THE DISJUNCTION BETWEEN CUSTOM AND FORMAL LAW: EROSION OF MATRILINEAL SUCCESSION IN INDIA

Devangi Dube[*] and Avi Kapoor[**]

ABSTRACT

Being distanced from the urban world through a practice of self-sustenance, tribal communities often developed certain traditional and customary practices that remain unique to their cultural identities. Although not recognized or codified by formal law, these customs continue to possess the sanction of their respective tribal communities and are practiced by their members as well. One such customary practice is that of matrilineal succession. Unlike the dominant patriarchal form of succession, the ancestral resources pass along to the female descendants under the custom of matrilineal succession. Additionally, the passage of identity works in a manner by which the mother's identity is assumed by the clan/tribe itself. This paper focuses on the matrilineal societies of Meghalaya, namely the Khasis and the neighbouring Garos. Often mischaracterized

[*]Devangi is a third-year B.A. LLB. (Hons.) student at the Jindal Global Law School, Sonepat. The author may be reached at 21jgls-ddube@jgu.edu.in.
[**]Avi is a third-year B.A. LLB. (Hons.) student at the Jindal Global Law School, Sonepat. The author may be reached at 21jgls-akapoor1@jgu.edu.in.

as "matriarchal," tribal women in these societies gain access to only a certain degree of power through matriliny. This paper seeks to argue that this special albeit restricted position of women in these tribal societies is further weakened by the non-recognition of matrilineal customs due to the adoption of colonial interpretation of customary laws by the Indian courts, mandating them to be 'ancient, certain, and reasonable.' Such an interpretation makes recognition of customs rigid, cumbersome, and improbable. This weakening is also exacerbated by the interaction between formal law structures, like land reform measures, codified personal laws, and informal customary practices. This interaction leaves the tribal customs vulnerable to the imposition of normative gender constructs practiced outside these communities.

Keywords: *Customs, Tribal Communities, Khasis, Garos, Matrilineal Customs, Matriarchal, Hindu Succession Act, 1956, Scheduled Tribes*

I. INTRODUCTION

The Khasis and the Garos are tribes inhabiting the north-eastern state of Meghalaya. The Khasis have traditionally been agriculturalists and their societies are organised around familial ties. They trace the origin of the family from ancestresses known as 'Kiaw' or grandmothers, that

are believed to be the root of the tree of the clan.[1] The Garos are agriculturalists as well, noted for the high status that the women hold in their society.[2]

The Khasis and the Garos of Meghalaya are some of the last existing matrilineal societies in the world.[3] In these societies, children assume the mother's last name/clan identity, and the youngest daughters inherit the ancestral property. Hence, women occupy a special position in matrilinies.[4] The justification for this matrilineal descent system is rooted in the idea that it is the mother who nurtures the child during incubation and should be given rights over the child. Since blood is transmitted from mother to child, it is on this sacred bond that the descent principle is based and clans are formed.[5] Consequently, Khasi women have a significant role in the domestic sphere. As an inheritor of family property, the youngest daughter is also deemed its custodian and trustee.[6] Although these societies are often mischaracterized as 'matriarchal,' what actually shifts the power to the mother is the matrilineal system of inheritance.

The practice of matrilineal succession amongst the Khasis and the Garos does not adhere to the normative and prevalent practice of patriliny in the rest of the country. These matrilineal customs are often not recognized as legally valid, which results in the imposition of

[1]Roopleena Banerjee, 'Matriarchy And Contemporary Khasi Society' (2015) 76 Proceedings of the Indian History Congress 918, 922.
[2]Jayashree Kalita, 'Socio-cultural changes of the Garo's in Meghalaya' (2020) 11 (7) JETIR 672.
[3]Zinara Rathnayake, 'Khasis: India's indigenous matrilineal society' *BBC Travel* (30 March 2021) <https://www.bbc.com/travel/article/20210328-why-some-indians-want-more-mens-rights> accessed 02 May 2023.
[4]ibid.
[5]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 71, 74.
[6]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 76.

patrilineal practices through the application of land reform laws and codified personal laws. This leaves tribal customs vulnerable to the normative gender constructs which dispossess the daughters who inherit ancestral property from the authority commensurate with their duties and responsibilities, invariably shifting the power of the men in the family. The absence of any legislative sanction for these customs opens a lacuna in the legal framework governing succession amongst matrilineal tribes, which is often hastily remedied by the application of the Hindu Succession Act, 1956, and the principle of patriliny by the courts of law. Inevitably, the women have little say not only in the passage of their identity onto their offspring, but also on the control and management of the property they may or may not inherit. It is argued that the non-recognition of matrilineal customs and the subsequent imposition of patrilineal statutes of the Khasis and the Garos is violative of their tribal identities and results in their 'Hinduisation.' This paper analyses judgements passed by the Courts in India, which have often been faced with the issue of determination of tribal identities and the application of Hindu personal laws in cases involving tribal customs.

II. CUSTOMS IN INDIA: CONSTITUTIONAL PROTECTIONS AND JUDICIAL INTERPRETATION

John Salmond defined the unique relationship shared by customs and society. According to him, the relationship between custom and society is synonymous with that between law and State.[7] Preceding the emergence of a politically organized State with modern legal systems, customary laws of societies were the primary vehicle of social control of human conduct.[8] This reflected the sovereign power of communities.

[7]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 157, 159.
[8]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 159.

All legal relationships regarding marriage, succession, adoption, etc. were governed by customs of each religion, caste, or tribe. As elaborated upon in the following paragraphs, the modern legal system, recognising the value of customs, also ventured into integrating them within its framework. To promote the interests of tribal communities, the Scheduled Tribes in India are regulated by their respective uncodified customary laws. These untouched customary laws enjoy constitutional guarantees for the preservation of tribal identity. Article 244 of the Constitution of India[9] insists that the administration of Tribal Areas in the states of Assam, Meghalaya, Tripura, and Mizoram is to be overseen by the Sixth Schedule. Tribal areas in these states are deemed to be autonomous districts or regions, the boundaries of which are subject to creation, definition, and alteration through a public notification by the Governor.[10] Since this paper specifically focuses on the Khasi and Garo tribes of Meghalaya, clause 12A of the Sixth Schedule becomes relevant. As per clause 12A(b), the President may, by notification, direct the inapplicability of Acts of Parliament to such autonomous districts or regions, or only allow their application as an exception.[11] Therefore, under the Sixth Schedule, the autonomy of tribal areas is sought to be protected.

This paper argues that the judicial interpretation of customs within the modern legal framework has largely discarded this constitutional responsibility of protecting tribal customs, diluting their importance in India. The way custom must be proved has been extensively evolved by Indian courts through various judgements. Customs become laws only when they are either judicially recognised by the Court or when they receive legislative sanction. This judicial recognition is centred around the idea of 'proof,' there being no presumption that a person is governed by customs.[12] Since several prerequisites have been

[9]The Constitution of India, 1950 art 244.
[10]The Constitution of India, 1950 schedule VI, clause (1).
[11]The Constitution of India, 1950 schedule VI, clause (12A).
[12]*Gokal Chand v Pravin Kumari* (1952) 1 SCC 713 [14].

conceived to prove a custom, it is a burdensome exercise. In the *MT Subhani case*, it was held that proving custom necessitates that it has been in practice for such a *long period* and with such *invariability* that it has been established as a governing rule of a particular locality by common consent.[13] Hence, a custom must be ancient, certain, and reasonable. This high standard of proof was intensified in *Ramalaxmi*,[14] which observed that for the Court to be assured of a custom's antiquity and certainty, the evidence must be clear and unambiguous. The proof is only unnecessary when the custom is so notorious that courts take judicial notice of it.[15] Evidently, then, a legal custom is easily distinguishable from social customs, the former being obligatory, binding, and accompanied by sanction. Whereas the latter are merely norms of social conduct that do not enjoy legal enforceability.[16] The conception of *legal custom* is critically assessed in the following section, which exposes it as a problematic postulation.

III. PROBLEMATIC CONSTRUCTION OF CUSTOMS: A COLONIAL LEGACY AND ITS IMPACT ON MATRILINY

This characterization of customs has, however, not always been part of Indian society. In the practice of ancient Hindu law, custom was afforded a high place, being binding on the monarch in administration of justice. *Narada*, a Vedic sage, observed that custom decided everything and overruled sacred law.[17] On the contrary, the colonial tendency initially was to disregard unwritten customs and apply Hindu and Muslim religious texts strictly.[18] Even when the British sensed the

[13]*MT Subhani v Nawab* AIR 1941 PC 21 [32].
[14]*Ramalaxmi Ammal v Sivantha Perumal Sethuraya* (1872) SCC OnLine PC 20 [9].
[15]*Laxmibai (Dead) through LRS v Bhagwantbuva (Dead) through* LRS (2013) 4 SCC 97 [14].
[16]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 158.
[17]ibid.
[18]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 161.

significance of effecting long-standing customs, they undertook a reductionist stance, with the Privy Council adopting the "ancient and invariable" criterion of proving customs.[19] Halsbury's *Laws of England* describes custom as a rule that existed from "*time immemorial and has obtained the force of law in a particular locality*." Undoubtedly thus, the rule on customs, as it stands today, is a colonial construct.[20] The relation of necessity of proof as between customary and established law is however against the spirit of customary law. Since there was no presumption in favour of custom, it demonstrated how the legislature was neither enamoured by custom rather than law, nor did it reflect any tendency to extend the principles of custom to any matter where custom was not clearly proved to apply.[21]

This onerous burden of proving custom stemmed from a deeply mistaken idea of the Indian legal system. Immediately preceding the consolidation of the colonial rule, India's legal landscape was pluralistic and diverse, with prevalence of customary informal bodies at the village level, co-existing harmoniously with state-instituted, formal courts at the district, province and central levels of the state.[22] Hence, the so-called *chaos* and *vacuum* purported by the British, was in fact a highly evolved and complex legal structure deeply connected with the socio-cultural aspirations of the Indian populace.[23] Reflecting it as a mere set of social norms implemented by informal traditional courts rather than the normative Western construct of formal adjudication is arguably a colonial attempt to retain the power of making laws (vested in the British legislature), by not allowing any

[19]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 218.
[20]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 219.
[21]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 221.
[22]Mahendra Pal Singh and Niraj Kumar, 'Tracing the History of the Legal System in India' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Legal System: An Inquiry* (Oxford Academic 2019).
[23]ibid.

change to be affected in Hindu or Muslim law by any other agency.[24] If a new Hindu sect came into existence, and adopted a deviating form of marriage, the burden imposed on customs would not only render the marriage void but also bastardise a whole community. Ultimately, courts were exercising a kind of censorial power on custom, making it more rigid and formal. Conversely, in ancient Hindu law, it was not necessary to trace back the existence of any custom to an indefinite period.[25] Customs being enshrined in the unexpressed consciousness of the people, customary law was flexible.[26] Therefore, the sense in which custom is employed in English law, cannot be appropriately supplanted in the Indian society. The ultimate test should instead be what rules are now recognized as *binding on any community*, and not for how long they have been observed.[27]

Matrilineal succession in Garo and Khasi tribes of Meghalaya is rooted in customary law, its enforcement and implementation are disadvantaged through the onerous exercise of proving customs. By incorporating patriliny within a statutory framework, the law favours it over matriliny. A deconstruction of colonial policies then reveals the patriarchal biases of British officers who modernised the Indian legal system. It may be argued that colonial rulers, by giving India an artificial sense of cultural and political unity, reviving constructs such as *ancient Hindu/Indian tradition*, *cultural continuity*, and *institution of family*, further entrenched patriarchy and oppressed women.[28] The erosion of matriliny due to the inability to prove customs is evident in

[24]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 224-225.
[25]ibid.
[26]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 162.
[27]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 227.
[28]Nidhi Gupta, 'Rethinking The Relationship Between Law, Gender Justice and Traditions in India: From Hostility To Harmony' (Doctor of Law thesis, Ghent University 2017-18) 178.

recent judicial decisions. In *M. Marak v. State of Meghalaya*,[29] the petitioner rejected the Schedule Tribe identity of the respondent, who was the progeny of marriage between a Khasi father and non-Khasi mother. The custom pleaded by the petitioner was that the Khasi society being matrilineal, every Khasi must take the 'Jaid' (clan) of his mother, and the son of a non-Khasi mother cannot have a clan. Consequently, children of a Khasi father and non-Khasi mother cannot be Khasis, allowing matrilineal lineage alone. However, the court rejected proof of this custom on two grounds. Firstly, the custom pleaded was not accepted by the Guwahati High Court in *A.S. Khogphai case*.[30] It also relied on *Wilson Reade*,[31] which held that in absence of a definition of the "Khasi tribe," its membership cannot be determined solely on purity of blood. Instead, conduct of the individual in following the customs of the tribe, how they were treated by the community, etc., shall also be tested. By requiring stringent proof of custom, the Court diluted the importance given to matriliny in the Khasi tribe. Traditionally, children take the clan-name of their mother and the recognition of their Khasi identity stems through their Khasi mother. Thus, the perpetuation of the clan is ensured only through the role of the female as the mother. The Court in this instance conceivably follows the attitude adopted by the modern legislature through its codification of tribal inheritance by the Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997. Section 3(1)(c) of the Act,[32] much like the Supreme Court in this decision, enumerates the limited scenarios in which a Khasi father's (married to a non-Khasi mother) identity may be inherited. This non-recognition of custom that strictly allow matrilineal lineage alone, warrants a speculation of consequent erosion of matrilineal succession.

[29]*Sr. M Marak v State of Meghalaya* (2013) SCC OnLine Megh 122.
[30]*AS Khongphai v Stanley DD Nichols Roy* (2008) (1) GLT 180.
[31]*Wilson Reade v C.S. Booth* AIR 1958 Assam 128 [5].
[32]The Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997 s 3(1)(c).

In the *Anjan Kumar* case, the sole question involved was whether the offshoot of a tribal woman and non-tribal man could claim status of a Scheduled Tribe and be granted a certificate to that effect. The condition precedent for granting the certificate was that "*one must suffer disabilities wherefrom one belongs*." If an offshoot was brought up in the atmosphere of a Forward class, they are not subject to any disability. However, the case is different where a tribal man marries a non-tribal woman, in which case the offspring may attain tribal status.[33] In another case, *Lakhan KMA*,[34] the tribal identities of petitioners who were off-springs of a Khasi mother and non-tribal father were called into question. The petitioners used Section 3 of Khasi Custom Act to contend they are Khasis, following the Khasi matrilineal system of lineage and adopting the Khasi language. However, the Court, relying on *Anjan Kumar*, held that their mother being Khasi was not in itself sufficient to assume Khasi identity. Instead, one must prove that they have adopted all customs and culture of the tribal community, including their language, and are residing in a tribal area in as much as they are not availing the facilities of a forward class. Along with proving the custom, the Court placed an additional burden of practicing said customs. This additional burden imposed by the Court is still somewhat acceptable when the father is Khasi (as in the previous case) for the Khasis usually follow matriliny, an obstacle to assuming the father's identity. However, it makes little sense when the mother is a Khasi and matrilineal lineage should be a given by default. This indicates the less privileged position of matriliny and matrilineal succession in India. Hence, this ambiguity surrounding the determination of Khasi identity only exacerbates the issue of proving customs, and erodes the matrilineal succession grounded in it.

[33] *Anjan Kumar v Union of India* (2006) 3 SCC 257.
[34] *Dr. Lakhan KMA and Anr. v Union of India* (2011) SCC OnLine Gau 415.

IV. FORMAL LAW: IMPACT OF LAND REFORMS ON MATRILINEAL CUSTOMS

Although constitutionally protected under the Sixth Schedule,[35] tribal customs have not existed in a vacuum. Since colonialism, they have faced a threat of forceful integration with the mainstream culture. With advent of globalization in the modern day, tribal economies have had to integrate with national and global markets.[36] This has led to interactions between informal customary practices and formal legal systems, and subsequently, the imposition of the latter over the former.

Legislations like land reforms have enabled such imposition and the resultant erosion of matrilineal customs. Opposed to individualism, the Khasis and the Garos hold land as a Common Property Resource ("**CPR**"). Although ownership of CPR passes along the female descendants, the entire community enjoys the right of using it for their livelihood.[37] Matrilineal succession allows women to have a source of livelihood independent of their husbands or male relatives. Thus, given the self-sufficient and distant nature of tribes, larger landholdings become necessary to satisfy the needs of the entire community. However, with the promulgation of land acquisition and reform acts post-independence, customs of matrilineal succession amongst the Khasis and the Garos have been detrimentally affected. Such legislations have an underlying individualistic character and are aimed at reducing the size of landholdings and re-distributing them.[38] Although they may arguably be egalitarian causes when implemented in the context of increasing zamindaris and bonded labour, they take

[35]The Constitution of India, 1950 schedule VI.
[36]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 97.
[37]Rekha M Shangpliang, 'Forest Legislations and Livelihood Strategies: Khasi Women in Rural Meghalaya' (2012) 61(3) Sociological Bulletin 479, 480.
[38]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 97.

away the autonomy that the women of the tribe possess by virtue of matrilineal succession. In Khasi culture, matrilineal succession is justified by the primacy given to the role of a woman in reproduction.[39] This grants women a relatively higher social position, when compared to those in patrilineal societies.

Land acquisitions by the government for public purposes, under the principle of eminent domain, alienate the CPR from the tribes and result in the erosion of the female member's economic utility and social status.[40] A similar effect is seen with land redistribution, where property rights are distributed to *household heads* who are normatively interpreted as the eldest male members of the family.[41] In the absence of a CPR, matrilineal succession is rendered null as there is no common property to inherit anymore, or the landholding is no longer large enough to maintain the livelihoods of the members. Smaller individual landholdings become self-acquired properties and are not governed by matriliny.

The imposition of such individualistic attitude through land reforms can be better understood through the example of the conditional subsidization of rubber cultivation in the Garo Hills. This subsidy can only be availed by those that individually own land.[42] Since such subsidies would make agriculture more profitable and lucrative, Garo men were more inclined towards shifting away from the customs of matriliny and CPR and dividing up landholdings. Further, loans for rubber cultivation were only being given to *family heads* and most

[39]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 74.
[40]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 99.
[41]Susie Jacobs, 'Structures and Processes: Land, Families, and Gender Relations' (1996) 4(2) Gender and Development 35, 37.
[42]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 100.

financial institutions interpreted them to be male.[43] This enforces the stereotypical notion of women not being fit enough to manage land.[44] Through such legislative measures, normative ideals and values are imported into tribal attitudes. They strengthen the patriarchal structures within the tribes, while systematically weakening the matrilineal customs that grant women a certain degree of autonomy which cannot be found in patrilineal societies.

Matrilineal succession is intricately related to the livelihood of tribal women as well. Although effective administrative control of the CPR has usually remained with the male members, matrilineal succession allowed women to deriving sustenance out of the CPR independently of their husbands. The dependency of tribal women on CPR is highlighted by the Supreme Court, where it granted inheritance to a tribal woman while dealing with a land reform legislation.[45] Although it did not explicitly deal with CPR, it observed that in the absence of the male heads, the female members are dependent on the agricultural land for their livelihood, and such livelihood must be preserved until they are dependent on such land.[46] Interestingly, the Court chose to employ Article 21[47] as the justification for its decision, instead of the Article 14.[48] It did not establish equal inheritance rights for both men and women, rather just ensured minimum means of survival for women. However, even this right seems to be subject to two conditions – absence of the male head of the family, and complete dependency on the subject land for livelihood.

Together, land acquisition and redistribution laws systemically take away the limited property rights that tribal women possess and leave

[43]ibid.
[44]Susie Jacobs, 'Structures and Processes: Land, Families, and Gender Relations' (1996) 4(2) Gender and Development 35, 37.
[45]*Madhu Kishwar & Ors v State Of Bihar* AIR 1996 SC 1864 [56].
[46]ibid.
[47]The Constitution of India, 1950 art 21.
[48]The Constitution of India, 1950 art 14.

them economically and politically vulnerable. They have led to the erosion of the CPR by reducing landholding sizes and alienating it from tribal practices and thus, adding to the erosion of matrilineal succession itself.

V. 'HINDUISATION': ASSESSING THE APPLICABILITY OF HSA ON MATRILINEAL TRIBES

Since matrilineal customs are often not legally recognised due to reasons mentioned before, the succession of property amongst these tribes becomes ambiguous. The Hindu Succession Act ("**HSA**") of 1956 governs matters of intestate succession among all Hindus, Buddhists, Jainas and Sikhs.[49] It exempts Schedule Tribes within the meaning of Article 366(25)[50] of the Constitution from its provisions, unless the Central Government directs otherwise.[51] Given that it does not explicitly apply to Scheduled Tribes, and that matrilineal customs fail to receive legal recognition through judicial interpretation, a lacuna in law is created in cases where customs are challenged. It is often argued that the courts should not hesitate in the application of HSA in the matters of '*Hinduised*' tribes.[52] A tribe is said to be *Hinduised* if its members practice the customs and traditions of Hinduism.[53]

The Supreme Court applied the HSA to the Santhal tribes, after holding them to be sufficiently *Hinduised*.[54] This reasoning was echoed by the Guwahati High Court[55] and the Delhi High Court[56] as well. The authors argue that one cannot apply the same reasoning in the case of

[49]The Hindu Succession Act, 1956 (30 of 1956) s 2.
[50]The Constitution of India, 1950 art 366(25).
[51]The Hindu Succession Act, 1956 (30 of 1956) s 2(2).
[52]Abhiruchi Singh, 'Hinduisation of Schedule Tribes vis-à-vis Codified Hindu Law' (2021) 4(4) IJLMH 2572, 2574.
[53]Abhiruchi Singh, 'Hinduisation of Schedule Tribes vis-à-vis Codified Hindu Law' (2021) 4(4) IJLMH 2575.
[54]*Labishwar Manjhi v Pran Manjhi And Ors* (2001) (1) BLJR 30 [5].
[55]*Anom Apang v Smt. Geeta Singh* (2012) (I) DMC 433.
[56]*Satprakash Meena v Alka Meena* C.R.P.1/2021.

matrilineal succession. Succession amongst Santhals is largely governed by patriliny, where the property passes along the male descendants.[57] This is in line with the general rule of male primogeniture, which forms the basis for HSA. Matrilineal succession is in direct contradiction with the rule of patriliny, as followed by HSA and thus, application of the same to tribes like Khasis and Garos would violate their customary practices. The Supreme Court, a year after the *Labishwar Manjhi* case, refused to apply the provisions of the Hindu Marriage Act of 1955, on account of Section 2(2) which exempts tribes from its application in the same manner as under the HSA.[58] The Court expressed concern on the required degree of *Hinduisation* and its conflict with Section 2(2) of HMA.[59] This has been affirmed by multiple High Courts as well.[60] Given both are codified personal laws of Hindus and have the same exemption, this reasoning would be applicable here as well.

Textual and purposive interpretations of Section 2(2) indicate that the legislative intent was the complete exemption of tribes from its application. Its language clearly indicates that nothing in this section is meant to be applied to the issues of inheritance amongst tribes, given the primacy their customs hold within the community.[61] The exception to this rule, given in the clause itself, which allows the Central Government to notify any tribe, reflects that such inclusion must be made by the legislature. Further, the purpose of the exemption under Section 2(2) is to preserve the customary and indigenous practices of

[57]Gitanjali Ghosh, 'De-Constructing Inheritance Rights Of Women Under Santhal Customary Laws Vis-A-Vis Hindu Succession Act, 1956' (2014) 3(1) IJLSR 58, 60.
[58]*Dr. Surajmani Stella Kujur v Durga Charan Hansdah* (2001) 3 SCC 13 [14].
[59]ibid.
[60]*Rajendra Kumar Singh Munda v Mamta Devi* (2015) SCC OnLine Jhar 3735; *Butaki Bai and Others v Sukhbati and Others* AIR 2014 Chh 110.
[61]Debayan Bhattacharya, 'The 'Hinduization' of Tribes: Examining the Application of the Hindu Code Bill to Scheduled Tribes' (*Law School Policy Review & Kautilya Society*, 13 November 2022) <https://lawschoolpolicyreview.com/2022/11/13/the-hinduization-of-tribes-examining-the-application-of-the-hindu-code-bill-to-scheduled-tribes/> accessed 02 May 2023.

tribals.[62] An arbitrary application of HSA not only overlooks this purpose, but also threatens the existence of those practices and by extension, the identity of the tribes themselves.

The Supreme Court held that one cannot give a rigid meaning to Hinduism and nor to its practices.[63] The Patna High Court held that whether a tribe is sufficiently *Hinduised* is a mixed question of fact and law.[64] The idea that a tribe is *Hinduised* on account of the practice of certain traditions, similar to those practiced in Hinduism, is quite problematic and leaves much to the value judgment of the court. The absence of a uniform requirement leaves many tribal customs vulnerable to the imposition of dominant religions and the threat of an autocratic integration. As seen above, the courts do not apply a consistent test, which only exacerbates these possibilities.[65] Enabling the '*Hinduisation*' of tribes undermines their independent cultural identity and violates the Constitutional ideal of their preservation under Article 46.[66]

It is argued that matrilineal precedent has sometimes been invoked successfully in civil litigation, especially by the Kerala High Court, thus proposing the idea that today matrilineal law and practice have been dismantled less comprehensively than thought.[67] Although matriliny ended completely in Kerala,[68] it is contended that it received a remarkable concession in the HSA. Under Section 15,[69] if a Hindu

[62]ibid.
[63]*Dr. Surajmani Stella Kujur v Durga Charan Hansdah* (2001) 3 SCC 13 [4].
[64]*Chunku Manjhi and Ors. v Bhabani Majhan and Ors.* AIR 33 1946 Pat 218.
[65]Debayan Bhattacharya, 'The 'Hinduization' of Tribes: Examining the Application of the Hindu Code Bill to Scheduled Tribes' (*Law School Policy Review & Kautilya Society*, 13 November 2022) <https://lawschoolpolicyreview.com/2022/11/13/the-hinduization-of-tribes-examining-the-application-of-the-hindu-code-bill-to-scheduled-tribes/> accessed 02 May 2023.
[66]The Constitution of India, 1950 art 46.
[67]Robin Jeffrey, 'Legacies of Matriliny: The Place of Women and the 'Kerala Model'' (2004/2005) 77 (4) Public Affairs 647, 661.
[68]Kerala Joint Hindu Family System (Abolition) Act, 1976 (30 of 1976).
[69]The Hindu Succession Act, 1956 (30 of 1956) s 15.

woman dies without a will, her heirs would be sons, daughters and husband. However, an *exception*[70] states the heirs to be sons, daughters, and mother. The mother supplanting the husband, Section 17 entails matrilineal recognition. The Kerala High Court[71] upheld the matrilineal provisions contained in Section 17 of HSA by deciding that the 1976 Act does not supersede or override it, and Section 17 prevails as long as there were people alive who would have been governed by matrilineal laws, i.e., those born before the notification of the 1976 Act.

However, there exists a failure to realise that relief for matrilineal succession is ultimately vested in the HSA, leading to a *Hinduisation* of matrilineal communities, which automatically entails an erosion of their identity. Therefore, this kind of so-called progressive interpretation or the *Kerala Model* cannot be co-opted by other tribes in India such as the Garos and Khasis, who are not governed by the HSA. It erodes their prevalent customary practices and imposes those values that are seen as normative by the rest of the society. The non-recognition of matriliny and the subsequent imposition of the formal legal structure erodes their prevalent customary practices.

VI. CONCLUSION

The non-recognition of matrilineal customs practiced by the Khasis and the Garos in Meghalaya, based on a colonial interpretation of Indian customary laws is detrimental to the interests of women in these tribal communities. In absence of any legislative sanction to these customs, such judicial interpretation of matrilineal customs *discards* the constitutional responsibilities of protecting the cultural identities of tribal communities. Therefore, the gap created by the lack of a statutory framework can only be filled in interim through an evolved judicial understanding of *customs* that abandons the necessity to prove longevity and invariability, rendering the burden to prove their

[70]The Hindu Succession Act, 1956 (30 of 1956) s 17.
[71]*Chellamma Kamalamma v Narayana Pillai* (1992) SCC OnLine Ker 336.

existence less onerous and more flexible. That being said, it is emphasised that the same can function as only a temporary suggestion, with explicit statutory recognition to matrilineal customs being the ideal solution.

Land reform laws and inheritance laws have eroded customary matrilineal practices of the Khasis and Garos by breaking down landholdings and by attempting to '*Hinduise'* tribes. Legislations aimed at re-distribution of land have led to the disintegration of the CPR. In absence of the CPR, the female members of the Garos and the Khasis end up losing the relatively little autonomy they possessed on account of matrilineal succession. Further, this has facilitated the intrusion of normative gender relations into tribal attitudes as well. The lacuna in law regarding the application of formal law in the absence of any recognition of tribal customs further exacerbates the difficulties faced by Garo and Khasi women. Although Hindu personal laws expressly exempt tribes from being subject to their provisions, there have been multiple instances where tribes have been declared '*Hinduised*' enough to be covered within the ambit of these laws. Imposition of personal laws based on the principle of male primogeniture not only vitiates the custom of matrilineal succession, but also strengthens the patriarchal structures already present within the tribes.

This dilution and transgression from strict observance of customs is noticed as the Apex Court infuses patriliny into the Khasi lifestyle by allowing the offspring to inherit the Khasi father's tribe under certain circumstances. Moreover, the Court in another decision, instead of deeming the child of a Khasi mother, also a Khasi by default, i.e., by virtue of being child to such a mother, places an additional burden of proving practice of Khasi customs besides proving the existence of such custom itself. In the absence of any legislative recognition of matrilineal customs and an emphasis on a colonial perspective towards

interpretation of customary laws, the fate of matrilineal succession in India ultimately hangs in the balance.