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The Routledge Companion to Northeast India



Edited by Jelle J.P. Wouters and Tanka B. Subba

THE ROUTLEDGE COMPANION TO NORTHEAST INDIA

The Routledge Companion to Northeast India is a trans-disciplinary and comprehensive compendium of a vital yet under-researched region in South Asia. It provides a unique guide to prevailing themes, theories, arguments, and history of Northeast India by discussing its life-forms – human and not – languages, landscapes, and lifeways in all its diversity and difference. The companion contains authoritative entries from leading specialists from and on the region and offers clear, concise, and illuminating explanations of key themes and ideas.

A hands-on, practical, and comprehensive guide to Northeast India, this companion fills a significant gap in the literature and will be an invaluable teaching, learning, and research resource for scholars and students of Northeast India Studies, South Asian and Southeast Asian societies, culture, politics, humanities, and the social sciences in general.

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CUSTOMARY LAW

Erik de Maaker

Throughout large parts of Northeast India, customary law is of great importance. Customary law encompasses rules and regulations that involve property, family relations, and land rights and are of particular relevance for those ethnic communities categorised as tribes. From a legal perspective, it is presumed that people who belong to a single tribe share a common language, religion, and culture. It refers to rules and regulations that apply, presumably, to all the members of such a group, while it may not have any relevance for people not belonging to the group. In those parts of Northeast India where it has a legal status, it takes precedence over other civil and common laws with respect to dedicated domains of life. To this end, it needs to be formulated in ways comparable to general law, presenting the rules and regulations that apply to an ethnic community as more or less unified and consolidated. Whereas much of the literature on custom in the region provides such consolidated accounts of customary law, other and more recent literature explores the process by which this consolidation or codification takes place (Goswami 2010; Karlsson 2011; De Maaker 2022). Customary laws, once codified, become inflexible, which renders them unable to adjust to changing political and economic conditions. When rigidly applied, such laws can legitimise the unequal and exploitative extraction of resources such as coal and timber, resulting in regimes of dispossession, despoliation, and ruin (Wouters 2020).

Historically, customary law has in a non-codified form been orally conveyed within given ethnic communities. Whenever conflicts arose that needed to be resolved, people who claimed authority, often elderly men, would state the principles or rules which, according to them, would apply in the given situation. Women would typically not have equal say in making such statements, neither in patrilineal nor in matrilineal contexts (Nongbri 2014). The same was true of non-adult men. These omnipresent hierarchies of gender and generation are increasingly contested since they are at times in conflict with the principle of equality before the law, which is central to the Indian Constitution.

The Constitution of the Republic of India explicitly creates room for distinct religious personal codes, which apply to people belonging to different religious groups and communities. At the same time, legislation that applies to a certain religious community is expected to be impersonal. That is, it should equally apply to any member of a given community and not be overly dependent on the interpretation of the legal authorities. To ensure that laws can function in such a way, they are written down, creating books of law that are considered the prime source of authority.

In Northeast India, states or autonomous district councils within states have certain domains of life regulated through codified customary laws. Such laws then create a legal realm that either connects, conflicts, or competes with the overall legal structure provided by the Indian constitution. What such laws entail varies a lot, and how it is imposed, and if and how people can appeal to the rulings made in accordance with it depends on their integration with district and state legislations.

The legal set-up of Northeast India accommodates the great ethnic and linguistic diversity of its populace. The Sixth Schedule of the Indian Constitution, created in the immediate aftermath of Indian independence, allows for the functioning of District and Regional Councils that 'have near full autonomy' with respect to 'administrative, legislative and judicial functions' (Goswami 2010, 8). The Sixth Schedule includes Autonomous Councils located in the states of Meghalaya, Assam, Tripura, Manipur, and Mizoram. In addition, following extensive political agitation and conflict, in the 1960s, more far-reaching constitutional amendments were created for 'tribal' states such as Nagaland and Mizoram. For example, Article 371A states that 'no Act of Parliament in respect to Naga customary law and procedure shall apply (...) unless the Legislative Assembly of Nagaland by resolution so decides' (Pereira et al. 2017b, 1). Such a far-reaching clause, which gives Naga customary law precedence over the laws of the Republic of India, does not apply to the Sixth Schedule areas, thus providing the areas that are covered by the later legislative amendments with better safeguards regarding the prevalence of codified customary law.

Codifying Custom

The legal makeup of the Indian state, in many respects, builds on structures of governance that developed in the colonial era (see, for example, Baruah 2008). These, in turn, were anchored in the forms of governance that preceded it, such as the de-centralised Naga and Garo polities or the more centralised larger or smaller states that existed in the region prior to colonial conquest. Consolidated polities were notably located in the fertile Brahmaputra and Barak valleys, which allowed for wet rice cultivation. In addition, the region encompassed extensive upland areas, which, in a political sense, mostly remained outside these early states. The societies of these uplands were mostly non-literate and created a judicial context through orally conveyed customary principles. Even though these uplands have by now long been integrated into the Indian state, at the village level such customary principles continue to be of relevance until today.

The customary principles by which people locally administer justice encompass a broad variety of rules, often guided by taboos. Historically, such taboos were not seldom religiously sanctioned. To some degree, such principles continue to operate today. For example, research on relatedness among Garo in Meghalaya shows that honouring ones' clan easily takes precedence over lesser issues (De Maaker 2021). In the early 2000s, a village court session ended with the decision to give a trashing to the accused by his own relatives, because he had put them to shame. That is, he had called upon them by demanding the village court to convene but then refused to provide them with a meal that had meat. This stinginess was perceived as an insult to the kin group as a whole, the anger about which took precedence over the actual conflict that triggered the trial in the first place (De Maaker 2021, 86–90). The situational interpretation of custom means that in such a context its formulation, and even more so its interpretation, depends on the persons who voiced it, that is, who claim – and perhaps are attributed – the power to do so. Legal principles, in other words, are then never disconnected from specific societal contexts and thus never impersonal.

After the colonial state came to occupy upland Northeast India in the late 19th and early 20th centuries, it created systems of governance that allowed for the exploitation of the natural resources of these areas, while otherwise demanding as little involvement (and costs) as possible. Most often, conflicts relating to marriages, divorces, inheritances, and so on were left to be resolved locally. Yet, in other respects, preceding political and legal practices were curtailed. To give an example, in the pre-colonial era, large parts of what now constitutes upland Northeast India would regularly see violent conflicts. This involved bloodshed, which was sometimes also religiously sanctioned, as in, for example, head-hunting (Zou 2005). But with the conquest of the uplands, the colonial state claimed the sole right to exercise violence. People were no longer allowed to use violence towards each other or towards the representatives of the state. The political but also legal principles that operated in the pre-colonial era were thus necessarily curtailed and restricted. The practices of governance that came into operation after colonial conquest in the uplands could be grafted on pre-colonial practices but could never be a straightforward continuation of these.

In the 19th century, travellers, administrators, missionaries, and the military began to compile ethnographic knowledge on the inhabitants of the expanding colonial state. Proceeding from a perspective on society which emphasised differences between groups, the various representatives of the colonial state began to create written records of the practices and rules which people belonging to the different groups regarded as authoritative (Cohn 1996). This resulted in classifications in terms of ethnicity, language, religion, caste, and so on. Groups who were neither Hindu nor Muslim and notably those who lived in 'remote' areas, were often categorised as tribes.

Certainly, in the 19th and early 20th centuries, very few of these texts, if any at all, derived from authors who belonged to the groups to which these practices and rules were thought to apply. Typically, authors would ask people who they presumed 'knew' these, to create written records. The records deriving from such interactions could seldom do justice to the complex layering of the moral and legal principles operating, in which dependent on the context one might overrule the other. Yet, those in charge of governance attributed a lot of authority to these texts, and until today administrators and judges may render these more important than what, according to people themselves, are appropriate interpretations of custom. In addition, these written records somehow render invisible that it is highly likely that within what are presumably consolidated groups, there can be disagreement about the formulation of certain rules and hinder these from being reinterpreted and adjusted over time. For example, women may resist rules which deprive them of property rights, as is evident from many cases recently documented (Hazarika 2020; Ltu 2020). These cases show that where male-centric rules are fixed in writing, it is almost impossible to reformulate these.

Writing down practices and rules implied their codification, creating the possibility to interpret them independent of the societal context in which they are generated, which allowed for their integration with formal legal systems. Throughout Northeast India, the colonial authorities sanctioned the enactment of those aspects of custom which they deemed acceptable. By empowering people who locally held authority (often senior men, as mentioned), these became a downward extension of colonial rule, as Comaroff and Comaroff have argued in relation to the position of 'tribal leaders' in colonial Southern Africa (Comaroff and Comaroff 2018, 1). As such, these leaders became crucial to the enactment of indirect rule. For the African context, Mamdani argues, the customary rule became 'an indispensable armature of colonial governance under in/direct rule; the two, direct and indirect, being "two faces of power" rather than readily distinguishable regimes of domination' (Mamdani 1999, 862). Customary law, as the codification of customary practices, thus created an interface between a given societal context, a lived reality,

and the judicial structures encompassing it. While this enables the channelling of state authority towards the local level, that has (certainly historically) not ruled out local level attempts to push back against the powers of the state.

An example taken from Garo Hills (Meghalaya), where one of the first Autonomous District Councils (ADC) was created, may be cited here. In the early 20th century, the Garo Hills ADC depended on the implementation of its policies on Garo village heads, while the inhabitants of these villages, in their economic, religious, and political behaviour, created realities which the ADCs had to live with. The power of the village heads to 'push back' the state is amply illustrated by a 'revolt' in the early 20th century, led by village head Sonaram Sangma, against claims made by the colonial state towards large tracts of village land (Karlsson 2011, 133–37). The protest shook the district administration and in addition to repression resulted in the mapping of the village lands throughout Garo Hills, which has created an important safeguard for communal land rights that has remained in place until today. Perhaps in part due to such instances of – admittedly rare – revolt, the village heads retained their authority in the eyes of the people who depended on them.

(C)ustomary authority, whatever its ebbs and flows across space and time (...) lived through the colonial epoch as if it had always been there, would always be there, always broadly the same even where/when it was obviously different.

(Comaroff and Comaroff 2018, 8)

In other words, for Garo Hills, the relation of the village heads to the district administration came to legitimise their position both towards the local context to which their power applied and to the state.

Challenging the Customary

The customary laws in Northeast India have been explored in a large number of volumes. This includes a 43-part series, produced under the supervision of Jeuti Barooah (personal communication), each dedicated to one ethnic community and published by the Law Research Institute of the Gauhati High Court with the sponsorship of the North Eastern Council. The councils of Autonomous Districts are empowered to establish village courts, a power which elsewhere in Northeast India often rests with the state judiciary. These village courts typically try minor cases, while cases that include serious violence are referred to a higher-level court. The High Court judges are expected to follow written guidelines such as the ones provided by the Law Research Institute. According to a former director of this Institute, they are expected to treat the customary laws as statutory laws, leaving as little leeway for a flexible interpretation as possible.

A detailed outline of the multilevel judicial landscape is given by Sanjib Goswami (2010). He notes that given the nature of custom, i.e. it being context-dependent, its codification can never be exhaustive. He also raises the question as to what degree the customary laws and practices, thus 'sanctioned' by the state, can deviate from the statutory laws. While there are many possible domains that can give rise to tensions, these have in recent decades been most profound with respect to the position of women. As was evident from the protests that emerged in 2017 in Nagaland over the unwillingness of men to allow women to join representative bodies (Ltu 2017), male dominance enshrined in codified customary laws can easily go against the rights of women. It seems very likely that codification has rendered customary practices inflexible, with at least some men taking advantage of the preferential position which this provides to them. Conflicts such as these are rife throughout the region and are analysed, among others, by Fernandes et al. (2005) and Roselima (2014).

Customary laws typically also regulate access to land, and being geared towards earlier economic patterns creates ample ground for contention (De Maaker and Tula 2020). Historically, the economies of the uplands of Northeast India were primarily geared towards subsistence cultivation, but increasingly this is being replaced by cash crops. As a result, land can be put to different usages. Moreover, as the rural economies monetarise, land is increasingly mortgaged or even sold, albeit mostly within the clan. If settling conflicts over land at the local level fails, customary laws become the yardstick for their settlement, rendering their formulation and interpretation essential. Many scholars have argued that conflicts over land are at the core of the contentious political situation in Northeast India, which once again underscores the importance of a crucial assessment of the relationship between customary laws and the practices it is supposed to reflect (Roy and Rizvi 1990; Pereira et al. 2017a).

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