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'Continuing Custom': Indigenous Inheritance in the Indian Supreme Court's *Kishwar v Bihar* Dissent

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This article offers an analysis of the dissenting judgment's understanding of indigenous inheritance custom in the gender inequity dispute in the Indian Supreme Court's 1996 Kishwar v Bihar *decision. It examines how the contemporary Indian judicial system uses modern law in interpreting and recognising tribal customs, specifically inheritance custom. The article finds that the law's description of custom in 'ancientness' and 'invariability' terms poses difficulties for the distinct tribal inheritance custom, which this article views as 'continuing custom'. It also shows how judicial interpretation privileges workable custom evidence by ignoring the impasse between custom's conceptual understanding and evidentiary requirements in the general law. The article offers a new theoretical perspective on the central problem of indigenous inheritance custom recognition by seeking to reconcile the impasse with 'continuing custom' that views temporality as essential.*

The 1996 decision in *Madhu Kishwar and Others v State of Bihar and Others* [(1996) 5 SCC 125] is the only Indian Supreme Court judgment by a three-judge bench to explicitly address gender inequality in property inheritance customs among India's tribes. The petitioners, who were from various areas in the Chota Nagpur plateau region in India's eastern state Jharkhand (part of Bihar state before 2001), challenged gender discrimination in inheritance customs practised by tribes in the region. Their land ownership and inheritance customs largely excluded women from ownership and so cultivated lands remained in each tribal family, handed down through the male line. The petitioners also contested the Chota Nagpur Tenancy Act, which institutionalises tribes' land ownership practices and recognises the petitioners' tribes' patrilineal inheritance customs. For the petitioners, the customs and the Act violated the fundamental rights guarantees such as the 'right to equality' stated in India's Constitution (art 14). While the Constitution recognises customary norms, including inheritance customs, it privileges fundamental rights in case of a conflict between the two (art 13).

Accordingly, the issues covered in the three-judge bench judgment in *Kishwar* fall into two broad categories: first, conceptual and evidentiary issues for determining and recognising the existence of indigenous tribal customs; and, second, the constitutional gender equality question, which encompassed the Tenancy Act. While the majority judgment, comprising two judges and delivered by Justice Madan Mohan Punchhi, focuses on the latter category, the lone dissenting opinion by Justice K Ramaswamy discusses both issues. However, due to their acknowledgment of Justice Ramaswamy's expertise on tribal laws, the majority justices delivered their judgment after Justice Ramaswamy's dissent, and framed their opinion as a response to Justice Ramaswamy. As regards the first issue, Justice Ramaswamy acknowledged the unique inheritance customs practised by various tribes in Chota Nagpur, but without explicit evidence of such practices by the petitioners, he balked at determining the generally discriminatory nature of the custom. Moreover, to avoid invalidating the Tenancy Act on the basis if the Constitution's gender equality provisions, Justice Ramaswamy ingeniously amended the gender discriminatory clauses of the Act and interpreted the phrase 'male descendants' to include female descendants. Likewise, Justice Punchhi's majority opinion avoided invalidating the Tenancy Act, albeit in a different way, by evading the equality issue and emphasising gender as a constitutional right to livelihood question. Moreover, in refusing to annul the gendered clauses, and disagreeing with the dissent's view of amending the Act, he purported to offer his support, with moral considerations, to tribal custom practice and privileged the legislative role in law-making over '[j]udge-made amendments'.

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This article examines the first topic, focusing on Justice K Ramaswamy's dissenting opinion, which offers extended treatment of judicial concepts of tribal custom. Justice Ramaswamy's dissent is critical for practical reasons as compared to the majority judgment. As stated above, because they wrote their decision after Justice Ramaswamy's dissent, the majority justices framed their opinion as a response to Justice Ramaswamy. Also, because Justice Punchhi's majority judgment expressly endorses Justice Ramaswamy's view on the first category concerning conceptual, evidentiary, and recognition issues, the majority decision did not discuss the topic further.

In focusing on Justice Ramaswamy's dissent, this article draws mainly on the sources he cited, including a previous judgment by the Privy Council, governmental reports, general accounts, and empirical studies on tribes in India. Because Justice Ramaswamy's descriptions of these sources are often brief and lack clarity, this article examines the sources themselves. It also employs additional references to offer insights. For example, the statistical reports published by the Election Commission of India (1985a, 1985b, 1990 and 1991) inform gender political representation among tribes with clarity. Moreover, Roy's accounts of the various Chota Nagpur tribes (Roy, 1915) have historical value, providing background to the tenancy statute, and legal importance as evidence of tribal custom.

Adopting the dialogic approach of Gadamer (1989), this article views custom recognition as 'continuing custom,' seeing customary practice and its recognition as an interplay between present and past horizons that helps ground custom in, for instance, the Santhal tribe example discussed by Archer (1984). Moreover, my lived experience and previous litigation practice in the region confirms this approach. For example, in this article, I offer my view that tribes generally privilege their inheritance customs over a legal will in property succession. Such interplay influences are vital to understanding the complexity of custom recognition, and 'continuing custom' encompasses these intricacies throughout the analysis. In employing these ideas to examine Justice Ramaswamy's analyses and the published works cited in his dissent, this article aims to offer insights into the judicial understanding and recognition of indigenous customs, specifically inheritance. Moreover, in addition to textual description and critique, it also offers a way forward through the conceptual and practical impasse the law presents. It emphasises the dilemma encompassing the law's custom conditions and the challenges of its evidence requirements. Critical approaches to textual examination are thus central to the custom recognition discussion in this article.

This article has five sections. While the first section contextualises the article by providing background information on the *Kishwar* dispute, the second section evaluates the legal premise discussed by the Privy Council in an 1872 lawsuit for grounding a custom, and examines the evidentiary aspects required by the general law of evidence. In the third section, my analysis moves to the structural elements that highlight the tribal custom and legal requirements dichotomy. The fourth section reviews the empirical sources that Justice Ramaswamy cites in scrutinising examples of tribal inheritance custom, especially concerning the gender question, practised in India. Moreover, this section examines whether Justice Ramaswamy's custom examples offer evidence that meets the certainty requirements for a valid custom. Finally, the fifth section assesses the dissent's concluding approach to custom recognition and its impact on the petitioners' inheritance claims.

This article is timely, as India's Parliament expects to introduce a draft Uniform Civil Code bill soon. Commonly known as the UCC, it aims to supplant religious and personal laws and apply uniform rules in family law matters, including marriage, divorce, adoption, and inheritance. A public notice (Uniform Civil Code – Public Notice) published on 14 June 2023 by the 22nd Law Commission of India seeking feedback from individual and religious organisations about reforming personal laws through a Uniform Civil Code has amplified divergent views. Generally, as Herklotz (2016) remarks, while the UCC proponents ground their claims on national integrity, the needs of a modern and secular state, and gender equality concerns, their adversaries view the proposed code as an attack on minority rights and legal pluralism, and prefer bottom-up reforms within existing personal laws. Likewise, the tribes hold self-determination to be essential and support the latter view. Regardless of the proposed law's merits or demerits as regards the tribal inheritance custom question, it is my hope that the article may impact the reform discourse and, afterward, disputes narratives.

Facts and Claims

As stated above, *Kishwar* deals with general claims of gender discrimination in the inheritance customs practised by various tribes in Chota Nagpur. The petitioners' tribal membership, however, is varied; the main, or first, petitioner, Madhu Kishwar, is a women's rights activist but not a tribe member. The other three women petitioners are residents of Chota Nagpur and members of two different tribes: the second and third petitioners belong to the Ho tribe, and the fourth to the Oraon. Although the Oraon petitioner filed a separate lawsuit, the Court considered the petitions jointly as they raise a 'common question of law: whether [a] female tribal is entitled to parity with [a] male tribal in intestate succession,' that is, where someone dies without a will. Due to its formal nature and its unpopularity among tribes, a legal will is typically absent in property succession among tribes, who privilege their inheritance customs. Specifically, the petitioners sought from the Court a general declaration that the tribes' custom of denying women the right to inherit property, as also stipulated in the Chota Nagpur Tenancy Act of 1908, is unconstitutional and invalid.

Moreover, Justice Ramaswamy stated that the petitioners emphasised the general abuse of women in inheritance customary practices. They raised moral arguments that 'tribal women toil, share with men equally the daily sweat, troubles, and tribulations in agricultural operations and family management' and that the customary law denying women the inheritance of property is, therefore, 'unfair' and 'unjust'. The petitioners also contended that the usufructuary right, which allows women to use and enjoy property but prohibits them from altering it, is 'illusory,' as lineal male descendants usually seek women's exclusion from even this right, through coercion. Further, they offered various grounds for women's exclusion, such as remarriage and women's acts of 'adultery' with non-tribals, and highlighted how such exclusion commonly involves incidents of violence like suicides, physical attacks, and murders. Due to the general nature of the petitioners' allegations of the abuse of women, neither Justice Ramaswamy's dissent nor the majority opinion presented any precise and detailed instances of discrimination and ill-treatment.

Turning now to a concise explanation of the relevant statutory law, the Chota Nagpur Tenancy Act, enacted in British India in 1908, responded to resistance by tribes residing in the Chota Nagpur region to land grabs and levies on their land by local rulers, merchants, and money lenders. The Act both recognises and institutionalises aspects of tribes' customary landholding practices but also introduces characteristics of modern states, like the requirements for land registration, fees, and annual rents or property taxes (Chapters II and III of the Tenancy Act). As an example of the former (recognition and institutionalisation), the Tenancy Act recognises the Oraon tribe's *Bhuinhari* lands and the Munda tribe's *Khuntkatti* lands, allowing these tribes ownership over these kinds of land, that is, land recovered from the forest and cultivated by original settlers (Classes of Tenants in Chapter II of the act). Also, to prevent further land alienation, the Act provides for demarcating tribes' land through surveys and records (Roy, 1915: 36–51).

The Tenancy Act frames tribal succession to land along the male line of descent explicitly but also obliquely and open-endedly. In accurately describing the different classes of land tenants, ss 7 and 8 of the Act recognise 'descendants in the male line' as legal heirs of the specific Oraon Bhuinhari lands or the Munda Khuntkatti lands that the original settlers recovered from forests for cultivation. However, s 76 of the act generally recognises tribes' 'custom, usage or customary right' relevant to their landholding practices. In effect, s 76 allows courts to determine the tribe inheritance custom, especially regarding all other acquired forms of land properties, such as cases where later settlers or *raiyat* occupied parts of the original Bhuinhari lands. In other words, while the Tenancy Act recognises the different classes of tribe tenants, it leaves their precise inheritance custom undefined.

Due to the lack of a definitive description of the tribes' inheritance customs in the Tenancy Act, courts have referred to Sarat Chandra Roy's accounts of tribal life (Roy, 1915). Roy, a trained lawyer, practised in the Court of the Judicial Commissioner in Ranchi in the Chota Nagpur region in British India during the early twentieth century, and published field studies on the various tribes in Chota Nagpur between 1912 and 1937. His work documents land ownership customs that largely excluded women from ownership. For Roy, the Oraons, for example, practised separate ownership of land held by each family. A married daughter was thought to contradict such proprietorship, as she would take

land ownership outside the family, to her in-laws. Accordingly, the cultivated lands remained in the family along the male line (Roy, 1915: 118–19).

As to constitutionality, Justice Ramaswamy highlighted how the Constitution of India recognises customary norms. Specifically, art 13 of the Constitution recognises '[a]ll laws in force in the territory of India immediately before the commencement of this Constitution,' and the term 'laws' here includes 'custom or usage' and customary norms (cl. 1 and cl. 3, sub-cl. a). Article 13, however, also states that 'in so far as they [laws, including custom] are inconsistent with the provisions of this Part [III], [they] shall, to the extent of such inconsistency, be void' (cl. 1). That is, the Constitution does not recognise those propositions of law and custom that conflict with fundamental rights guarantees such as the 'right to equality' stated in Part III of the Constitution (arts 12–35). Justice Ramaswamy, thus, reaffirms the basic scheme of the Constitution, which, while honouring customary norms, offers 'primacy to fundamental rights' in the event of a conflict between the two.

As regards the respondent's response, summarised in Justice Ramaswamy's dissent, the Bihar government was unwilling to change the discriminatory inheritance provisions in the Tenancy Act. To provide inheritance rights to women members of the tribes, the Court, in *Kishwar*, therefore issued an interim order instructing the Bihar government to modify the Tenancy Act. Accordingly, the state government constituted the Tribal Advisory Board, 'consisting of the Chief Minister, Cabinet Ministers, [and particularly] legislators and parliamentarians representing the tribal areas' in Bihar. The Advisory Board passed a resolution in a meeting held in 1988 stating that:

> The tribal society is dominated by males. This, however does not mean that the female members are neglected. A female member in a tribal family has right of usufruct if the property owned by same is the property of her husband after the marriage. However, she does not have any right to transfer her share to anybody by any means whatsoever. A widow will have right to usufruct of the husband's property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring, the children succeed the property of the father and the mother will be a care taker of the property till the children attain majority…. [E]very tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation of the tribal land in the hands of non-tribals…. [Their] right of transfer of their rights [property] is the origin of malpractices like dowry and the like prevalent in other non-tribal societies.

The response raises the social and political impact of the tenancy statute amendment. It points to the perception that tribal land alienation results from the tribe transferring land to members outside the tribe. Moreover, the response mentions the threats of 'agitation' and 'social unrest' by the tribes should the respondent government amend the act. In refusing to initiate any legislative changes in favour of women's inheritance, the respondent appears to yield to the political coercion tactics of the legislators and parliamentarians representing the various tribes. A further inquiry, however, into attitudes apparently endorsing patrilineal inheritance offers insight into the role of gender in decision-making.

Although Justice Ramaswamy's dissent does not describe or pinpoint the lawmakers present at the Tribal Advisory Board meeting, this article can explain the composition of the board. As noted in the court opinion, the board had met twice to discuss the tribal women's inheritance question: first in 1988, when it passed the above resolution; and, next, in 1992, when it restated its earlier viewpoint. The meetings also comprised 28 state legislators and five federal parliamentarians who belonged to and represented the various tribes in Bihar. However, between 1985 and 1990, Bihar's ninth legislative assembly had only one tribal woman lawmaker; likewise, the 1985–89 federal parliament had one tribal woman member from the state of Bihar. From 1990 to 1995, the succeeding legislative assembly had two elected women from the tribal communities, but the 1991–96 federal parliament had none from Bihar. Only two tribal women lawmakers were present at the Tribal Advisory Board meetings. Therefore, gender inequality in decision-making may explain, in part, the male-influenced hegemonic account of tribe citizenship in the board resolutions (Statistical Report, 1985, 1990, 1991).

Returning to the Justice Ramaswamy's dissent, the following section examines his discussion of the legal premise for grounding a custom.

Privy Council's Legal Basis of Custom in *Ramalakshmi v Sivanantha*

Commenting on the legal basis of customary laws, Justice Ramaswamy quotes the Privy Council's 1872 judgment in *Ramalakshmi Ammal v Sivanantha Perumal Sethurayar* (1872) 14 MIA 570:

> [C]ustom is of the essence of special usages, modifying the ordinary law... [they] should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends (585-86).

These remarks seem to indicate that while a custom transcends ordinary, general, or statute law, its 'ancient' or 'antiquity' and 'invariable' or 'certainty' aspects as determined by 'clear and unambiguous evidence' are essential for custom's legal validity. However, Justice Ramaswamy's dissent in *Kishwar* lacks *Ramalakshmi*'s contextual clarity about the legal basis of custom: it is unclear what pieces of evidence determine custom's 'antiquity and certainty'. Conceivably, an analysis of Justice Ramaswamy's approach to the specific tribal inheritance custom claims in *Kishwar* can spell out how he builds on the Privy Council's definition of custom cited here. However, before proceeding to examine Justice Ramaswamy's approach, I will assess the custom premise as applied in *Ramalakshmi*.

Ramalakshmi advanced an 'impartible' estate title dispute and primarily determined the validity of local custom practised by the Maravar Hindu caste in the Tinnevelly district in British India's Madras province. This 'impartible' custom restricted the partition of certain estates of a Hindu joint family comprising lineal descendants of a common male ancestor, and it recognised that such estates were held by only one male member of the joint family. In property succession, that male member is the first wife's eldest son. However, in *Ramalakshmi*, the estate title dispute arose because the first wife of the Maravar landlord in Tinnevelly bore no child. Moreover, following the Maravar landlord's death, his two surviving sons, each born to his second and third wives, claimed their exclusive succession right to inherit the landlord's 'impartible' estate, Urkadu. While the landlord's first wife had died without issue, the birth sequence of the two surviving sons differed to the landlord's remaining two wives' marriage order and precedence or seniority: the third wife's son was born before the second wife's son, that is, the respondent son was the third wife's child but was older than the second wife's son or the appellant son.

Accordingly, in support of their claims of exclusive succession rights, each of the two surviving sons relied on local and family customary practices, as well as the general or statutory Hindu law of succession to claim precedence by virtue of either their age or the marriage sequence of their mothers to the landlord. Due to arguments primarily based on custom, the Privy Council recognised custom's precedence over the statutory law, stating that the Hindu statute would apply if the two surviving sons failed to establish the custom. It also acknowledged that, unlike custom, the Hindu succession statute, by 'right of primogeniture,' allowed heirship to the oldest son irrespective of any wives' marriage sequence, where the wives belong to the 'same caste and rank, as occurs in the present case…' Thus, the Privy Council had to primarily determine the existence of such local and family customary practices and elucidate their legal validity (583).

Therefore, besides specifying the legal basis of custom, as also quoted by Justice Ramaswamy in *Kishwar* and discussed in this section's first paragraph, *Ramalakshmi* explains:

> [B]ut their Lordships consider that whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest, should be observed. One of these principles is, that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the Zemindars [landlords] or some of them might not have been called as Witnesses, when, of course, they

> would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider…the only evidence offered, viz., the Collector's Letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district. The summary of the Collector (if it may be looked at) discloses that the Zemindars were not unanimous in their view of the custom; and it further appears, that their opinions were given with reference to the succession to a zeminadary [estate/territory] in a family of a different caste (588).

These comments provide critical insights into the evidentiary aspects of judicial decision-making in custom disputes. First, *Ramalakshmi* identified acceptable evidence in such disputes. Due to the practical difficulties in obtaining evidence on a local custom, *Ramalakshmi* ignored the general or statutory law's 'strict and technical rules' governing evidence. In lieu, the *Ramalakshmi* interpretation privileges the 'substantive principles' that allow evidence with 'authenticity and value'. Such evidence includes 'best evidence' and, in its absence, 'secondary and inferior evidence': the lack of the 'best evidence' justifies employing the latter evidence forms. For *Ramalakshmi*, the range between the best and secondary or inferior evidence includes, first, the cross-examination of witnesses; next, written opinions of the witnesses; and, lastly, governmental records. Thus, in discarding the rigid evidence rules and emphasising the 'substantive principles,' *Ramalakshmi* considers the official records comprising the 'Collector's Letter and Summary' as proof of the local custom.

Besides acceptable evidence in custom disputes, another evidentiary issue dealt with in *Ramalakshmi* was 'clear and unambiguous' evidence of the 'existence of an ancient and invariable custom'. In considering various landlords' accounts as reported in the Collector's Letter and Summary, *Ramalakshmi* spelled out what this meant. Due to the landlords' divided views on the local custom in the collector's records, *Ramalakshmi* found the local custom evidence 'not unanimous' or '[un]clear and [ambiguous]'. Moreover, the landlords' statements concerned custom as practised by a caste group different to the Maravar caste to which the parties in the lawsuit belonged. In the *Ramalakshmi* description, 'clear and unambiguous' evidence pointed to consistent opinions, specifically, consistent testimonies about the local and caste-specific custom practice. Still, the extent to which such a requirement of acceptable and consistent evidence relates to 'ancient and invariable custom' conditions is unclear.

The critical problem with holding oral or written accounts of landlords or governmental agencies as acceptable and consistent evidence of custom is that there are limits to how far the evidence can be taken. Besides indicating a specific location and caste group, such accounts are also temporal. Using Gadamer's hermeneutics (Gadamer 1989), custom is, in fact, 'continuing custom,' due to its ongoing overlap between the present and the past; it is, therefore, transient and incompatible with a general and literal notion of *ancient*. Rather, any custom evidence merely attests to the prevailing practices of a particular group in a given location. The conceptual and practical challenges associated with custom evidence and temporality mean *Ramalakshmi* lacked explicit explanations of how its use of terms such as 'ancient' or 'antiquity' and 'invariable' or 'certainty' in defining a valid custom relate to the evidentiary requirements of the general law of evidence (Gadamer, 1989: 307). Instead, it privileged 'clear and unambiguous' proof by focusing on 'substantive principles' or 'authenticity and value' based evidence, which it finds in the 'acceptable' and 'consistent' aspects. Moreover, for *Ramalakshmi*, these evidentiary aspects seemed to qualify the 'ancient' or 'antiquity' and 'invariable' or 'certainty' it required of custom. *Ramalakshmi* thus implicitly conflated acceptability and consistency with custom's ancientness and invariability to give meaning to the latter. Alternatively, it is also possible to argue that the Privy Council ignored 'ancient' or 'antiquity' aspects entirely. Regardless, the analysis suggests that conceptual and practical challenges exist and that applying the legal basis of custom offers meaning to such a custom construct.

Accordingly, in response to the appellant son's local custom claims, due to the inconsistent testimonial evidence of various local landlords belonging to different castes, the Privy Council in *Ramalakshmi* failed to ascertain whether the district's succession custom favoured the appellant son by virtue of his mother's marriage seniority. Likewise, the respondent son's family custom claims also remained unsubstantiated. The landlord had previously given contradictory testimony on the

family inheritance custom in two different declaratory lawsuits, once in favour of one son and once in favour of the other. Without consistent evidence on particular local, family, and caste-specific custom, the Privy Council decided the inheritance dispute based on the general Hindu succession statute law. As mentioned earlier, unlike custom, the Hindu statute allowed heirship to the eldest son irrespective of any wives' marriage sequence where the wives belong to the 'same caste and rank, as occurs in the present case…' (*Ramalakshmi*, p 583). However, because this article focuses on custom recognition and the statute law is beyond its scope, it disregards *Ramalakshmi*'s deliberations on the latter

Returning to the *Kishwar* dissent, in quoting *Ramalakshmi*'s custom conception, Justice Ramaswamy does not explicitly deal with the conceptual and practical peculiarities. This ambiguity stimulates questions. Does Justice Ramaswamy give meaning to custom in ways similar to *Ramalakshmi*? Does Justice Ramaswamy focus on the location and group-specific or tribe-specific evidence? Does he also recognise the temporal nature of such evidence?

The following section examines Justice Ramaswamy's discussion of the structural elements that highlight the dichotomy between tribal customs' attributes and the legal requirements for a valid custom.

Tribal Custom and the Legal Premise

In addition to quoting the general judicial conception of a valid societal custom in the Privy Council's *Ramalakshmi* decision, Justice Ramaswamy, in *Kishwar*, draws on notions of the specific tribes' customs derived from non-judicial sources. Citing an officially sponsored report by Singh and Mahanti (Singh, 1993: 8), he states: 'Customary law refers to rules transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society'. Although Justice Ramaswamy does not clarify, it is clear that, in contrast to *Ramalakshmi*, Singh and Mahanti's report adopts a broader perspective; it avoids the tribal custom description in ancientness and invariability terms. Although, as discussed in the previous section, *Ramalakshmi*'s emphasis on evidentiary acceptable and consistency features somewhat mitigates the conceptual conditions requiring ancientness and invariability in a custom, Singh and Mahanti's description eliminates the complexities of such requirements and appears closer to the 'continuing custom' notion.

Another source cited by Justice Ramaswamy, Anand Prasad Sinha, who worked as the Judicial Commissioner of Chotanagpur, offers a dichotomy between the legal conception of custom and the nature of tribal custom:

> The element of certainty and definiteness of custom in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally product of dominating mind, nurtured in the belief of super-natural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted on the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage (Sinha, 1986: 297-311).

However, due to the lack of a clear explanation of Sinha's assessment by Justice Ramaswamy, the analysis here turns to Sinha's observations that point to a few critical and distinguishing contexts of tribes' customs. Sinha recognises the gap between the law's custom requirement and tribal customary practices. The legal requirement of 'certainty and definiteness' is, Sinha argues, incongruous with the 'divergent custom' among tribes and regions (Sinha, 1986: 310-11).

Moreover, for Sinha, while law values custom's 'antiquity,' the extent of ancientness is inconsequential to tribes. In his description, Sinha underscores the spirituality and custom nexus. While the general understanding of evolution of custom privileges sociological or need-based 'spontaneous growth' explanations, Sinha identifies tribal custom as emphasising the significance of totem and taboo, that is, spiritual power and obligation based on a belief in supernatural forces. Tribal customs backed by spiritual force develop as family law within particular families under the authority of the patriarchal head and, thus, as an overlapping construct of the 'ruling minority'. Accordingly, those customs are primarily bereft of public demands and, sometimes, morality. The law's 'antiquity,' for Sinha, is, thus, irrelevant to the tribal custom, which chiefly evolves based on totem and taboo (Sinha, 1986: 310-11).

One consequence of the emphasis on spiritual aspects, Sinha suggests, is tribal custom's lack of legal status or validity, although a few tribal customs have attained legal status, including inheritance, adoption, and marriages. Specifically, Sinha suggests a lack of 'scientific explanations' as a reason for the lack of legal validity. As explained earlier, insofar as tribal custom extends from one generation to another, it locates its origin in totem and taboo. Due to the presence of these two spiritual elements, a need-based sociological or empirical account can explain tribal customs only inadequately. Arguably, such a deficiency in 'scientific explanations' challenges formal evidence rules demanding certainty and, thus, undermines custom's legal status or validity. Sinha's account, however, is unclear about the implications of challenges for those exceptional inheritance, adoption, and marriage customs that have legal validity (Sinha, 1986: 310-11).

As also cited in Justice Ramaswamy's dissent, Sinha ends his account by grounding tribal custom in the general premises of tribal life:

> If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operation or the mode of occupation for livelihood, all are tagged, linked and based upon certain conduct and behaviour reflecting, nearly custom and it may be said that entire tribal society is based upon the rigid rules of custom and any society still untouched by the influence of urbanisation exists in the phenomenon of religion mixed with magic – Custom (Sinha, 1986: 311).

Sinha here seems to suggest a central role for agriculture in the lives of tribes. For Sinha, tribes' livelihood depends on agriculture, and their entire life, 'conduct and behaviour,' revolves around the agricultural occupation. However, Sinha places tribes' agricultural trade in a setting distant from urban influence. This distance allows, in tribal custom, the characteristic blend of 'religion...and magic'. Accordingly, Sinha purports to ground his tribal custom description in the tribes' independent and distant agrarian living, without urban impact on their spiritual traditions.

Sinha's account is, essentially, a recap of the general presumptions of tribal custom and the typical difficulties with custom's legal validity. His description is brief and simplified but lacks reference to sources that inform it. Conceivably, as a legal officer commissioned in the tribes dominating the Chottanagpur plateau, Sinha draws on his professional and personal experience to rehash judicial understanding of tribal custom in general. Accordingly, when Justice Ramaswamy, in *Kishwar*, quotes Sinha's description, he credits Lalita Prasad Vidyarthi in place of Sinha by stating that 'Dr. L.P. Vidyarthi in his Tribal Development Act and Its Administration...has stated at page 310 that ...' Here, while Vidyarthi, a professor of anthropology at Ranchi University, is the volume editor, it is, in fact, Sinha who is the author of the description that Justice Ramaswamy quotes. In ascribing the opinion to Vidyarthi, Justice Ramaswamy either seeks to attach anthropological credibility to the description or commits a citation error. Regardless of these criticisms, Sinha's account, as quoted by Justice Ramaswamy, outlines the necessary conditions for the legal recognition of tribes' customs.

As noted in this section, Justice Ramaswamy's sources in *Kishwar* highlight the dichotomy between the legal requirements for a valid custom and tribal custom attributes. While they differentiate between ancientness and tribal customs, the sources also underscore the problem of custom's 'certainty' in divergent tribes and regions. Thus, the sources appear to view custom as transient and overlapping. As examined in the next section, Justice Ramaswamy moves on to probe

the inheritance customs practised by various tribes in different areas in India. Clearly, instead of accepting the reconciling approach or *Ramalakshmi's* practical methodology at face value, Justice Ramaswamy aims first to establish that inheritance custom's invariability or certainty necessarily points to unique tribes and regions.

Inheritance Customs as Practised by the Tribes in India

Justice Ramaswamy purports to assess whether tribes follow a uniform or specific inheritance custom, especially concerning the gender question, throughout India. Accordingly, he turns to 'empirical study by Anthropologists and Sociologists'. His references include, first, the account of the Chenchus tribe by the Austrian ethnologist Christopher von Fürer-Haimendorf, who was an officer with British India's North-East Frontier Agency, and, subsequently, a tribal affairs advisor to the government of the Nizam of Hyderabad (Macfarlane, 1996: 548-51). In his short explanation of Fürer-Haimendorf's account, Justice Ramaswamy states:

> Chenchus women tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband are joint possessors of the family property insofar as it is acquired by the daily labour.

In this explanation, Justice Ramaswamy aims to explain gender equality in property matters as practised by the Chenchus, but his description lacks clarity. A juxtaposition of Justice Ramaswamy's explanation and Fürer-Haimendorf's original account reveals contradictions. While Justice Ramaswamy appears to associate Chenchus women's 'equal status' with property ownership and possession issues, Fürer-Haimendorf relates equality with a Chenchus family's freedom to 'live with either the husband's or the wife's tribal group'. Moreover, contrary to Justice Ramaswamy's emphasis on 'family property', Fürer-Haimendorf notes that the Chenchus followed a communal landholding arrangement in which members hunted and gathered on that communal land. Although Justice Ramaswamy's description is obscure and contradictory, an assessment of Fürer-Haimendorf's original account of the Chenchus tribe provides a more precise context for Justice Ramaswamy's Chenchus reference (Fürer-Haimendorf, 1982: 3).

Fürer-Haimendorf documents the changing economic state of the Chenchus tribe between 1940 and 1980. As Fürer-Haimendorf notes, the forest-dwelling Chenchus traditionally lived 'on wild fruits and tubers and the occasional game hunt[ing]' and continually moved 'from one collecting ground to another'. Moreover, due to remoteness, the Chenchus seldom traded 'honey or other minor forest produce' for cereals. Their seclusion, however, ceased with the government's 1894 and 1930 forest reserve notifications, which allowed cutting down trees for commercial timber activities. Although, on Fürer-Haimendorf's intervention to preserve their traditional livelihood, the Nizam's government demarcated a forest area as the Chinchu Reserve, commercial demands for minor forest produce altered the Chenchus' economy. To meet the demand, the state-sponsored Girijan Cooperative Marketing Society led the tribe to collect minor forest commodities for commercial value, that is, tribe members moved 'from gathering roots, tubers, and wild fruits for consumption to the collection of minor forest produce on a large scale for sale'. This was a transition from a subsistence food-gathering economy to a cash economy (Fürer-Haimendorf, 1982: 81-83).

Despite this transition, due to the continued maintenance of their forest-dependent lifestyle, the 'Chenchus of the Nallamalai Hills' are distinguished as a 'foodgatherers and hunters' tribe in Fürer-Haimendorf's account. This classification contrasts with the categorisation Fürer-Haimendorf uses for other tribes that experienced a transition similar to Chenchus. In his discussion on the Andhra Pradesh forest policy, Fürer-Haimendorf categorises other tribes as either 'shifting-cultivators' or 'settled farming populations'. However, Fürer-Haimendorf is wary of the Chenchus' continued status as tribal 'foodgatherers and hunters':

> Until 1979, forest conservancy and the pursuance of the Chenchus' traditional lifestyle were not in conflict … However, in 1980 I noticed large-scale inroads into the bamboo forest … for the exploitation of bamboo on the upper Amrabad Plateau. (Fürer-Haimendorf, 1982: 83-84)

Conceivably, deforestation would further change the Chenchus' economic situation and classification to become an agrarian or labour community

In addition to considering their general economic pattern, Fürer-Haimendorf discusses economic variations within the Chenchus, albeit with regard to a minor population:

> The Chenchus on the lower Amrabad Plateau … have lived for some generations in close contact with non-tribal agricultural populations. The Chenchus of some communities, such as Mananur, were able to acquire land and learn to cultivate … In the villages east of Amrabad … they depend entirely on agriculture, but most are short of land and of plough bullocks, and work mainly as farm servants or casual labourers for landowners belonging to the higher Hindu castes. (Fürer-Haimendorf, 1982: 188)

Fürer-Haimendorf's description indicates that the Chenchus' economic conditions had regional variations, particularly among a minor population living outside of the forested Nallamalai Hills. These smaller groups had transitioned to settled farming and owned land; some also worked as labourers. Arguably, the Chenchus' general economic transitions, discussed previously, as well as their specific regional variations involving the shift from communal to individual land ownership, had implications for their inheritance custom. Although Justice Ramaswamy's discussion of Fürer-Haimendorf's writing is short and unclear, his reference to Fürer-Haimendorf's Chenchus' account is significant for the certainty and consistency questions.

Justice Ramaswamy cited another tribal inheritance example offered by P Ramaiah, a professor in the Economics Department at Kakatiya University in Andhra Pradesh. Quoting Ramaiah's account of Andhra Pradesh's Koya tribe, Justice Ramaswamy states, 'Hereditary rights rule the property distribution arrangements. If a man dies, his wife and sons get an equal share of the property. Widow gets her husband's share from the property.' Justice Ramaswamy's Koya reference points to the widow's equal share in her husband's property, but his statement lacks clarity on the scope of the Koya widow's landholding rights from the perspective of gender equality. Moreover, according to Ramiah, the Koyas limit inheritance to sons and ignores daughters in inheritance matters (Ramaiah, 1988: 9).

A more explicit inheritance custom example that Justice Ramaswamy mentions is found in the account of the Santhal tribes by William George Archer, a British administrator who worked as the deputy commissioner of the Santhal Parganas district – presently a region in Jharkhand state – between 1942 and 1945, and documented the 'principles of tribal law' of the 'Sant[h]als of the Sant[h]al Parganas' (Skelton, 1979: 186). In citing Archer, Justice Ramaswamy highlights Santhal inheritance custom, stating that the unmarried Santhal woman has limited land rights, that is, while she has no partition rights, for Justice Ramaswamy, 'some land may be kept by her father or a brother for financing her marriage and maintaining her, but that is to fulfill their duties towards her and does not confer upon her any rights'. If the father or brother fails in their maintenance duties, the unmarried Santhal woman is entitled to 'claim enough land for keeping her till marriage'. Although she has limited landholding rights in her father's property, the unmarried Santhal woman has absolute rights over the land she acquires independently (Archer, 1984: 135).

In regard to the married Santhal woman's right to her father's property, Justice Ramaswamy, quoting Archer, writes that in the absence of her male agnates, the married Santhal woman is allowed to keep her deceased father's land if she marries a '*ghar jawae*', that is, a man who cultivates her father's land, who, subsequently, upon marrying her, becomes the adopted son-in-law. Without marriage to a ghar jawae, she shares the land property with her other married sisters. Moreover, during the Santhal woman's marriage, 'two to three bighas of land would be given as '*stridhan*' or 'her absolute property' and the 'right of the father, brother or agnates are extinguished' over that stridhan property. Upon her death, her children inherit her absolute property, but, in their absence, her father, brother, mother, or male agnates receive the property. These instances allow the married Santhal woman to receive her father's property (Archer, 1984: 140-47).

Besides the issue of the father's property, Justice Ramaswamy's opinion cited Archer describing the Santhal woman's right to her husband's property. In a divorce or a separation between husband and wife, Justice Ramaswamy notes, the Santhal inheritance custom allows the equal partition of the husband's property: '[T]he wife and children get one share [each], and the husband gets one

share'. Also, a widowed Santhal woman continues to live with her deceased husband's joint family as before. Any maintenance refusal by her in-laws, however, entitles the widow to a share in the jointly held land property. Furthermore, in an entire family's partition, the widow and her children have the right to the deceased husband's share in such jointly held property. Due to the emphasis on her maintenance, thus, for Justice Ramaswamy, 'she gets life estate'; that is, the Santhal woman's right to a share in her husband's property lasts her lifetime (Archer, 1984: 156).

While Justice Ramaswamy's reference to Archer points to a specific inheritance custom example among the Santhals residing in the Santhal Pargana area, his subsequent citing of Singh and Mahanti presents Santhal custom as practised in a different region. In quoting Singh and Mahanti, whose work focuses primarily on the tribes in Orissa state (presently known as Odisha), Justice Ramaswamy observes that Santhals' inheritance custom 'is not strictly patrilineal' and '[s]ome … preferred succession among son and daughter equally'. In contrast, despite the 'on-going acculturation process', many Santhals 'have not completely discarded the customs'. This reveals differing inheritance custom attitudes among the Santhals of Orissa (Singh, 1993: 38-45).

A striking difference emerges in comparing Archer's Santhal inheritance account with that of Singh and Mahanti. While Archer proposes a uniform Santhal inheritance custom, Singh and Mahanti highlight a range of Santhal customs (Singh, 1993). As the local administrator between 1942 and 1945, Archer purports to 'set out the principles of tribal law' governing the Santhal tribe in the Santhal Pargana region. However, Singh and Mahanti submitted their report in 1993, and their account extends to the entire Orissa state. The differences in time, region, and the authors' pursuit may explain the different accounts they offer but all such studies examining tribal customs have limitations, and their findings cannot extend to a generalised context (Archer, 1984: 1e).

As a specific example, Archer's study (1984) has severe limitations for understanding the Santhal custom. First, he surveys and documents the 'current Sant[h]al law', observing 'In adjusting disputes or punishing offences, a tribal court [of Santhals] is moved not only by the ways in which similar disputes have been adjusted formerly or offences punished but also by contemporary tribal attitudes'. That is, both customary precedents as well as 'contemporary tribal attitudes' inform dispute resolution among the Santhals. However, in the absence of codified or written Santhal custom, and because of the lack of custom for newer disputes, Archer emphasises the role of the 'contemporary tribal attitudes' in Santhal law. Thus, in differentiating and balancing Santhal law between its historical and 'current' sense, Archer's account purports to acknowledge that the Santhal customary law of the time reflects an overlap between the historical horizon and the present (Archer, 1984: 1e-1f; Gadamer, 1989: 307).

Also, Archer's findings may not be generalisable to Santhals inhabiting geographically unconnected regions. His discussion of the shift in Santhal inheritance rules exemplifies the generalisation issue. Specifically, when an earlier inheritance rule allowing a Santhal widow to inherit her husband's land while she stayed in the village was updated to recognise the widow's right to inherit for life, for Archer, this inheritance transformation followed a gradual and continuous process. Any new or distinct inheritance practice begins consensually among a few families. Subsequently, it translates into a voluntary practice of the village and, finally, of the entire region (Archer, 1984: 1g). Moreover, due to the reverence for ancestors and usages and the local or neighbouring societal views, distinct Santhal practices within families typically culminate in common regional customs. Accordingly, Archer's account focuses on and generalises the Santhal law within the Santhal Pargana regional or province limits. However, his regional generalisation approach ignores distinct inheritance practice variations that may exist at the family and village levels.

Archer's limitations are comparable to those of similar studies that Justice Ramaswamy cites, and his findings cannot be extrapolated to Singh and Mahanti's Santhal inheritance accounts or all Santhals in different regions and other tribes. As regards the Oraons and Mundas, such extrapolating constraints hold, and Justice Ramaswamy ignores the discussion of the exclusivity of the tribal custom, which is similar to the Santhal inheritance example. For Justice Ramaswamy, Sarat Chandra Roy's accounts indicate 'The Mundas and their country … and The Oraons of Chota Nagpur … dealt with inheritance on the same lines' as Archer's Santhal, 'so they need no reiteration'.

However, a comparison of the issue of the adoption of a 'prospective son-in-law' in the absence of an unmarried daughter's father or mother, for example, indicates that the tribal inheritance customs may, in fact, vary. In contrast to Archer's Santhal account, which points to the village community's adopting authority, Roy's Oraon description limits the adopting authority to the Oraon sonless father or mother alone (Roy, 1915: 75). The comparative example signals a nuance; still, in his passing reference to Roy's Oraon and Munda accounts, Justice Ramaswamy purports to extrapolate and generalise by emphasising the broader nature of inheritance custom as generally practised by the tribes, including the Santhals

In addition to the empirical accounts discussed in the preceding paragraphs, Justice Ramaswamy's discussion of the question of formalising the tribal customs also has consequences for the certainty issue. Specifically, Justice Ramaswamy highlights the bureaucratic demand for written codes on tribal customs. In quoting a bureaucratic report, Justice Ramaswamy states that because of the continuation of the tribes' customs in unwritten forms, the 'courts are unable to reach a definite conclusion' in resolving disputes. Moreover, the changing tribal customs influenced by 'other advanced societies' have also led to inability or uncertainty on the part of the courts. Accordingly, due to the belief that formal written codes or legal statutes aid courts in determining disputes, the report recommends formalising or codifying the tribes' customs. It does this even though criticisms of such bureaucratic demands abound (Ghosh, 1987: 89). To underscore the opposition to any official move toward codifying the tribes' customs, Justice Ramaswamy quotes Singh and Mahanti:

> [T]o reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from one community to other would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided (Singh, 1993: 1).

These remarks admit the contradiction: the static form of written codes denies the organic form of tribal customs. Moreover, the remarks suggest that a codified form of the tribes' customs would create confusion for tribe members and lead to their 'exploitation'. In referring to both bureaucratic demand and criticism, Justice Ramaswamy acknowledges the challenges and the impasse. However, the comparative analysis of the bureaucratic report and the empirical studies point to another consequence. One impact of the report's demand for codifying the tribes' customs is that it changes the 'invariable' or 'certainty' description. This demand views 'certainty' as written codes or statutory laws to provide the courts the convenience of definiteness in decision-making. On the contrary, the empirical studies confirm that the term 'certainty' implies consistent evidence establishing regional, local, or tribe-specific customs. Any act of codifying tribal customs shifts the certainty description from the tribes' particular views to an official view of the tribes' customs. The bureaucratic demand for a uniform codified tribe custom, thus, contradicts the certainty premise that privileges the local tribal custom.

Although Justice Ramaswamy endeavours to establish the certainty premise from the tribes' viewpoint, like *Ramalakshmi*, he overlooks custom's transient features, albeit with dissimilar approaches. For example, the empirical studies he cites as evidence of custom's invariability or certainty range widely from the early to late twentieth century. 'Continuing custom' would view such evidence as temporal and not applicable indefinitely. As mentioned, while emphasising custom's ancientness and invariability, *Ramalakshmi* also appears to ignore custom's transient features, although it somewhat mitigates the problems of neglecting such features by focusing on witnesses and official records of testimonies as evidence of custom, albeit with a limited range. On the contrary, Justice Ramaswamy prefers the convenience of readily accessible published empirical studies (Ghosh, 1987: 89).

The next section examines Justice Ramaswamy's conclusion.

Justice Ramaswamy's Decision

On the issue of legal recognition of tribal inheritance custom, Justice Ramaswamy concluded:

> It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, Customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilised sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends art 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.

As these remarks imply, Justice Ramaswamy refused to broadly invalidate Chota Nagpur tribal inheritance custom, which, as *Kishwar's* petitioners alleged, discriminates against women. As noted previously, the petitioners were members of two distinct tribes, Ho and Oraon, and they disputed the gender discriminatory inheritance custom as generally practised by tribes in Chota Nagpur. Although Justice Ramaswamy recognised the 'general trend' favouring 'patrilineal succession' as practised by the tribes 'throughout the country', he admits that tribal inheritance customs also differ and are local and group-specific, a premise he establishes through an extensive range of sources reviewed in the previous sections. Accordingly, due to the absence of explicit evidence on the unique inheritance customs practised by various tribes in Chota Nagpur, Justice Ramaswamy balked at determining the generally discriminatory nature of the custom.

Justice Ramaswamy's concluding remarks also highlighted the essential challenge of the law's treatment of customs. Restating his inability to decide without 'acceptable material', he said that such material evidence would have helped him determine whether inheritance custom is 'valid, certain, ancient and consistent …' His narrative of what comprises legally valid custom is similar to *Ramalakshmi*'s custom formulation, and the terms 'ancient' and 'invariable' in such a formulation pose evidentiary challenges. Nevertheless, in stating that 'customs … vary from tribe to tribe and region to region, based upon the established practice prevailing', Justice Ramaswamy sought to associate 'ancient' and 'invariable' terms with 'consistent' evidence as regards unique local and tribe-specific custom. Although the theoretical custom formulation and the practical approach are contradictory, Justice Ramaswamy follows a practical interpretation, similar to *Ramalakshmi*, to overcome the conceptual clashes.

However, unlike his earlier practical approaches of citing empirical studies from a wide time range, Justice Ramaswamy's conclusion purported to privilege precise evidence on petitioners' specific inheritance customs. Justice Ramaswamy refused to determine the inheritance custom to be discriminatory because he found there was no explicit and clear evidence of it presented by the petitioners. However, unlike *Ramalakshmi*, which centres on witnesses or testimonial records, Justice Ramaswamy did not offer any clarity about what would constitute clear evidence, and how that evidence might be gathered. Merely offering his inability to determine the existence of petitioners' specific inheritance customs and their discriminatory nature, Justice Ramaswamy moved on to consider the tenancy statute.

The Tenancy Act limits tribal succession to certain landholdings or ownerships along the line of male descendants. The statute also recognises the tribal customs in inheritance matters, which predominantly follow patrilineal practices. Accordingly, Justice Ramaswamy determined the gender inequality and constitutionality questions about the Tenancy Act. The majority judgment also dealt with these issues. However, this article does not engage with the statutory and constitutionality topic, as a complete discussion of these questions lies beyond its scope.

Conclusion

This article has examined Justice Ramaswamy's understanding of tribal custom in *Kishwar*. Drawing on the Privy Council's 1872 *Ramalakshmi* decision, Justice Ramaswamy reiterated that the law's definition of custom emphasises 'ancient' or 'antiquity' and 'invariable' or 'certainty' conditions. He also referred to various accounts, including empirical studies and official reports, to understand customary practices among some tribes in India. While Justice Ramaswamy pithily quoted the Privy Council's explanation of custom and briefly traced inheritance customs practised by a few selected tribes in India, this article has offered a more in-depth analysis of the works he cited. It has also examined the impact of the relationship between legal definitions of custom and tribal custom.

A prominent finding that emerged from my analysis is that the law's definition of custom poses difficulties for distinct tribal customs, especially inheritance customs. While the law's conception requires 'acceptable' evidence to point to a custom's ancientness and invariability, seemingly static qualities, such evidence, are impracticable as regards tribal custom, which is unique, varying, and non-generalisable. The analysis has also shown that Justice Ramaswamy's dissenting opinion privileged workable custom evidence to overcome the conceptual and practical impasse, as did the Privy Council in *Ramalakshmi*, that is, he either ignored or conflated the 'ancient' requirement, and accentuated and associated 'invariable' or 'certainty' provisions with consistent evidence on custom unique to a tribe's circumstances.

Although Justice Ramaswamy followed the Privy Council in privileging custom evidence, their evidentiary scope differs. While the Privy Council focuses on a limited range of evidence of custom, such as witnesses and official records of testimonies, Justice Ramaswamy scanned various sources, including empirical studies across a wide time range to acknowledge that inheritance customs vary and are local and group-specific. Whereas, in emphasising custom's ancientness and invariability, the Privy Council overlook custom's temporal features, they somewhat mitigate the problems this creates by focusing on custom evidence with a limited range. However, regarding Justice Ramaswamy's conclusion, it is unclear if he attempted to mitigate the problems when he refused to determine, in the absence of clear evidence, whether the tribal inheritance custom was discriminatory. Moreover, Justice Ramaswamy did not clarify the scope of the evidence he would consider to be sufficiently 'clear'.

A significant theoretical implication of the arguments presented in this article is that due to its evidence-centricity, the judicial understanding of the law's definition of custom lies in its application, that is, the evidence on inheritance custom accords meaning to the law's custom description. However, my analysis here reveals the conceptual and practical challenges, and that they discount temporality. Accordingly, it is possible to propose an alternative way forward: that custom's conceptual and evidentiary requirements in law reconcile with 'continuing custom'. This would resolve the conceptual and evidentiary impasse and views temporality in evidence as a significant predictor of custom recognition. While this implication is generalisable to all indigenous custom recognition, the judicial interpretative approaches will differ when tribal custom exists in legally binding precedents or statutes.

This article was limited to analysing the dissenting judgment in *Kishwar*. It did not discuss custom recognition in Indigenous women's inheritance matters in subsequent court judgments. Recent cases reported include *Kamala Neti v Special Land Acquisition Officer* (Supreme Court of India, 2022) and *Prabha Minz v Martha Ekka* (High Court of Jharkhand, 2022). However, these cases cite and employ the *Kishwar* formulation, including *Kishwar*'s dissent approaches to custom recognition of indigenous inheritance. What is now needed is a cross-case exploration of judicial understanding and recognition of Indigenous customs.

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