the role of law, here being customary law, the Tangkhul Naga has been chosen specially because small scale societies which are predominantly traditional in character exhibits the ability to sustain relations and relationship between different members in the society even in modern times, it is interesting to note that there is an unbridled adheres to customary practices and this chapter calls attention to how customary law functions in contemporary times today and its impact on women. As the third chapter pointed out, Customary law has existed as a living law even before the colonial intervention; however, the consolidation of customary law as law in this part of the country is condition during the colonial period and in modern nation state, customary law still remains a strong force of law in the areas that are defined as the scheduled areas in the Northeast of India.

Although during the age of head-hunting era, villages were isolated and fortified and any outside intrusion even of neighbouring village was looked upon with suspicion, after the coming of Britishers, realization of similarity and closeness encompasses them, as such the isolated villages came together in unity to fight against their common enemy, here

being the British. Before going straight to customary law, gender relation among the Tangkhul society with regard to the division of labour between the sexes is touched briefly to understand the construction of man's and woman's work in the society. It should be noted that Tangkhuls being a patriarchal society, there is a strong notion of man and woman's work and from this study one can draw insights about the subordination of women in the society. Feminist arguments of law as the production of patriarchy at work can be examined by looking into the Tangkhul construction of gender as this will unravel the gendered nature of their customary law.

4.2 Gendered Division of Labour and Gender Relations

The most basic division of labour appears to be found on gender lines. From the simplest hunting and gathering bands to the most complex industrial societies there are certain notions that dichotomize between men and women's work in the society. As discussed earlier in the second chapter, scholars who sees division of labour on the ground of biological attributes argues that the sexual division of labour and inequality between the sexes is determined to some degree by biological or genetically based difference between men and women while there are scholars who view that this division of labour are culturally determined and that inequality is the result of sexually constructed power relations. According to U. A. Shimray, inequality between man and women is linked to a complex historical process and it varies according to the social and cultural conditions of society. He found in his study among the Tangkhul Naga that a high degree of gender division of labour prevails among them. He pointed out that earlier traditional culture or customs indirectly encouraged such divisions and this can be attributed to the existence of patriarchal mindset which makes the men dominant in taking decisions.¹ He found that people commonly say "Women do not plough" and "Men do not carry firewood". When the couple returns from the jhum field, the wife is often laden with fire woods and vegetables while the men usually returns carrying only a dao in his hand. Most of the household chores were exclusively carried out by women especially the mother and the eldest daughter, while those tasks that demands physical strength were carried out by men

¹Shimray, U. A. 2004. 1706

folks. He writes, “The tradition of the Naga society expects women to be ‘obedient’ and ‘submissive’. Naga women performed the role of mother, child-bearer, food producer and household manager. Naga women are required to respect and obey their husbands and clan members. Women have a greater range of responsibilities, starting from household maintenance to various agricultural activities and they have greater work burden in both as well.”² As pointed out in the preceding chapter, both men and women equally take part in the agricultural process. Men and women carry out activities like transplantation, reaping, trashing and winnowing. In present times, there has been a high increase in the area of women’s work. Shimray opines that this can be attributed to the changing nature of the society. During the head hunting tradition, there was always the fear of potential attack from the enemy village. This threat of war kept the men folk constantly busy in guarding the village. Even in contemporary times, such notion prevails in their idea of man as the protector of the household.

Another possible factor is defining the division of labour along gender lines is because of the patriarchal system at work which makes sure that men and women from tender age are imparted the socially prescribed gender roles,³ pointed out by Freepaothing in his analysis of the status of Tangkhul women. According to him, in the Tangkhul families, a girl is less welcome than a boy. He found in his study that “There was also less ceremony to mark the various stages of her growth than those of the boys. She was checked if she was an extrovert and constantly reminded that she should not appear bold or important. Parents and grandparents were indulgent towards the boys, for they believed that they provided them with support during their old age.”⁴ He further writes that girls were thought to be protected and kept; even the younger brothers adopted such attitudes. According to the Human Development Report (HRD) 1995, it shows that women work longer hours than men in nearly every country. Of the total burden of work, women carried out an average of 53 percent in the developing countries, and 51 percent in the

²ibid. p. 1704

³ibid. p. 1706

⁴Freepaothing, Z. V. 1994. p. 24

developed ones.⁵ Among the Tangkul's today, women are now employed outside the household. Thus, women's work has doubled the amount of work load which they tackled earlier in traditional times, because although women are increasing working outside the household, the definition of women's work entails that women do the household domestic chores too. Thus, the frontier of women's work is increasingly expanding.

In an unpublished article written by Yuingam Jajo titled '*Pukreila* – The Patriarchal Ideology: Interrogating Tribal Women's position in the Society', he brings out the role of *pukreila* as being highly conditioned by the patriarchal ideology of the Tangkhul society. The role of *pukreila* is no longer existent in modern times but during the head hunting tradition *pukreila* played a significant role as the neutral group. As discussed earlier briefly in the third chapter, *pukreila* are the neutral women who boldly entered the battle field of the warring parties and their entry in the battle field denote the end of war because by law of war no warring groups were allowed to harm or attack them. Jajo asserted an interesting argument that there is nothing that can be heralded of in the role of *pukreila*. He pointed out that *pukreila* walking freely amidst the battle and her exposure to eminent danger suggests that women are merely taken as an expendable commodity that can be easily replaced in the patriarchal society. He further points out that since women were taboo object before the head expedition, refraining from harming the *pukreila* in the battle field may not be because of the fear of inviting retribution but rather it can be due to the fear of women bringing ill luck during such expedition. Thus he argues that the notion of women occupying high position in the Tangkhul society is more of fallacy.

Jajo's argument is highly significant in understanding the ideology of patriarchy at work in the Tangkhul society. From the Tangkhul practice of forbidding women to touch the instruments that were used in the head hunting expedition as ill luck illustrates such ideology. However, again disregarding such roles as merely a product of patriarchal society negates the highly significant role of women and their ability to bring changes in

⁵Shimray, U. A. 2004. p. 1707

the society. It is essential to note that despite the fact that patriarchy is deeply entrenched in the society; simultaneously agency of individual women doing extraordinary things cannot be rejected and overlooked.

4.3 Customary Law of the Tangkhul Naga (*Shiyan Chikan*)

Before the British period, elaborate customs and practices in the Tangkhul society was followed by every member of the society; violation of any customary practices incurred the wrath of the whole village, even resulting in the excommunication of the violator. Customs and practices that govern the actions of inheritance of land or chieftainship, representation to the village council and religious practices etc. were strictly followed based on the unwritten customary law that was expected to adhere by every member of the society. The person who was found breaching *gennas* or taboos was punished by the *Hangva* according to their customary law. In case any dispute arises with regard to land, theft, divorce, inheritance, adultery, assault, disregard to decisions given by the *Hangva*, the matter was taken up in the village court. Roy and Rizvi noted, "It is expected for all the residents of the village that they abide by the customary laws. Every individual is expected to be well conversant with customary usages."⁶ Tangkhul customs are not a homogeneous uniform in all the different villages; variations exist from region to region.

With the coming of British, significant changes took place resulting in a closer contact between different villages. As time passed by, the people realized they could not exist in isolation and thus they formed a body of law that governed a group of neighbouring villages known as *Luiyan*, 'Lui' here means field and 'yan' denotes norm or law. Thus, this law spells out the sharing of fields among the neighbouring villages. Gradually, they formed larger bodies of villages sharing common water shed known as the *Somkhogyan*, here *Som* and *Kong* can be translated as inhabiting and river respectively. The meetings of such bodies were held at a place called Somsai near Ukhrul now occupied by Assam Rifles. All these bodies become dysfunctional by 1800 for some unknown reasons. It was only after one hundred and twenty years later in 1921, a man name Shangyang Shaiza

⁶Roy and Rizvi. 1990. p. 135

formed a body known as Education Fund which included all the existing Tangkhul villages of that time. Later, in between the year 1947-48 the body was renamed as Tangkhul Long and much later again came to be known as Tangkhul Naga Long. The governance of the Tangkhuls today follow the system of three-tier structure with the Tangkhul Naga Long existing at the highest level of disputes resolution that encompasses the whole of Tangkhul villages, at the next level, is the Longphang (four regions, literally meaning Long branch as the word ‘*phang*’ denotes) and at the third level, the Village Authority/*Hangashim*. The Village Authority is either headed by the *Awunga*/chief or an elected chairman. The Manipur Hill areas Village Authority Act 1956 provides for an elected headman on the term of five years tenure. However, the same Act under Section 3 (4) states that the hereditary chief is to retain as the chairman of the village authority. The Village Authority Act and the rules laid down by the Act were dismissed by the Tangkhuls. Instead, Tangkhul irrespective of villages with hereditary chief or elected chairman follows the laws spell out in the ‘Riyan’ meaning Constitution of the Tangkhul Naga Long. Hitherto, there has been no attempt what so ever to translate the constitution of Tangkhul Naga Long from Tangkhul dialect into English. Thus, this translated version has been taken out from an unpublished dissertation work of Shomi Brian Raikhan (2008, JNU) who had produced this work in his dissertation titled *Dispute Resolution system of the Tangkhul Nagas: Ukhrul District Manipur*. The constitution was adopted at the time of the formation of Tangkhul Long in 1948, it was reviewed in 1986 and in 2005 the same was reviewed again and was approved on the 8th October in the same year. In the next section, the Tangkhul conception of citizenship in the Riyan of the TNL is briefly examined. Studying citizenship, can throw light on some of the major issues which are involved in the complex relationships between individuals, collectivities and the state, and the ways in which gender relations (as well as other social divisions) affect the formation of law.

4.4 Citizenship

In this section, I will touch briefly on the definition and the criteria of citizenship and eligibility of representation to the TNL. The *Riyan* elucidates in detail the definition of

citizenship, the Article 74 of the Tangkhul Naga Long states that anyone born within the village boundary shall become the citizen of the village and thus Tangkhul citizens. All who have come and settled in the village from elsewhere with due permission and after fulfilling all the customary requirement shall also become citizens. Citizens living outside of the homestead shall still remain citizens but a married woman married to an outsider is no longer a citizen of that particular village she hails from. By virtue of being a citizen of the village, an individual becomes a citizen of the Long.

Only Tangkhul citizen can hold office in the TNL. Under the Article 9 of the *Riyan*, the eligibility criteria to be a representative in the Long are laid down. He must be a Tangkhul citizen of 25 years, who observes and knows the Tangkhul customs and traditions. He should not be a criminal or a convict of either the government of India or the TNL. He must not be bankrupt or an insolvent and must not be of unsound mind. Article 17 defines the eligibility criteria to become a TNL executive. He should be a Tangkhul citizen and must not be less than 35 years of age. In case of presidential candidate, he should he should be 40 years and above. He should not be a person convicted by any competent court. He should not be a member of any active political party and should not be a person who violates the *Riyan* and *Shiyan Chikan* of the Tangkhuls. He should not be of unsound mind. Article 30 states that the criteria for the judges to the TNL, after fulfilling all the other criteria, the judges cannot be less than 45 years of age.

4.5 *Shiyan Chikan*/Customary Law

The Tangkhul Nagas followed their own legal system and jurisprudence and as mention earlier, full fledged and elaborate legal body like that of the Indian government judicial system was set and even today this body functions as the normative legal set up of the Tangkhuls. As mentioned earlier, during the British rule, cases and disputes which the village authorities were unable to solve were even taken up by the British. After the Independence of India, some of the cases were referred to the Indian state courts. However, with the rise of Naga nationalism led by Phizo under the NNC (Naga National

Council) banner, the Tangkhuls joined the resistance movement and have been giving rigorous leadership to the movement since then. Thus, it seems obvious that the Naga nationalist banned the use of state courts in the Tangkhul region. The Tangkhul Naga long (TNL) appointed a committee to draft and approved written form of customary law locally known as *Shiyan Chikan* on the 12th December 1997. It became operational on the 9th of January, 1998 and it has 20 chapters and 114 sections. In this section, I have confined the study to examine this written and documented form of customary law confining the study to chapter 1 to 3, the first two chapters deal with the property and inheritance and the third deals with the function and the roles of the *Awunga* and *Hanga*. Sections 15-16 have been discussed below as it laid down the criteria for eligibility to citizenship and clan membership in the customary law. Lastly, law relating to marriage and divorce, that is laid down in Section 75-94 of the *Shiyan Chikan* will be briefly looked at.

Section-1: *Shimyan Luiyan*

The words, 'shim' denotes house, 'yan' refers to share while 'lui' indicates field. Thus, *shimyan luiyan* refers to the law of the house and the field and the person who is entitle to the property as his share. This section explicates in detail the manner in which properties are to be shared among the children in time of marriage which falls as the duty of the father as the head of the family. Since Tangkhul follows the system of primogeniture, the eldest male inherits the parental house. He inherits the full responsibility of the father, even in case of his death; it is the eldest son who carries out the necessary responsibility as the eldest son.

The eldest son of the first wife is always taken as the eldest son in case of second marriage of the man after the death of his first wife or in case of the man married to more than one woman. In the case of deceased of a husband without a male heir, the wife and his children may be the custodian of the properties during her lifetime of the mother if she does not remarry. But she is not entitled to sell it off as it constitutes ancestral property. In case of death of the *Awunga* (king) without a male heir, his wife and

daughters may be the custodian of all the properties in the lifetime of the mother and before the marriage of the daughters, but the role of chieftainship could only be claimed by the nearest male kin. For the daughters, they can be given cloths, money, utensil and cattle as they cannot inherit landed property.

Section-2: *Shimluikhat*

This section expounds the entitlement of property and house in case of the death of all the immediate family members in a household or the couple is left without a male heir. The nearest kin as the closest relative from the father side can claim the property as *shimluikat*, which can be define as properties that can be rightfully claim by the nearest relative by virtue of being the closest male relative. Similarly, in case of a man without a son or sons, the same rule applies. His property or properties are divided in the order of primogeniture among the nearest male kins. (This section also spells out the disowning of female as the inheritor) Female relative however close they are cannot claim property under the law of *shimluikat*.

Section-3: *Shimlui khayor*

The words '*shimlui khayor*' can be translated as selling of house and field. Under this law, selling of house or field due to debt or difficulties should be informed to the clan members so that the relatives are given the first choice to buy the property. In case of absence of prospective buyer among the relative, the property can be sold to anyone outside of the clan. Even if the property is bought by a person from neighbouring village, such ownership of property does not change the existing boundary of the two villages.

Chapter-3: The Role and the Function of *Hangshim* (Section 4-6)

Section-4: *Hangashim*

The *awunga*, the representative of all the clans of the village forms a house or body known as *Hangashim*. *Awungawui Otngarut* (Section-5): This can be translated in

English as duties of the King. The *awunga* is the head of the *Hanga* and his house shall be used as the court of the *Hanga*. He shall convene meetings of the *Hangashim* and shall give the verdict in all the decisions taken by the *Hangashim*. He also shall run the administration of the village.

Section-6: *Hanga kala Otngarut*

This defines the *Hangva* and its duties. Those who have the approval of the clan to be their representative have the right to sit in the *Hangashim*. Each clan shall send a representative. A person who came and settled in the village from some other village cannot be granted a *Hangva* Seat nor can he represent the clan. The *Awunga*, *Wungva*, *Hangva* seat cannot be exchanged or changed. In any cases of disputes or problem, it is the duty of clan elders to settle the dispute, failing which it can be referred to the village *Hanga*. In case of problem between two villages, it can be settled by the concern two villages *Hanga*, failing which it can be referred to Longphang and the Longrei accordingly. If it is an individual problem between two people of different village, the plaintiff can file the case in the village *Hanga* of the alleged offender.

Chapter-5: Citizenship (*Ruichumnao*) and Clan Membership

Section-15: *Shangzan Ramzan*

If anybody leaves his village and settles in another village, he shall seek admission into the village and clan; this is called '*Shangzan Ramzan*'. He shall produce a certificate from the *Awunga* of his previous village. Animal has to be killed to show that he has become a part and member of the village or the clan. *Mingpho Kasang* (Section-16): in case of the death of all the immediate family of a 'Royal Descend' and when the property has to go to the *Shimluikat*, the person claiming the property can also inherit the status. This is known as '*Mingpho Kasang*'. According to the statuses claim, buffalo, mithun, bull or cow are given to the village for recognition.

Law Relating to Marriage

Section-75: *Lakhot*

The Act of marriage is called '*Lakhot*'. In common usage 'marriage' is known as '*shakzat*'.

Section-76: *Ngala Hangsang*

Any person from man or the woman side trying to negotiate marriage is called '*Ngala Hangsang*'. In case of problem between the two couple, the person who negotiated the marriage shall give their true statement.

Section-77: *Mak-Kakham*

When the negotiation for marriage is over or the marriage is fixed it is called '*Mak-kakham*'.

Section-78: *Neira Khamang*

After the engagement process is over and the '*Manho*' (meaning bride price) is paid to the bride's family it is called '*Neira Khamang*'.

Section-79: *Ngala Shakzat*

The word '*Ngala Shakzat*' means marriage. When marriage ceremony is conducted and animals are killed for the feast, the respective share of meat shall be given to all relatives who are entitled to receive parts of the animals according to their entitlement.

Section-80: *Long Ngasham Nao*

Physical union between two consenting adults (man and woman) is called '*Long Ngasham Nao*' or '*Wonreokahkui*'. In case of a pregnant woman and the man refuses to marry her, a fine of Rs. 5,000/- shall be paid by him and another Rs. 3,000/- is to be given

for the upbringing of the child. In case, if it is the woman who refuses to marry the man, no such fine shall be imposed on anybody.

Section-81: *Khangasham*

In case if a woman or a girl has an affair with more than one man and problem arises thereafter, it shall be the responsibility of the last man to either marry the girl or pay the fine of Rs. 5,000/- and Rs. 3,000/- for child maintenance

Section-82: *Ngala Ngashim*

If a person has more than one wife it is called '*Ngala Ngashim*'. The woman was married in a proper ceremony shall be the legal wife of the man. In case if there was no marriage ceremony in both the cases, the woman who was brought home first shall be considered the legal wife. The second wife is called '*Ngashirva*' and she is not entitled to the rights of the first wife.

4.6 Law of Divorce, Adultery, Defamation and Rape

Section-3: *Lapan*

If a man and woman are husband and wife and for some unavoidable circumstances could not live with each other, the separation is called '*Lapan*'.

Section-85: *Tuihat*

After an engagement, before the act of marriage, if any party breaks the promise is called '*Tuihat*'. A fine of Rs. 2,000/- shall be imposed on the party responsible.

Section-85: *Lanchin*

This can be translated as 'divorce'. If a man chooses to divorce the wife, he shall leave the property to his wife, but if it is the wife who divorces the husband the wife shall leave

empty handed. After the man leaves empty handed, the wife cannot sell any of the landed property, and in case she remarries she shall leave the property behind.

Section-86: *Phophat*

The word '*Phophat*' means '*adultery*'. If it is the husband who commits adultery, he shall leave all his properties behind. If it is the woman who is the adulteress she shall leave empty handed. And in case, if the man takes another wife man's wife he shall be liable to pay a fine of Rs. 25,000/-

Section-87: *Sarhom*

If a man divorces his wife in her old age is called '*Sarhom*'. In such case, she is entitled to one by third of the harvest of the year she was divorced, and she is also entitled to one by third of other properties.

Section-88: *Shatngathan*

A mutually agreed divorce is called '*Shatngathan*'. In this case, the woman can take all the moveable properties she brought in time of marriage. For the official recognition of their divorce, a fee of Rs. 100/- shall be paid to the Hanga which is called '*Raivao*'.

Section-89: *Khongrun*

Whether it is the husband or the wife who after the death of one of them remarries before the '*Thisham*' festival (soul send off festival), it is called '*Khongrun Phophat*'. A fine of Rs. 1000/- shall be paid to the village Hanga.

Section-90: *Marong Kapei*

It can be translated as the practice of '*Liverate*'. After the dead of husband, if the woman marries the younger brother of the husband, it is called '*Marong Kapei*'. Such marriage is not restricted.

Section-91: *Sham Kachit*

This can be translated as 'defamation'. If a married woman or unmarried woman is defamed by a man out of jealousy or hatred is called 'Sham Kachit'. A fine of Rs. 5000/- shall be imposed on the guilty person.

Section-92: *Naoyum*

The word 'Naoyum' means 'abortion'. If an abortion is committed by a woman without the knowledge of the man, a fine of Rs. 5000/- she is liable to pay a fine of Rs. 500/- to the man. In case the abortion is committed by the couple, a fine of Rs. 5000/- shall be equally divided between the couple.

Section-93: *Prezai*

If a man physically assaults a woman, it is called 'Prezai'. The guilty person is liable to pay a fine of Rs. 1,500/-, however, if the victim is physically injured, the fine shall depend on the gravity of the injury.

Section-94: *Latuk*

The word 'Latuk' denotes 'rape'. If a man rape a married woman, a minor or a widow, he shall pay a fine of Rs. 25,000. An attempt to rape shall attract a fine of Rs. 4,000/-.

4.7 Gender Relations in Customary Law

The Tangkhul customary law and the definition of citizenship under *Riyan* and *Chiyen Chikan* provide a lucid picture of the existences and working of patriarchy among the Tangkhul Naga. As already define in the second chapter, patriarchy in its simplest understanding is the 'rule of the father', thus under patriarchy, it is the man as the head of the family who is endowed with absolute authority. It can be noted that among the Tangkhuls, women do not and cannot own any property because as per the customary law dictum, women are excluded from inheritance. The understanding that can be drawn from the above discussion is that Tangkhul customary law indicates that only men are the

inheritor, women in any circumstances have no right to inherit property. The customary law spells out that girls may receive property as gift only during the time of her marriage. The eldest son, by the law of primogeniture, gets the biggest share of the parental property. If the couple is childless or did not have a male heir, the law of *Shimluikat* demands that the property be transfer to the nearest paternal male relative. A widow is entitled to use her husband's house and property during her life time. In case of remarriage, she has no right to her first husband's property because the property will belong to her son or sons. Property includes lands, house, moveable or immovable articles, money, ornaments and debts. The sons inherit all the property, including debts. Among all these property, ancestral property is valued the most and is rarely sold away, especially to another village. Ornaments owned by a woman after her death goes to her husband. In case he is predeceased, it will go to her heir. However, those ornaments that she bought during her life time lies in her discretion; she could distribute it to her daughters or anyone she chooses to give.

It has to be noted that in present times, property that are bought by the couple themselves land, house or any other valuables could be given away according to the parents discretion even to a woman. However, this is rarely practiced except in rare cases where the couple is without a son does a daughter stand the chances of inheriting these properties. There are also cases where after the death of the husband in the absence of a son, the nearest paternal male kin demanded the property as his right even those properties which have been bought by the couple themselves. In such cases, the law of *Shimluikat* cannot be applied because even without a male heir, the property will belong to the widow and her daughter or daughters since the land does not constitute an ancestral property.

4.7.1 *Patriliney and Women's Subordination*

The primary reason for women's inability to demand land or daughter rights is due to the existence of patriliney among the Tangkhul. The term is used in kinship theory to indicate

the tracing of kinship through the male line.⁷ The tracing of descent through father's side and the patrilocal residence after marriage ensures that descent is traced through the father side alone. This points towards two important assumptions: firstly, patriarchy as a system of institutional authority privileges men and secondly, the notion of patriarchy among the Tangkhuls is closely associated with patriliney. This practice makes it impossible for women to claim land from the parents since women are expected to take up residence with the husband after marriage. Also the prevalence of age old attitudes and values towards women in the society has deep impact in the individual woman's decisions who will not only stick by the societal norms but discourage such demands. There is also the factor of shame and stigma associated with the demand of land rights by women, therefore this practice of land which can be given away if the property acquired is not ancestral is hardly practice or implemented. Indira Devi pointed out this is due to the insecurity felt by women in general to demand for land and property as women rights because of the fear of losing her dignity, modesty and other related inhibition that keep women off from resorting to legal actions.⁸ Ancestral property in any circumstances cannot be inherited by woman among the Tangkhuls, thus the question of resorting to legal rights with regard to ancestral property does not arise.

It is important here to bring in the patrilineal Swazi tribe of Africa to draw a comparative frame of reference with the Tangkhuls patriliney. Both these societies were once colonies of the colonial rulers and for the benefit of the colonial masters their existing age old customary practices were codified as laws in the case of the former and recognize as law in the case of the later and this served to perpetuate the enforcement of unfavourable customary law on women in many aspects of their life. Among the Swazi, custom provides that men control land access, it also dictates the procedures according to which a woman can acquire land. A married woman should go to her husband's village (patrilocal residence), where she receives land to build a house and to cultivate, an unmarried woman (single or divorced) should try to receive land from her father or brothers in her birth village, and a widow should stay at her former husband's area and

⁷ Gordan, Marshal. 2006. p. 485.

⁸ Devi, M. Indira. 1994. In Lotika Sarkar and B. Sivaramayya's (ed.). p. 171

continue to use his land if she is on good terms with his relatives and they agree to her continued presence. A woman who is not able to obtain land rights from her paternal relatives or in-laws should try to obtain a land grant from the chief in her birth village, or from a chief in another area, relying upon a "grown" son or another male relative who the chief on her behalf.⁹

Societies which follow patrilineal descent and patrilocal residences exploitation of women can be mainly divided into two broad understanding. Firstly, women being an outsider in a patrilocal residence does not have a say in the decision making of the household or the community she married into as illustrated by the Tangkhul's and the Swazi's. Secondly, women's condition gets aggravated because she cannot own land and property. Widows and separated women undergo the greatest hardship, in the absence of a son woman does not have the security of a roof over her family head. Ada Okoye points out that in Nigeria, the rigid application of customary law inflicted tremendous hardship on women. Thus, she opines that customary law in any patriarchal society prescribes that women should not inherit property and the adoption of such customs as law ensures that women do not own any property for generations to come.¹⁰ Even in the matriliney Khasi and Garo societies in Meghalaya, there is a strong division of 'ownership of land' and 'control of land' in the society because decision making is exclusively the rights of the mother's brother, that is, men alone made the decision in the society. Thus, looking into gender relation with regard to customary law of the tribes in the Northeast reveals the gendered nature of customary law that has been entirely responsible from the exclusion of women from citizenship rights of the state because it is under customary law that women are denied from fulfilling and realizing the aspiration of basic human rights as free and equal citizens before the law.

The practice of the law of *Shimluikat* among the Tangkhul shows that women are viewed as the secondary citizen or temporary citizen in the society. The fact that women will eventually be married off in future and take up residence with the husband makes the law

⁹Rose, L. Laurel. 2002. p. 130

¹⁰Okoye, Ada. 2008. p. 2

makers to create and produce such law based on this notion of female roles. Again, law of *Shimluikat* has a serious consequence in the family of female headed household, in response to the changes of the role of women in the society as many of the household are run by women due to separation from the husband or widowed. Since among the Tangkhuls, though property can be retained by the widow in case of the death of the husband, in the absence of male heir, the property she occupies constitute only a temporary arrangement which she can neither be sold nor can give away to daughters.

As evident from their *shiyon chikan*, it is not difficult to understand that there is a wide disparity between women and men in their access to and control over resources and land, thus, women are systematically non-existent to their access over community governance, because of their less than optimal participation in decision-making of the village or the society. This lack of women participation in the process of decision making or politics is evident when one examines the nature of the criteria of membership to *Hangashim*. As discussed earlier, each clan in the village sends their representative to the village council. The customary law excludes women from holding office in the *hangva*. Since Tangkhul's are patrilineal and patriarchal, office of the headman or chieftainship is passes on from father to the eldest son. If the chief is devoid of male child, the nearest male kin succeeds him. In case the chief's heir is 'mentally challenged' or 'physically challenged', incapable of performing the task ahead of him, or cannot perform the burial ceremony in a befitting manner, a man of character, integrity and leadership is selected from within the same *shang*/clan. The daughters of the chief, in no circumstances can succeed him in his office. Banerjee while writing about the Naga women in conflict zones pointed out that "despite the enormous success attained by Naga peace groups, formal representational politics has failed to attract women. Women who will gladly initiate dialogues with the rebel Naga or Kuki leaders will not attempt to enter into state level elections. They say that politics does not fall within their traditional roles. In private discussions, they have stated that such elections go against their clan and tribal ethos."¹¹ These findings are not surprising; in fact, it can be pertinently argued that in societies that

¹¹Banerjee, Paula. 2000.p. 141

are highly antagonistic towards women's leadership role, it is only expected that women will be extremely cautious in going into such well defined men's domain.

4.7.2 The Notion of Inclusion and Exclusion with Regard to TNL

In the definition of citizenship among the Tangkhuls by the TNL, there is the problem of inclusions and exclusions divides between men and women. The paradox is that though the definition of citizenship by the TNL encompasses the whole member of the society irrespective of men and women at the same time women are excluded from holding of public office as enshrine in the *Riyan* of the TNL that firmly states that only man alone can be nominated and represented in the house of the TNL. One major problem of the TNL conception of citizenship is its gendered division of public and private domain. It clearly spells out the role of man as the decision maker in the society. In such a conception of citizenship, the argument of Carol Pateman's critique of the construction of citizenship with male public sphere and of the demarcation of domestic activities of the female private sphere becomes prominent. Thus, allocation of women in the private sphere makes them virtually inaccessible to citizenship.¹² Among the Swazi of Africa, only men may represent land matters to the authorities in customary courts, this practice among the Tangkhul Naga can be observed from their representation to *Hangashim* or TNL where only men come together to discuss and judge matters relating to all the issues in the society.

Freepaothing pointed out that among the Tangkhul Naga every man in the village is always an active citizen of the village.¹³ Considering the importance of family, clan, the role of *Hanga*, the village, one can safely argues that all this bodies and institutions are made for the man who qualify by the virtue of being a man to be the head of the family, representative to the *Hangashim* from the clan, and the protector of the village. In all these basic fundamental roles of the village as a whole, it can be noted that the role of women can only be seen in the private realm where she, being a 'woman' should care for

¹²Sunder Rajan, Rajeswari. 2003. p. 21

¹³Freepaothing, Z. V. 1994. p. 14

the elderly in the family, look after the children as a mother, do the household chores, cook and clean, she is expected to fetch water and firewood and so on. Even within the educated Tangkhul couples living in the metropolis, gender roles are so entrenched in the social up bringing that although both men and women equally earn for the family, it is the wife who is expected to care for the children and do the household chores.

This traditional construction of womanly attributes and roles have an influential impact on the construction and production of law be it customary law or personal law of different religions or the state law that constantly build the images of woman as passive and meek being in need of protection. Though Tangkhul society at a glance might portray a highly gender neutral society that does not seem to put any restriction to the freedom of movement of their women both in economic and social realm, when one observed the 'position' of women from their customary law, one will unravel the true reality of the belittling of women's role in the society. There is nothing in the customary law of the Tangkhuls that empowers women. In all its definition of *Ruichumnao*, *Shimyan Luiyan*, and *Shimluikat* women are nowhere regarded as full citizens of the village because the TNL conception of citizenship recognizes only men as the full fledged members of society. Thus, this construction of citizenship is gender blind as most feminist would argue. Unlike common law of the state which was modified by the rules of equity, there was no corresponding development to address the problems and issues of women who encountered the loss of husband or father, especially in the absence of a male child.

In this kind of conception of citizenship, the citizenship framework as given by T. H. Marshall (1963) is a far off cry, which cannot be applied to women who are ruled under customary law because citizens in common parlance are endowed with equal rights and opportunities for both men and women. For instance, within the Indian state the Constitution of India, definition of citizenship empowers its citizens to live the life of dignity where every man and woman is equal in the eyes of the law. However, this does not mean that women outside of customary law are free and equal compared to men. As discussed earlier in the second chapter, citizenship issue in all over the world is highly controversial and complex so much so that feminist groups have critiqued that women

have always been second citizens or have never been a part of citizen in its rightful sense. In the context of Tangkhul women, the citizenship as define by TNL does not and have not even included women, unlike the common law of India that encompasses both men and women living or born within India to be its rightful citizen. The fact that the *Shiyan Chikan* pronounce with clarity the rights of men to be the rightful heir and decision makers leave no rooms for doubt that the Tangkhul Naga (in their customary law) disregard the importance and role of women viewing them only as the object of child bearing for the perpetuation of their population.

Again the unequal gender relation can be observed from the Tangkhul household. Couples usually prefer the birth of a baby boy as the first born because of the patriarchal nature of the society that attaches a great significance to the role of the first born son. The law of primogeniture as laid down in the *Shiyan Chikan* dictates that the eldest is the second in command next to the father's role as the head of the household and this makes the birth of the first born as a son highly auspicious and hence preference for the first born as male. Here, comparison can be drawn between the Tangkhuls and the patriliney Swazi of Africa, who traces descent through the male line. Like the Tangkhul law of inheritance, the Swazi customary law permits only man to acquire land rights in several ways: inheritance, direct grant from another individual, loan, and direct grant from a chief. A man who receives land through inheritance does so through his patrilineage.¹⁴ Like that of the Tangkhul's law of primogeniture the oldest son of a homestead head receives the largest land allocation and administrative responsibilities upon the death of his father. Thus, men rather than women exercise significant land use rights as farmers, and men rather than women make major decisions about land use on homesteads.

4.8 Dissenting Voices

In the publication of the Naga Women's Union, Manipur, *Raisunriang*, Oct, 1997, the Union expounded in detail their demands. They write, "The Union wishes to claim that

¹⁴Rose, L. Laurel. 2002. p. 125

this customs of Nagas should be made to be seen by including women as their representative to their respective Village councils.” It further goes:

The claims of the Union includes equal wages for both sexes for equal amount of work; and equal rights to inheritance of properties moveable and immovable for both the female and the male children. Being the sustaining force in Naga society, the Naga women stand to guard against any force that would attempt to destroy against good culture and customs of the Naga.

It is interesting to observe how far this claim has materialized in fulfilling the aspiration of Naga Women Union’s (Manipur) demands. Among the Tangkhuls such demands by the women’s groups have resulted in providing a representation from the Tangkhul Shanao Long to the TNL meetings so that women’s voices are also taken into consideration in the decision making process. But it has to be noted that, such representation of women in this Long is only because of the kind of influential roles women have been playing in the Naga movement for freedom as the peace initiators and Tangkhul Shanao Long has also been actively working as social workers by banning the abuse of drugs, alcohol, prostitution and other social ailments in the society. Individual woman representation as judges and executives in the TNL is still an impossible dream. The fact that their customary law does not includes women in the decision making body sees women entering in this body as going against their age old tradition which is detrimental to the preservation of custom and culture. For instance, when the question of women’s representation to the Village Authority was taken up recently, the customary law keepers vehemently opposed such inclusion as going against the customs of the Tangkhuls. This is one indicator that in the name of tradition and in the name of preserving their culture, law makers cannot envisage woman as decision maker in the society. Here, the notion of gender roles is clearly spelled out which is so deeply entrenched in the society so much so that it can be reflected in their customary law. By examining these problems, the state apathy towards women’s issues is revealed. The fact that no any form of changes and modification favourable to women has been made with regard to the Tangkhul customary law or customary law in general suggests that the state existing as a patriarchal order is gender blind indeed. This argument has been illustrated

by the work of Haskar in her critique of the Indian State double standard attitudes by incorporating in its legal machinery gender biasness. She asserted that this is an effort by the state to preserve the present family system based on male dominance and control of female sexuality and reproduction.¹⁵

Although the Tangkhuls conception of law of inheritance and decision making favours man, when it comes to their law of marriage, divorce and rape both man and woman are treated equally. In committing adultery or divorce, the law demands that the culprit in case of the former or the divorce initiator in case of the later are made to pay equally for the consequence irrespective of being a man or the husband. The fact that if a man who is supposedly the owner of property in the society initiates the divorce, he is entitled to leave his property behind speaks of the importance of the role as a mother. The Tangkhul gives a great significance to the role of motherhood, thus even if the wife cannot sell the husband's property she and her children are provided for by the law to ensure their safety.

In spite of all this exclusion and discrimination against women, it is significant to note that individual women have made remarkable achievement in an area which is supposed to be predominantly male centric. Among the tribes of Manipur, Hangmila Shaiza a Tangkhul Naga is the first elected women MLA (Member of Legislative Assembly). Body such as Tangkhul Shanao Long was traditionally non-existent however after its inception in 1970s it has made tremendous impact in the society as social workers. This calls upon the understanding of Ortner's Practice framework propagated by Bourdieu (in his concept of Habitus) which advocates that though social life is culturally organized and constructed, in terms of defining categories of actors, rules and goals of the society and that social life also consist of web of relationship and interaction between multiple shifting interrelated subjects, positions and yet there is the role of "agency" which actors in the society can play with their own skill, intention, wit, knowledge, intelligence. Within the practice framework, the role of individual as an agent of social change is recognized. It states that although human actions are constraint by the given social and

¹⁵Hakar, Nandita. 1994. In Lotika Sarkar and B. Sivaramayya's (ed). pp. 35-36

cultural order, they also are endowed with the capacity to make or unmake it.¹⁶ The fact that against all odds women ability to change society in one way or another like the Nagas Mother Association, Watsu Mongdung among the Nagas speaks of such agencies. Below a brief comparison of women caught under customary law is provided by bringing in the African women experience to understand the implication of customary law on women.

4.9 Conclusion

The Tangkhuls since time immemorial has been living with the direction that their age old customs dictates. Though there was no written customary law, the *Awunga* and the *Hanga* together preside over the rules and law of the society. However, this was all to change after the coming of the British; the people in different Tangkhul villages who hitherto had lived in isolation recognized the importance of coming together in unity. Thus, this resulted in the formation of different body of laws that governed a group of neighbouring villages. These bodies began to increase and by 1921 a body known as Education Fund was incepted, this body made possible all the isolated Tangkhul villages to come together in unity. The body was renamed as Tangkhul Long and eventually came to be known as Tangkhul Naga Long. The body that came together initially to empower Tangkhuls for education purpose later took the shape of legal jurisprudence that also laid down the Tangkhul's Constitution and law like a sovereign nation state. From their pseudo state like functions with their own flag, it can be noted that the freedom movement among the Nagas has a great impact on the lives of Nagas thereby resulting in rejection of the Village Authority Act of 1956 rules in Manipur. Thus, at the highest level of the of the dispute resolution, Tangkhul Naga Long exist, followed by Longphang and Hangashim at the lowest level.

The Tangkhul Naga Long being the apex body laid down a the constitution of the Tangkhuls also their elaborate customs were written down for the first time in 1948 and since then disputes of any nature is first refer to the *Hangashim* (*Awunga* and his

¹⁶Ortner, Sherry. 1996. pp. 2-3

councilors), the unsatisfied party can further refer to the Longphang (appointed judges) and at last to the Tangkhul Naga Long (appointed judges). In all the selection of representative to these bodies of law, women as per the customary law are not allowed to be a member. In the definition of citizenship in the *Riyan* and *Shiyan Chikan* of the TNL it is impossible to miss the exclusion of women. Their customary law with regard to inheritance, chieftainship, and representation to decision making bodies does not recognize women as an able human with the capacities to make decisions. This outlook of women images as demure, quite and passive being can be also clearly seen in their division of labour on gender lines which clearly brings out the macho image of man and woman as the weak sex in need of protection. Thus, such views creep into the construction of law in the society thereby sidelining and discriminating women viewing them only in the role of mothers, home makers and thus these roles are not in congruent with the owning of land and decision making.

The gendered nature of the Tangkhul society can be sharply visible when one examines their customary law that denies women fundamental rights to the ownership and control of land. Also this has a direct impact in women's marginalization in decision making. Patriarchy is so strong in this society that questioning and challenging their customary law and roles has not gained center stage in the public domain except for some exceptional women who have been able to achieve such recognition in otherwise male centric roles. The Tangkhul Shanao Long has made some achievement in taking up important issues of social problems, however, these roles rather than being a movement for women rights can be regarded as women activism for human rights. Thus so far this gendered nature of the customary law has remained unchallenged.

The Tangkhul women and customary law problem is not an isolated case only happening in the Northeast of India alone, when one examines the African women experience, in Nigeria, in Kenya or any other African countries, customary law have largely determined women exclusion from the control of land and decision making. Women under customary practices even among the matrilineal society are victims of exclusion in the public domain of the society. Thus, this exclusion politics of the state or the customary law in

this context is illustrated by the radical feminist critique of the society that the personal is political and as such women should be recognized and notice by the state as citizens in need of inclusion.

Conclusion

My interest in the study of customary law and its implication on women was triggered by the presence of apathy and complacency surrounding the study of women under customary law in the Northeast region by scholars. The fact that no any study has been done with regards to the study of Tangkhul customary law and its implication on women shows that customary law as an area of study is a highly neglected one in the feminist literature. Taking customary law as the subject matter for the analysis of women's subordination in the Northeast or to be more precise among the Nagas, here being the Tangkhul Naga illuminates us with the unprecedented hardship that women have to endure in a patrilineal and patriarchal society. For grasping women's subordination among the Tangkhul society, it is important to examine the various feminist perspectives on women and law; chapter second has provided an overview of different feminist perspectives and critiques of the gendered nature of law and society.

In examining the existing perspectives in women's subordination, feminist has clearly pointed out the subordination of women in patriarchal society. Patriarchy as a concept has been widely used as a man headed household has been argued as a universal phenomenon. In this light scholar such as Janaki Nair (1996: 11) has postulated that patriarchal arrangements are universal occurrence that has existed through most period of human history. Thus, scholars who look from the angle of patriarchy as an ideology and instrument of female subordination saw kinship system which determines the way women are related to the whole system of production and social reproduction. Haksar (1986: 85-86) who study society from the legal justice approach have made a strong argument on the issue of state complacency with regard to women's problem. She saw patriarchy as a social organization of family, community and state which together yield women submissiveness by male power. The concept of patriarchy is central in the understanding of Tangkhul Naga culture and society because Tangkhul as a society run by man as the head would be incomplete without bringing out the subordination of women in patriarchal set up. The fact that the Constitution produced by the TNL and its

customary law speaks of the patriarchal nature of the society that made the Tangkhul women perpetuates as second citizen by denying them basic human rights to inheritance and decision making. Again, the Indian state which has a well define citizenship rights as laid down in the Constitution of India have negated the sufferings of women govern by customary law by accepting customary law as the supreme law in the tribal society, here being Tangkhul. Feminist who study law from the patriarchal approach pointed out this mechanism of gender injustice. As Haksar (1994: 39) pointed out, this inequality is built into the legal system as can be reflected in the system of inheritance, marriage, custody, succession, guardianship, maintenance and so on.

Similar to what Haskar has raised, Lina Gonsalves's (1993: 108) assertion that law initiators discriminate between man and woman unconsciously incorporating traditional rigid towards women can be reflected in the Tangkhul society. As pointed out earlier, the Tangkhul's have a well define traditional image of women, as captured in their gender division of labour in the society. From the tender age, socializing young girls to be meek and demure is again adopted in their customary law that men are the custodian of law and hence protector of women. Thus, women subordination is not an isolated occurrence in law or customary law but is strongly working in tandem with the gendered nature of society that perpetuates such inequality.

Again the notion of masculinity and femininity which the Marxist theorist has propagated is significant in the society which follows the system of patrilocal and patrilineal form of residence. The division of male and female roles conditions and lay down the way in which women and men ought to behave in the society according to their socially prescribe norms. Engels spells this division of masculinity and femininity by illustrating that society created the notion that men ought to be in the forest while women's place is in the household. Thus, while men increase its hold on the society with its growing wealth, women's domestic work was devalued. As a result, women become increasingly subordinated to men and men's power increase with the accumulation of wealth. Engels perspective points to the question of dominance and subordination, of man and woman. While ownership of land, as illustrated by the Khasi and Garo matriliney, does not always

denote authority and control, the problem of women's subordination is aggravated by the ownership of property as illustrated by the Tangkhul's Naga and the importance they held for the birth of a son. This can be pertinently argued that the son holds a high place in the society due to the Tangkhul customary law of *Shimlui kat* which maintains that only man can inherit property irrespective of whether the couple has son or not.

Nivedita Menon (2004: 10) who studied rights in the realm of law prescribe to the understanding that men are the bearer of rights because so far existing rights in the society are only for the advantage of men or in other words, rights exist as an illusion instead of empowering women, it just exists in a passive written form without activism. Here, Bina Agarwal's (1994: 17) study of land rights in the Northwest of India holds relevance, she asserted that in legal terms women's issue has been taken up and initiative has been made to bring gender equity in the existing law, however, in the actual practice this is far from being implemented. Her study reveals that in an agrarian society where land value is considered paramount, exclusion of women from land rights has serious consequences. The fact that women married far off among strangers after their husband's death returned to work as agricultural wage labourer in their brother's land which if not for the practice of excluding women in their inheritance system would have been rightfully hers too. This discussion brings out the Tangkhul customary law of inheritance again. The Tangkhuls are agrarian society and as pointed out earlier, land constitutes the most precious wealth as it provides livelihood to the people. The fact that the Tangkhul practice patrilineal inheritance ensures that land is passed down from father to son. Women can benefit from land by marrying and by taking up patrilocal residence with her husband. However, after the death of the husband without a son, her right of cultivating on the land which was her husband's property in his life time is suddenly taken away since by no means women have any rights to own land.

It is interesting to point out that with this myriad from of inequalities prevalent among the Tangkhuls, scholars not long ago considered Tangkhul society to be gender neutral. As pointed out earlier, this misconception was due to women's unrestricted movement in the economic process, in their social life women also equally took parts their festivals or in

the Christian era, women equally are important members of the church (illustrated in the third chapter). This is because, scholars usually overlook the basic unequal structure embodied in the allotment of rights and privilege in their customary law. Nongbri's study of Khasi customary law and its exclusion of women from decision making thereby sidelining women's voice in the community resource management illustrate this marginalization of women in community decision making in tribal communities in the Northeast.

The issue of citizenship and its inclusion and exclusion politics again throw light on the 'double standard' position of the state. The fact that the constitution of India, after granting equal rights to all the citizens of India again incorporates inequality by sanctioning the authority of personal law (in case of the non-tribal) and customary law (tribal) reveals this contradictory approach with regard to women. This inclusion and exclusion among the Tangkhuls is produced in their conception of citizenship and customary law as constructed by the TNL, a body comprising of only male executives and judges as law makers. Thus, the feminists' critique of gender blindness in state policy seems relevant here. It is not surprising that without the contribution of women's voice in such conception of law, it is only inevitable that women's interests were sideline and discarded.

As a conclusion, it can be safely argued that the gendered customary law should not be seen in isolation. The fact that gender relations in Tangkhul society are highly unequal is the reason behind the subordination and perpetuation of such inequality in their customary law. Thus, these give rise to the further question of how individual women as well as collectives respond to such inequalities in the society? What are the problems of women in the female headed households without the man as head of the family? How fair is the TNL judgments on issue relating to women? These questions can be further probed but only through an intensive and indepth field work by looking into case studies of individual women rather than taking the broad frame work of customary law and its implications. Only with further research such questions can be explored and answered.

Bibliography

Primary Sources

Tangkhul Naga Long Riyan, 2005 (Constitution).

Tangkhul Naga Long Shiyam Chikan, 1998 (Customary Law).

Bhatt, S. C. and Bhargava, Gopal K. 2005. (ed.) *Land and People of Indian States and Union Territory (in 36 Volumes) Manipur*. Volume 17. New Delhi: kalpaz Publications.

Directorate of Economics and Statistics. 2008. *Economic Survey Manipur 2007-2008*. Imphal: Government of Manipur.

Secondary Sources

Published Books

Akui, Z.A.S. 1973. *A Short Account of Tangkhul Naga Culture*. Imphal: Taru Printing Works.

Aleu, Sharyn L. Roach. 2000. *Law and Social Change*. London: Sage Publication.

Ansari, S.A. 1991. *Tribal Demography and Socio-Economic Development*. Delhi: Daya Publishing House.

Ardener, Edwin. 1986. 'The Problem of Dominance' in Leela Dube (ed.) *Visibility and power: Essays on Women in Society and Development*. New Delhi: Oxford University Press.

Bakshi, P. M. 2008. *The Constitution of India*. Delhi: Universal Law Publishing Company Co. Pvt. Ltd.

- Barpujari, H.K. 1996. *The Christian Impact on the Status of Women in North East India*. Shillong: North East Hill University Publications.
- Barpujara, H. K. (Endowment Lectures). 1996. *The Christian Impact on the Status of Women in Northeast India*. Shillong: North-Eastern Hill University Publications.
- Basu, D. D. 1998. *Introduction to the Constitution of India*. New Delhi: Prentice Hall.
- Basu, Srimati. 1999. *She Comes to Take her Rights: Indian Women, Property and Propriety*. Albany: State University of New York Press.
- Baxi, Upendra. 1986. *Sociology of Law*. New Delhi: Satvahan Publications.
- Beauvoir, Simone de. 1974. *The second Sex*. Translated by Parshley, H. M. New York: Vintage Books.
- Brown, Radcliffe. 1979. *Structure and Function in Primitive Society*. London: Routledge and Kegan Paul.
- Burman, Roy B. K. 1988. 'Challenges of Development and Tribal Women of India'. In J. P. Singh, M. N. Svyas, R. S. Mann's (ed.) *Tribal Women and Development*. Jaipur: Rawat Publications.
- Channa, S.M. (ed.), 1992. *Nagaland: A Contemporary Ethnography*. New Delhi: Cosmo Publication.
- Chanok, Martin, 1985. *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- Chauhan, Abha. 1990. *Tribal Women and Social Change in India*. Etawah: A. C. Brothers.
- Daila, Ashikho. 1992. *Nagas: Problems and Politics*. New Delhi: Ashish Publishing House.

- Desai, A. R. 1994. 'Gender Role in the Constitution'. In Lotika Sarkar and B. Sivaramayya's (ed.) *Women and Law: Contemporary problems*. New Delhi: Vikas Publishing House Pvt Ltd.
- Deva, Indra. 2005. *Sociology of Law*. New Delhi: Oxford University Press.
- Deva, Indra. (ed.), 2005. *Sociology of Law*. New Delhi: Oxford University Press.
- Devi, M. Indira. 1994. 'Woman's Assertion of Legal Rights to Ownership of Property'. In Lotika Sarkar and B. Sivaramayya's (ed.) *Women and Law: Contemporary problems*. New Delhi: Vikas Publishing House Pvt Ltd.
- Dube, L. (ed.), 1986. *Visibility and Power: Essays on Women in Society and Development*. Delhi: Oxford University Press.
- Dube, Leela. 1997. *Women and Kinship: Comparative Perspective on Gender in South and South-east Asia*. New Delhi: Vistaar Publications.
- Dubey, S. M. 1978. *North East India: A Sociological Study*. Delhi: Concept Publishing House.
- Durkheim, Emile. 1964. *The Division of Labour in Society* (Translated by George Simpson). London: Collier- Macmillan Ltd.
- Engels, Frederick. 1948. *The Origin of Family, Private Property and the State in the Light of the Researches of Lewis Henry Morgan*. Moscow: Foreign Language Publication House.
- Fernandes, W. and Barbora, s. (ed.), 2002. *Challenging Women Status in India: Focus on the North East*. Guwahati: North East Research Centre.
- Fernandes, W, Pereira, M, Khatso, V. 2006. *Customary Laws in North East: Impact on Women*. New Delhi: National Commission for Women.
- Freepaathing, Z. V. 1994. *Status of Tangkhul Women*. Imphal: Modern Press.

- Freidman, M. Lawrence. 1977. *Law and Society: An Introduction*. Eaglewood Cliffs: Prentice Hall.
- Gandhi, Nandita and Shah, Nandita. 1992. *The Issues at Stake*. New Delhi: Kali for Women.
- Geetha, V. 2007. *Patriarchy*. Kolkata: Stree.
- Gonsalves, Lina. 1993. *Women and the Law*. New Delhi: Lancer.
- Guha, Ramachandra. 2007. *India After Gandhi: The History of the World's Largest Democracy*. New York. Harper Collins Publishers.
- Haimendorf, C.V. 1939. *The Naked Nagas*. London: Methuan and Co, Ltd.
- Haksar, Nandita. 1986. *The Demystification of Law for women*. New Delhi: Lancer Press.
- Haksar, Nandita. 1994. 'Dominance, Suppression and Law'. In Lotika Sarkar and B. Sivaramayya's (ed.) *Women and Law: Contemporary problems*. New Delhi: Vikas Publishing House Pvt Ltd.
- Hart, H. L. A. 1961. *The Concept of Law*. New Delhi. Oxford University Press.
- Hodson, T. C. 1996. *The Naga Tribes of Manipur*. Delhi: Low Price Publications.
- Hooks, Bell. 1997. 'Feminism: A movement to end Sexist Oppression'. In Sandra Kemp and Judith Squire (ed). *Feminisms*. Oxford: Oxford University Press.
- Horam, M. 1977. *Social and Cultural life of Nagas: The Tangkhul Nagas*. Delhi: P R Publishing Corporation.
- Horam, M. 1990. *North East India: A profile*. New Delhi: Cosmos Publications.
- Hutton, J.S. 1969. *The Angami Nagas: With Some Notes on Neighbouring Tribes*. Delhi: Oxford University Press.
- Kapoor, N. D. and Abbi, Rajni. 1996. *General Laws and Procedures*. New Delhi: Sultan Chands and Sons.

- Kapur, R and Crossman, B. 1996. *Subversive Sites: Feminist Engagement with Law in India*. New Delhi: Sage Publications.
- Kumar, B.B. 1993. *Modernization in Naga Society*. New Delhi: Omsons Publications.
- Kumar, Krishna. 2005. 'Patterns of Criminal Justice Amongst Some Tribe'. In Indra Deva's (ed.) *Sociology of Law*. New Delhi: Oxford University Press.
- Kuper, Adam. 1983. *Anthropologist and Anthropology: The British School 1922-1972*. London, Boston: Routledge and Kegan Paul.
- Kuper, Adam. 1988. *The Invention of Primitive Society: Transformations of an Illusion*. London, New York: Routledge.
- Leacock, Eleanor. 1986. 'Women, Power and Visibility' in Leela Dube (ed.), *Visibility and Power: Essays on Women in Society and Development*. Delhi: Oxford Publications.
- Luikham, T. 1961. *Wung Tangkhul Naga Okthot Mayonza: Wung (Tangkhul) Naga Traditional Law*. Imphal: Published by the Author.
- Majumdar, D. N. and Madan, T. N. 1956. *Introduction to Social Anthropology*. Bombay: Asia Publishing House.
- Malinowski, B. 1970. *Crime and Custom in Savage Society*. London: Routledge.
- Malinowski, B. 1972. *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea*. London: Routledge & Hegan Paul.
- Marshall, Gordan. 2006. *A Dictionary of Sociology*. New Delhi: Oxford University Press.
- Marshall, T. S. 1963. *Sociology at the Crossroads and other Essays*. London: Heinemann Education Books Ltd.
- Mehrotra, Nilika. 1992. 'Angami Naga Women: Some Reflection on their Status'. In S. M. Channa (ed.) *Nagaland: A Contemporary Ethnography*. New Delhi: Cosmo Publications.

- Menon, Nevidita. 2004. *Recovering Subversion: Feminist Politics Beyond the Law*. Delhi: Permanent Black.
- Mukhopadhyay, Maitrayee. 1998. *Legally Dispossessed: Gender, Identity and the Process of Law*. Kolkata: Stree.
- Mukhopadhyay, Swapna. 1998. (ed.) *In the Name of Justice: Women and Law in Society*. Delhi: Manohar.
- Moore, H.L. 1988. *Feminism and Anthropology*. Cambridge: Polity Press.
- Nair, Janaki. 1996. *Women and Law in Colonial India: A Social History*. New Delhi: Kali for Women.
- Nongbri, Tiplut. 1994. 'Gender and Khasi Family Structure' in Patricia Oberoi (ed.), *Family, Kinship and Marriage in India*. Delhi: Oxford University Press.
- Nongbri, Tiplut. 2003. *Development, Ethnicity and Gender: Selected Essays on Tribes in India*. New Delhi: Rawat Publications.
- Nye, Andrea. 1989. *Feminist Theory and the Philosophy of Man*. New York: Routledge.
- Ortner, S.B. and Harriet Whitehead (ed.), 1981. *Sexual meanings: The Cultural Construction of Gender and Sexuality*. Cambridge: Cambridge University Press.
- Ortner, Sherry. 1998. *Making Gender: The politics and Erotics of Culture*. Boston: Beacon Press.
- Parsons, T & Bales, R.F. 1955. *Family, Socialization and Interaction Process*. New York: The Free Press.
- Rajan, S. Rajeswari. 1993. *Real and Imagined Women: Gender, Culture and Post colonialism*. New York: Routledge.
- Rajan, S. Rajeswari. 2003. *The Scandal of the State: Women, Law and Citizenship in Post Colonial India*. New Delhi: Permanent Black.

- Rammuny, Murkot. 1988. *The World of the Nagas*. New Delhi: Northern Book Centre.
- Ray, A.K. 1990. *Authority and Legitimacy: A Study of the Thadou- Kukis in Manipur*. Delhi: Renaissance Publishing House.
- Roy, S and Rizvi, S.H.M. 1990. *Tribal Customary Law of North East India*. Delhi: B.R. Publishing Corporation.
- Ruivah, Kashim. 1993. *Social Changes Among the Nagas: Tangkhul*. New Delhi: Cosmos Publication.
- Sachchidananda. 1988. 'Tribal Women in the Throes of Development'. In J. P. Singh, M. N. Svyas, R. S. Mann's (ed.) *Tribal Women and Development*. Jaipur: Rawat Publications.
- Sema, Piketo, 1991. *British Policy and Administration in Nagaland 1881-1947*. New Delhi: Scholar Publishing House.
- Shimray, Y.K. 1996. 'Customary Laws of Tangkhul Tribe' in Jyotsna Chatterji (ed.), *Customary Laws and Women in Manipur*. New Delhi: Uppal Publishing House.
- Shimray, A. S. W. 2001. *History of the Tangkhul Nagas*. New Delhi: Akansha Publishing House.
- Singh, K. C. 1988. 'Tribal Women: An Anthropological Perspective'. In J. P. Singh, M. N. Svyas, R. S. Mann's (ed.) *Tribal Women and Development*. Jaipur: Rawat Publications.
- Timasheff, N. S. 1976. *An Introduction to the Sociology of Law*. Westport, Connecticut: Greenwood Press.
- Unnithan-Kumar, Maya. 1997. *Identity, Gender and Poverty: New Perspective on Tribe and Caste in Rajasthan*. Providence: Berghahn Books.
- Vashum, R. 2005. *Nagas' Right to Self-Determination*. New Delhi: Mittal Publication.
- Venuh, N. 2004. *Naga Society: Continuity and Change*. Delhi: Regency Publications.

Vitso, Adino. 2005. *Customary Law and women: the Chakeshang Nagas*. New Delhi: Regency Publications.

Walby, Sylvia. 1990. *Theorizing Patriarchy*. Oxford: Blackwell Publishers.

Walby, Sylvia. 1997. *Gender Transformation*. London: Routledge.

Watt, George. 1969. 'The Nagas of Manipur' in Elwin Verrier (ed.), *The Nagas in the Nineteenth Century*. New York: Oxford University Press.

Yonou, Asoso. 1974. *The Rising Nagas*. New Delhi: Vikas Publishing House.

Zehol, Lucy (ed.), 1998. *Women in Naga Society*. New Delhi: Regency publications.

Unpublished Dissertations and Articles

Awungshi, Gimson. 1989. *Gender relations in Naga Society*. New Delhi. Unpublished M. Phil Dissertation Submitted to Centre for the Study of Social Systems, School of Social Sciences.

Jajo, Yuinagam. 'Pukreila – The Patriarchal Ideology: Interrogating Tribal Women's position in the Society.

Lalgoulian. 2005. *The Dynamics of Ethnic Identity Formation in Manipur: A Sociological Study*. New Delhi. Unpublished M. Phil Dissertation Submitted to Centre for the Study of Social Systems, School of Social Sciences.

Raikhon, Shomi Brian. 2008. *Dispute Resolution System of the Tangkhul Nagas: Ukhrul District, Manipur*. New Delhi: Unpublished M. Phil Dissertation Submitted to Centre for the Study of Social Systems, School of Social Sciences.

Articles and Journals

- Banerjee, Paula. 2000. 'The Naga Women's Intervention for peace'. *Canadian Women Studies*. Vol. 19. No. 4. pp. 137-142.
- Shimray, U. A. 2004. 'Women's Work in Naga Society'. *Economic and Political Weekly*. April 24. pp. 1698-1711.
- Krishna, Sumi. 2001. 'Gender, Tribe and Community Control of Natural Resources in the North East India'. *Indian Journals of Gender Studies*. Vol. 8. pp. 307-321.
- Mehrotra, Nilika. 2004. 'Situating Tribal Women'. *The Eastern Anthropologist*. Vol. 57. No. 1. pp. 61-73.
- Pallay, Navi. 1990. 'Legal Eye: Equality and Customary Law', *Agenda Feminist Media*, Vol. 20. pp. 44-47.
- Samuel, Sharita. 1999. 'Women married in Customary Law: No longer Permanent minors', *Agenda Feminist Media*, Vol. 40. pp. 23-31.
- Shangkham, Gina. 1997. 'Report from the Secretary'. *Raisunriang (News Link)*. Third Issue. October. Imphal: Naga Women's Union, Manipur. pp. 1-7.
- Xaxa, Virginius. 2004. 'Women and Gender in the Study of Tribes in India'. *Indian Journal of Gender Studies*. Vol. 11. pp. 345-365.

Internet Sources

- Okoye, Ada. 2008. 'Gender Citizenship and Customary Law from Commonwealth Africa'. <http://www.gwsafrica.org/knowledge/ada.htm>.
- Rose, Laurel L. 2008. 'Women Strategies for Customary Land Access in Swaziland and Malawi: A Comparative Study'. *Africa Today*. Vol. 49. No. 2 (Summer). pp. 123-149. <http://www.jstor.org/stable/4187501>.

Turkel, Gerald. 1990. 'Michel Foucault: Law, Power and Knowledge'. *Journal of law and Society*. Vol. 17. No. 2 (Summer). pp. 170-193. <http://www.jstor.org/stable/1410084>.

Garland, David. 1986. 'Foucault's "Discipline and Punishment"—An Exposition and Critique'. *American Bar Foundation Research Journal*. Vol. 11. No. 4 (Autumn). pp. 847-880. <http://www.jstor.org/stable/828299>.

Spritzer, Steven. 1983. 'Marxist Perspectives in the Sociology of Law'. *Annual Review of Sociology*. August. Vol. 9. pp. 103-124. <http://www.jstor.org/stable/2946059>.

Hunt, Allen. 1985. 'The Ideology of Law: Advances and Problems in Recent Application of the Concept of Ideology to the Analysis of Law'. *Law and Society Review*, Vol. 19. No. 1. pp. 11-38. <http://www.jstor.org/stable/3853393>.

Vincent, Andrew. 1993. 'Marx and Law'. *Journal of Law and Society*. Vol. 20. No. 4. pp. 371-397. <http://www.jstor.org/stable/1410207>.

