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A critical analysis of Customary laws, Woman's property right and Uniform Civil Code in reference to Arunachal Pradesh, India

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Abstract

Status of woman under Customary laws in context of Arunachal Pradesh is not well defined rather contentious. Rights of woman are interpreted by respective traditional councils predominated by male members based on their perception of customary laws. Each tribe has their own customary beliefs and practices governing marriage, divorce, custody of children, polygamy, inheritance and various other aspects of social life. There are 25 major tribes in Arunachal Pradesh in terms of population size and about 100 sub-tribes. The cultural and linguistic diversity is remarkable in itself. With the introduction of formal laws in both civil and criminal matters hitherto regulated by Customary laws, the traditional institutions are gradually losing its grip. However, for people living in the village continues to rely on traditional systems of adjudication in land, property matters and marriage related disputes. The application of formal laws has led to some ambiguity also due to interplay of both customary laws and formal laws on the same subject matter. Once a decision is given by the

traditional council Court normally do not interfere with the matter out of reverence for the culture and tradition involved. Being an appellate Court whether such abdication of judicial review power in all cases may lead to injustice sometimes. As it becomes necessary to determine the Constitutionality of certain Customary laws affecting woman's right enshrined under the Constitution objectively by the Court where there is a negation of right or denial of justice. At some point, intervention of Court becomes necessary to undo the wrong done. There is a need for legal clarity in terms of appeal against decision of traditional village authority. The author will make a critical appraisal of Customary laws in the changing social contexts and prevailing notions of woman's property right and challenges before the woman's inheritance rights. How social and cultural norms are impacting the property rights claim for woman. Whether Uniform Civil Code offers solution to these problems?

Keywords: Customary Law, Uniform Civil Code, Assam Frontier Regulation Act, Constitution of India, Head Gao Bura/Buris, Village Traditional Councils

Introduction

Arunachal Pradesh is primarily a hilly tract nestled in the foothills of Himalayas in the North Eastern part of India. Situated at a Latitude - 26°28' North and 29°30' North and Longitude - 91°30' East and 96°30' East. As per Census of 2011 total population of Arunachal Pradesh is 1,383,727, making it one of the most thinly populated States of India. The Sex ratio stands at 938, total literacy rate in State is 65.38 %, female literacy-57.70 % against male literacy rate of 72.55 %.¹ In political representation, the tribal state of Arunachal Pradesh, for instance, has only four women MLAs in the current assembly of 60 mandated members, and it has never had a woman MP since the attainment of statehood in 1987 (Wangsu, Wire).² This paper is a doctrinal study with an objective to analyse the status of women in Arunachal Pradesh in context of traditional customary laws, social, educational, political and economic rights of women in society. To understand the inherent social problems and possible solutions. At the outset, the author admits that in tribal society many virtues exist appertaining to significant contribution of women within the given cultural ethos as many social traditions are dependent on role of women. This phenomenon is often misconstrued as good status of women in society. Author also believes that in every society which are placed in similar socio-cultural landscape as this, the women are similarly placed would not be a wrong statement. What role women get to do and how they participate in society at all levels will give us a clear indication of their social standing.

Woman in North East India enjoy so much freedom and doing better than man in many fields- is often said generally by all. Is this really true? Or is this just a sweeping statement with no iota of truth in it? Status or position of woman in society should be assessed on several parameters. Such as education, employment, sex ratio, social and political participation, economic independence, status within family, status within marriage, cultural status, customary laws vis-à-vis woman, social practices like child marriage and polygamy. Free movement of woman everywhere and active participation of woman folk in socio-cultural ecosystem is not conclusive of good status of woman in society.

Customary laws and social regulation

Unlike the State made law, Customary laws are uncodified and orally dispensed. It originates from a particular usage or custom continued for times immemorial in perpetuity by the concerned tribal councils manned by village elders or wise men. This practice was prevalent even before the pre-independence when the tribal areas was an exclusive area and solely regulated by its own Customary laws and cultural practices that even British ruler did not deem fit to interfere. As a result, even in post Independent India, British enacted law such as Assam Frontier Regulation Act 1945 (hereafter AFR) legitimised the power and jurisdiction of Village Authority in a legal manner. The Act introduced the institution of 'Gao bura' and 'Gao buris' (akin to village elders) vested with civil and criminal powers. The Act entrusted administration of village law and order in the hands of the Village Authority. Thereby the Customary laws came to be enforced through the Village Authority created under the AFR Act. Customary laws origin cannot be predated to any precise time, it is as old as the tribal society from where it originates, a product of their culture and beliefs, therefore it enjoys more social acceptance. Post-independent legal developments and gradual application of formal laws have weakened the power and authority of the Village Authority or traditional customary institutions in effect. This process began with the coming of AFR 1945, H.G.B's/ G.B's appointment are at the discretion of DC. DC can even overrule the majority decision of the village in the selection of a suitable G.B's. In practice, local political representatives give recommendation which is arbitrary as political interference in the appointment of the H.G.B's/ G.B's affects the village democracy. The decision of the H.G.B's/ G.B's is not final and binding as the aggrieved party can always appeal before the DC/AC. This system dealt a big blow to ancient democratic system of selection of village councils by the village people themselves. Further, the right to appeal before the Deputy Commissioner against the decision of Village Authority under the AFR created more complications and eroded the independence of Village Authority. After the setting up of judicial courts at all levels in the State has rendered the village authority's decision open to challenge and interference by the DC and the higher courts, if parties appeal against the decision of the Village Authority. In many cases, matter remain pending due to inordinate delay which defeat the main purpose of creation of Village Authority that is to bring the justice at the doors of the village people and to provide fast and cost-effective legal remedy. Instead of making the traditional system better in post-modern times, the law and procedures followed has created more complications and hurdles for them. Customary laws are mainly principles and norms

accepted as binding on community because of social sanctions or approval. It is not dependent on individual perception or interpretation. It has a social sanctity even if an individual tries to misinterpret a Customary norm, a village elder or wise man having knowledge of the same would intervene and object. However, once a matter gets admitted before the Court in case of appeal by any party such as land disputes, the Court can adjudicate on the matter and merit of the case afresh under its appellate power. Right of appeal is also essential for justice, hence necessary. The fundamental principle governing the traditional justice institution are premised on mediation and conciliation of the disputing parties by the HGB and GBs and making them agree on mutual settlement. But to strike at a mutual settlement agreeable to both parties, the Village Authority should act impartial and honest and no consideration of powerful position of the party. Normally if the decision appears just, fair, reasonable to both the parties it is accepted willingly. Nowadays, a losing party themselves challenge the decision of Village Authority before the Court. This way Customary laws and its adjudication is also being challenged by the member of community who feel aggrieved by the decision. Community acceptance and faith on traditional justice system is at the core of its existence. Nevertheless, Custom and Customary laws have a strong influence in tribal society in the present time also and large part of social life is still regulated by it.

Women's role in Village traditional Council

There is no provision for women's reservation under the AFR, 1945 though some woman have been appointed as Gao Buris in some village but the number is negligible. Unlike the gram panchayat where the government provides for 33% reservation for women in Arunachal Pradesh, participation of women in Village traditional council is totally under represented. This field is a male bastion even in 21st century. The structure is highly patriarchal and gender equality is gravely missing, absence of woman member in village authority is a loss of experience and wisdom of woman as many of them possess rich folk and knowledge of customs as a key member of society and woman had been in centre stage of village life since ages. A woman's perspective on customary laws and its effect on woman depends on equal gender participation in modern times. The influence of custom on people is unshakable, customary norms are accepted unquestionably in a closely knit clan based tribal society. Woman believe that Village Councils are for men and woman have no active role in it. Customary laws in practice never acknowledge woman to partake in any decision-making process. It views woman as a home maker, harbinger of culture, responsibility of man folk, a care giver and procreation. Generally, woman play a key role in every aspect of society, but man are the real decision maker. However, at Gram Panchayat level, due to reservation for women, they are better represented even though they may be proxy of their husband in reality. Many customary practices like polygamy (marrying more than one wives) are regarded as a custom by many tribes mainly Galo tribe and first wife has no remedy. If she decides to end her matrimonial relation on account of polygamy she cannot claim maintenance for herself, therefore many woman remain in the marriage for spousal support. Girl child are normally given to mother's custody on annulment of marriage as per custom, however exceptions are also there.

Property or succession right- a gender perspective

Traditional concept of property is generally classified into movable property comprising traditional jewellery, brass objects, animals and immovable property includes land (ancestral and personal), river, hills. Under the Customary laws of the tribes' women have no right on immovable property and male heir are the natural successor to all kinds of immovable property even in absence of male heir, daughter is not entitled to inherit immovable property. In case of movable property namely, traditional jewellery and brass objects some items are given to daughter only on marriage. Animals such as Mithun (*Bos frontalis*), cow, pig are of great traditional value and significance, it is used as a valuable item in marriage and given as a bride price to girls paternal family. The property right of a woman is dependent on matrimonial status of latter. Hence, right to movable property is incidental to marriage and linked to bride price value given by the groom's side. Amount of bride price in tangible form like Mithun, pig, cow are given in exchange of bridal jewellery or any other traditional items given by bride's family. Bride price vary from tribe to tribe and these are accounted for and settled in the event of annulment of marriage. Sometimes if bride price given by the groom side outweighs the property given by the bride's side then those property are retained by the groom's family as per the decision of the traditional council. Generally, in matrimonial disputes, the rich and powerful side get more favourable decision due to their influence and social standing. However, if the members of village council consist of people who are honest and impartial, pressure and influence will have little effect. As per traditional succession right, it is the male heirs who gets the succession to father's immovable property and right as legal heir. If one dies without a male heir property devolves to brother's children. With coming of modern judiciary, people tend to turn to court if dissatisfied with the customary law adjudication guided by lawyers. Hence, established legal rules and principles are resorted to challenge the legality of given customary law dispensation.

Draft Arunachal Pradesh Marriage and Inheritance of Property Bill, 2021

In year 2021 an apex woman's body of Arunachal Pradesh called Arunachal Pradesh Woman's Commission took initiative in preparing a draft of a law securing equal property right to daughter, banning polygamy, recognising right of the first wife on husband's property, declaring mother as the head of the family on the demise of the father inter alia. The draft was submitted to the government by the woman's body for consideration as a possible law. The draft garnered an intense public debate on the social media after an article written by the author was published by Arunachal Times. It envisaged equal right to both son and daughter to father's property both immovable and movable but ancestral village property was left within the domain of customary laws. The most controversial part of the draft was the clause on property right of woman marrying non-APST (referring to non-Arunachali or non-indigenous person) as the draft contained a provision which recognised the right of a daughter to inherit property from father even if she married a non-Arunachali. In reality, customary laws as such do not prohibit inter-religious or inter-cultural marriages and society do not boycott such marriages as such. In past tribe like 'Apatani' held a very rigid stand towards inter-tribal or inter-cultural marriages. Number of inter-cultural marriages

are also steadily growing considering the small size of population of the State. There are large instances where both boys and girls marry non-Arunachali. However, it is generally found that social acceptance is more towards boy marrying an outsider than a girl marrying an outsider.

Key features of the draft bill-

- a, neither party has a spouse living at the time of the marriage.
- b, Marriage age of male is twenty-one years of age, female shall complete eighteen years of age.
- c, In marriage under local customs and rites, customary exchange shall not exceed the price of 1 (one) Mithun (as per the market rate).
- d, Registration of marriage is compulsory under the draft.
- e, Restitution of conjugal rights when either of the party has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights.
- f, Grounds for dissolution of marriage are cruelty, desertion, irreconcilable incompatibility, unsound mind, mental disorder, venereal disease etc.
- g, Permanent alimony and maintenance to wife who is unable to maintain herself can file application to the court for maintenance, the Court may order that the husband shall pay to her an appropriate lump sum of permanent alimony, including children.
- h, Father is designated as the head of the family, in case of father's demise mother is the head of the family.
- i, In case of divorce, a child below the age of 10 (Ten) years shall be in the custody of the mother unless the mother is found unfit by the Court.
- J, Wife's right to personal property is expressly recognised. Specific focus is given to inheritance right of wife upon husband's property. Draft classifies property into – movable and immovable properties, inherited, acquired (self-acquired or jointly acquired), ancestral property and village ancestral property. Except ancestral and village ancestral property, wife's right is recognised in all other kinds of property even on divorce on ground of cruelty or polygamy by the husband.
- h, On the death of the head of the family, the wife will automatically become the head of the family.
- i, The right to inherit will operate only after the death of the person who owns property.
- J, The property left by the deceased husband will be inherited by the intestate's widow, or if there are more widows than one, half of his property shall belong to all widows subject to the condition that the priority shall be given to the first wife and the remaining half shall go to the lineal descendants.
- k, It states-the property of the intestate shall be equally divided among all his surviving children (daughter is not mentioned specifically).
- l, Personal Property acquired by daughter (dying intestate) shall devolve to her children, husband, husband's heir, mother and mother's heir. In case of ancestral property obtained from father or mother, the property shall devolve to father's heir. This clause is applicable to all cases of APST woman i.e., Arunachal Pradesh Scheduled Tribe, who are married to an Arunachali.
- m, APST woman marrying a non-APST woman, her immovable property inherited from father shall devolve to father's heir after her death. Her self-acquired immovable property shall devolve to her children and husband but they

can not alienate the property to a non-indigenous person. It may be mentioned that this clause became very controversial as the indigenous people of the State is opposed to giving any property right to woman marrying a non-Arunachali. Due to stiff opposition on social media against the draft bill resulting to severe trolling and attack against the Arunachal Pradesh Woman Commission and intellectuals for supporting the move, the government has kept the matter in limbo and it was not discussed in the State Assembly.

As stated earlier, the draft bill has dealt with polygamy and right of wife in the occurrence of polygamy very succinctly and criminalising polygamy a long-standing demand of the womenfolk in the State is well fulfilled. And the bill has good provisions to protect the right of the wife as a consequence of polygamy. However, the same conclusion cannot be reached in contexts of daughter's property right as there is no express provision specifying it, which is only to be implied from sec. 37 emphasising equal division of property amongst children. Prescribing majority age as 21 for boys and 18 for woman for purpose of marriage is a good move.

Codification of Customary laws

Customary laws of the tribal of North East have drawn a critical focus in the current discourse on Uniform Civil Code (UCC). In this ongoing debate, women's rights and gender justice holds a significant position being one of the foremost stakeholder. Out of a population of about 13.84 lakhs in Arunachal as per 2011 census, male comprises of over 7 lakhs and female over 6 lakhs. The sex ratio i.e. number of females per 1000 of males stand at 938 compared to sex ratio of Meghalaya-989, Manipur-985, Mizoram-976, Tripura-960, Assam-958, Nagaland-931, Sikkim-890 (lowest sex ratio of these). Arunachal has the third lowest sex ratio among the North eastern states, despite marginal increase from 2001 census, it is still below the national average of 943. But one positive point is Arunachal's child sex ratio is 972 i.e., number of females per thousand males in the age of 0-6 yrs. On the literacy front, Arunachal has 65.38% of which 72.55% is the male literacy rate and female literacy is 57.70%.

In the 60-member house of legislative assembly there are only two women elected representative for a population in which female population is more than 6 lakhs. The entire north east has the lowest percentage of women in political representation nationwide. Social, political and educational empowerment of women is very well reflected in the given statistics.

This calls for a critical analysis of the real social conditions of women within the paradigm of customary laws. There is a need to understand the existing customary laws of various tribes within the state, comprising 25 major classifications and more than 100 sub-tribes and how each of them address the rights of women folk in matters of marriage, inheritance, divorce, maintenance etc. Can there be common general principles which can evolve- to identify the common vices in all the customs.

For the women's rights and gender justice and equality, a uniform codification of customary laws in civil matters by the members of all the communities in a consensual and coordinated way is the need of the hour. Compiling and collecting the best practices relating to marriage, divorce, inheritance, maintenance etc and abolishing the anti-women

and children practices with the ultimate aim of codification of selected and amended customary norms is essential. Author believes that having a uniform customary laws in consonance with Constitutional objectives of gender justice and social equality of woman is more important than supporting or rejecting uniform civil code. There is a necessity to amend wherever change is felt to some violative customary practices and it is illogical to expect the social change to be ushered by the UCC alone, without changing our own customary outlook and mindset. Another strong reason for advocating codification of customary laws is instances of practical legal difficulties. For instance, when a woman files a case against her husband under Section 494 of IPC, which penalizes bigamy, if any man or a woman marries for a second time, both the husband and wife are punishable with fine and up to seven years of imprisonment. But for a tribal woman, to invoke this against the husband committing polygamy is a difficult proposition, even if the woman wants to. The court generally does not interfere in customary domains of tribal community. Hence, woman will be unable to use this penal provision effectively.

The courts in India recognize custom as a source of law for the society, where it is applicable unless it contravenes the Constitution. But distances itself from interpreting the oral customary laws.

Moreover, the unique tribal customs and traditions have somehow not been subjected to judicial scrutiny for reasons of cultural plurality and diversity to endure. But if change is made in the customary laws by suitable amendments and codification consequently the court shall enforce it by all means. Hence, codification of customary laws by statutory measures will bring much needed customary law reforms for improving the social status of women in general. The most salient feature of customary laws is its unwritten forms, accepted as oral usages, practices and traditions for generations. Due to its unwritten character, it is also prone to misuse and misinterpretation by the socially powerful and influential elites and used in perpetuating gender inequity in the society.

In one instance, an Arunachali girl and her mentally and physically disabled sister disowned by her father who married another woman, their own mother having married already. She wants to approach the court for seeking maintenance for both the siblings from the father under Section 125 of Cr.P.C.

What should be the customary norm in this case? One may argue that as per custom father's duty is to provide them maintenance but can the community compel the father in doing so against his wish in the absence of written code of customary laws and what will be the consequence of his denial? What is the customary mechanism in place which the helpless and abandoned daughters can invoke at the community level? Hence, she will be bound to knock the courts door. This trend will also affect the local dispute redressal system due to lack of specific customary laws governing such cases. Therefore, codification of customary laws is also inevitable for improving the village traditional councils and its functioning. Else, people will lose faith in the traditional courts and lean more towards the formal courts. The tribal village councils are integral part of our social system, its existence with necessary modification is basic need of the hour. Most importantly many laudable aspects of our customary laws equally need codification for its preservation. Codification will also bring finality to a

decision rendered by the village councils as the court will not easily overrule the decision given under the codified customary laws.

Due to uncoded laws of custom many societal norms and conventions have developed which perpetuate the practice of child marriage. Since tribes have not fixed any minimum age for marriage like under the Hindu family law age of marriage for boy is 21 and girl is 18 years. As per general law, age of majority is 18 years, whereas our tribes do not prescribe to any age criteria because of which we are unwittingly perpetuating child marriage by not changing this legal anomaly.

Another important point is, many of our youths can become victim of law if their relationship with any girl goes sour. The boy may be penalized for doing something consensually as there is no rigid rule under the custom on age of majority for such act. It is imperative to evolve custom as per changed law. Most important fact is under the amended Juvenile Justice Act, a boy of 16 to 18 years can be treated as an adult for committing heinous crimes like rape. These changes are significant which necessitates codification of customary laws to complement these general legal provisions. If not done, it will have detrimental consequences on the young boys and girls who may be below 18 years and tried for unintended offences committed by consensus.

As in the POCSO Act, a person below 18 years is a child and the age of consent is also 18 years and this Act which recognize no exception criminalizes even consensual sexual act with a person below 18 years. In view of these legal developments a common unified approach and synergy involving all the communities will be a good way forward.

The author came to know of Adi codification of customary laws called 'Adi Kebang Ayon' one of the first instances of codification in our state that can be replicated for the whole of Arunachal. The other tribes may also follow eventually.

Uniformity may be difficult to begin with but in matters of child marriage, polygamy, inheritance, maintenance of children, rights of women and children from polygamous matrimony, adoption etc a uniform codified customary laws are necessary. We cannot achieve all this merely by approving the uniform civil code without having uniform customary laws in written form at the first place.

Conclusions

Tribal society of Arunachal Pradesh is modernising at a fast pace. Age old culture has also evolved to adapt with the modern society. Traditional cultural order is juxtaposed with forces of western modernity and other religious impacts. It is a society in transition wherein lot of external cultural influences are making an inroad to native cultures. Wide economic divide and overall backwardness has given rise to social disharmony and unrest amongst the tribes. Rampant corruption in bureaucracy and weak governance contributes to fragile social order. Amidst these socio-political backdrop, the tribes continue with their customary laws in many walks of life. Even though the application of formal laws have affected the relevance of traditional customary laws and its efficacy. The Customary laws still play a pivotal role in village social order and many local matters are dispensed under its jurisdiction. Despite the evil influences of modern-day politics in ancient village democratic set up of tribal council systems, the tribes proudly hold on to their customs and traditions to preserve its ethnic identity in the face of

encroaching modernity. How long two systems comprising of Customary laws and laws in general i.e., formal laws can co-exist side by side is difficult to answer. The patriarchal notion of Customary laws which has inherent gender biases in its basic tenets may succumb to more gender-neutral legal order in due course unless Customary laws adapt to modern concept of equality and recognise woman as an equal stake holder in terms of rights and social status. Any kind of reformation in Customary laws will face stiff resistance from the male patriarchy as always has been in the past. Tribes have a tight hold on Customary laws within a given community. Every Community Based organisation, a apex body are largely dominated by male who are the custodian of Customary Laws has the final say on everything. This has given rise to question of codification and adoption of Uniform Civil Code as an alternative to existing system in order to pave way for woman's right to equality in terms of property and other concerns. However, the matter is complex and difficult both given the strong hold of patriarchy in society where woman's voice get marginalised. Customary laws have its own merits minus its vices, but the challenge is how to get rid of its vices without effecting its good part? Why the political class does not give a serious thought on this? Woman's issues and rights have never merited a serious effort not even a debate on the part of community and government even today. Woman's are both socially and politically marginalised and unable to organise themselves for fear of social backlash.

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