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# LEGAL TRADITIONS AND INEQUALITY: CUSTOMS, LAW, AND THE COMMONS

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"Whatever appears to a State to be just and fair, so long as it is regarded as such, is just and fair to it."
Plato in Theaetetus, 167 C.

The purpose of the paper is to examine the principles of customary institutions by which the commons were organised and regulated in pre-colonial Punjab with a view to assessing the measure of inequality that may have existed then and the changes that were brought about by positive law enacted by Governments both imperial and national. At the very outset it is necessary to point out that this is a formidable task because the concept of custom, as Ludwig Wittgenstein puts it, "has a family of meanings". It is possible to interpret that inequality on the commons in customary traditions could have been "fair" just as equality in positive law can be "unfair". Such normative considerations depend on comparing the principles by which legal traditions set up standards of fairness. Customs which regulated access, management and use from off the commons derived their *lex loci* from usage. And the primary aim of an usage was to bring about order on the commons. Custom was thus an artefact, crafted from subjective concerns of those directly involved. If order was the desired object of the custom and if this could be sustained only by the authority of an hierarchy of unequals then collective rationality deemed it "fair" that it be so. Its very legitimacy lay in the fact of its continuity over time. Continuity did not mean stagnation. Rather change in the custom revealed its inadequacy to meet a perceived need; and thereby indicated its adaptive capacity to the collective jural will and to the general environment. Desuetude meant its redundancy or abrogation.

On the other hand, it appeared that positive law enacted by the British in the Punjab gave the impression of its setting up an objective standard of fairness specially since it was supported by a duly elected parliament no

matter how remote. A rule of law even recognised native institutions by due process of enactment -- The Punjab Laws Act of 1872. It recognised Customary Law as the first principle by which the commons were to be organised but not to run counter to the principles of justice, equity and good conscience which were the pillars of positive law. Representation of justice as blindfolded equality balanced on weigh scales was perhaps not an inept illustration of the objective standards of "fairness" to which an age of humanism aspired. The questions that arise here are: Should law be indifferent to contextual differences as well as to intergenerational considerations? Questions of "ought" and "must" are important, and must law abandon these normative considerations in favour of what is an objective standard? Presumably these may have been important considerations for Customary Law, as it existed almost anywhere in Europe and in India. In the Punjab, customs were characterised by a flexible *lex loci* rather than an insistence on universal principles as in the case of positive law. Therefore, if we seek to look for comparisons of "fairness" in both the systems we need to look at the contextual differences of the narrative in which they were embedded. This paper addresses a very small part of this consideration. Also application of standards of fairness leads to questions of intent and content in both concepts of equality and its opposite -- inequality. Is equality an appropriate measure of "fairness"? And similarly is inequality necessarily "unfair"? These questions further require us to elucidate the terms equality and inequality at different levels -- economic, social and political. To give an example, women have de jure equality in India but not so at the de facto economic and social level. Discrimination has no rule.

It may be a matter of coincidence but is significant that the subject of this conference -- inequality on the commons -- was a major aspect of the post-1947 land reforms in India, and therefore these questions are relevant. Yet the commons were a non-issue at the time. It was not in 1949 that the commons took the centre of the stage as it does now in India. It was only in the 1970s that the growing landlessness directed attention in the rural areas

to the issue of the commons and was linked to that of inequality in the skewed distribution of land ownership in general and control of the village commons in particular. In the general concern for inequality, it was overlooked that in pre-colonial and colonial Punjab, the commoners were not agriculturists alone and that pastoralists were involved too; and within the village communities there were others as well, not all of them land-owners, but tenants and service groups all of whom had customary user-rights on the commons. Therefore, we believe there *was* something equal about "inequality on the commons" in the past and that *now* there seems to be less so.

In dealing with real contemporary situations we have come far away from the Hardinian concept of every rational herder having access to the commons by virtue of his having sheep or his ability to increase the numbers in his herd. Such freedom on the commons had *never* been a matter of natural presumption, even in the "primeval wastes" of the Himalayan Ranges, the African Sahel, the Andes, the Eurasian Steppes, the Antarctica and the Wild West. There has been in existence from early times (if we so choose to recognise) norms of access, appropriation and withdrawal which formed part of the customary traditions of the ethnic communities of the region. Entitlement to the commons has not really been a matter of open access, albeit there has been free-riding over them. Such rights have been circumscribed by customary institutions of policing, monitoring and sanctioning. These were in most instances, as in Europe, starting from medieval times, interventions by the State which started to set up its own rights and those of private and individual property rights through the means of positive law and thus have been prominent interventions in these customary institutions on the commons.

Thus it is that there emerged two sources of institutions-conventions and statutes, which stood juxtaposed against each other with different perceptions of inequality. In comparing these two legal traditions, Lord Macmillan's lecture in Edinburgh on Law and Custom in 1949 brings out succinctly the distinction with which we are concerned here, namely that "Law is rigid and imperative. It admits of no justification for a departure from

its letter. Custom on the other hand, is flexible. It permits exceptions and it insensibly adjusts itself to changing conditions. No legislature, however prescient, can foresee in framing a statute every case which may arise and almost every Act of Parliament inevitably creates hardships in circumstances which were not thought of when the measure was enacted." It would almost appear that customary law may have been better equipped to handle inequality on the commons as opposed to positive law.

## The Setting

In a historical setting, the context of inequality on the commons has changed with political ideology, social structure and legal traditions. These are very broad terms of reference, so we will confine our attention only to -- legal traditions and the commons. By legal tradition we mean the sphere of influence of institutions in the juridical order of a society. In British Punjab we are concerned with customary law of the agricultural tribes and that of positive law which was enacted in the first instance by the Government of Punjab as a part of Pax Britannica and then later as a part of the Union Government of Independent India. This paper will highlight the changing context of inequality as erosion of the institutional sphere of Customary Law and that of an indigenous juridical authority took place within a structure of a modern *rule of law* which was determined by institutions of statute and third party mediation of judges in law courts. At the same time we need to remember that there were underlying political motivations in legislation and ideology in matters related to social structure. For the sake of brevity we will touch upon only one aspect of political ideology since it concerned the *intention* of the Governments enacting specific legislation affecting the commons and examine those *contents* which were intended to affect the relationship of the different elements in the social structure of rural Punjab.

## Historic

Here we will compare two political situations one at the beginning of British rule in the Punjab and the other of the Indian Government at the time of Independence. In 1849, when the Punjab was annexed the East India Company

was more or less controlled by the British Parliament, which was evident in the Despatch of Governor General Dalhousie marking the event in which he desired "to uphold *Native institutions* and practices, as far as they are consistent with the *distribution of justice* to all classes"[1] (my emphasis). The intention was reiterated in Queen Victoria's Proclamation in 1858 which had formally declared India's colonial status. There was no shadow of doubt that this meant an indirect rule by the British parliamentary system -- a rule by legislation. At this point there were several reasons which could explain the public intention to uphold native institutions. One, was that the Sepoy Mutiny of 1857 had signalled to the new rulers the political consequences of meddling with the political institutions that existed in India and so the desire of a Parliamentary democracy to uphold them. Secondly, native institutions like the village community appeared to be sturdy social units, as was observed by Carles Metcalfe early in the nineteenth century, and capable of keeping order in rural areas apart from being good fiscal agents for the collection of revenue, which helped in administering a vast country with a handful of British revenue collectors. Thirdly, the British Parliament's desire to rule by law seemed to coincide with this system of human order which was regulated by customary norms very similar to the common law system in rural England. Finally, the British felt more comfortable with a pattern of customary institutions of property rights which was guided less by either Hindu or Muslim law and more by the pragmatics of material conditions of the region. This was in keeping with an Imperial desire to bring social cohesion in a heterogeneous society in India under the umbrella of a secular judicial system which would refer to a "universal" code based on equity, justice and good conscience; and that could become a reality with the help of the then existing social structure which had kept order in the rural areas -- namely the village body of proprietors. Hence the initial move was one of *laissez faire*. The Village Community and its communal control over the commons were recognised. Subsequently, however, statutes enacted in the Punjab did erode

some of the institutions and the authority of those who kept order on the commons.

In contrast to this situation, in 1947 when the Indian Government took over, the political ideology of a socialistic pattern of society, demanded the demolition of the older system of order associated with imperial structures and social inequities which was a part of it in the rural areas. Overnight the same village proprietary bodies or the malikan-deh which had been accepted by the Colonial rulers as repositories of ancient customs, now appeared to be the strongholds of traditional tyrannical caste-ridden cliques opposed to change and development. One would ask how this happened in Gandhi's India, but that is a different story. Thus it was that, exactly 100 years after the Punjab was annexed, by the British, that the Indian Government in 1949, announced the Land Reforms by which the different states were to rescind certain rights to property rights recorded and legalised by the colonial laws with the intention of setting aside the social inequities which upheld it. A situation exactly opposite to the European Enclosure Movement was intended with the creation of open access on the commons and the removal of the erstwhile commoners' control over the commons. The actual situation diverged from intention in some of the States within the Union of India. Punjab was one of them.

Character of Change on the Commons

These changes in the legal tradition were to do with the shift over from the governance of the commons by the Customs of self-governing communities to the tradition of a modernising colonial Government which believed in a parliamentary form of indirect rule by law which meant conducting enquiry into the rights to property, and recording of these rights in the rural areas by partial codification of customs and modification by Statute. The spheres of influence of these two legal traditions -- Custom and Statute waned and waxed accordingly, albeit asymmetrically. We will examine the nature of the transition at two points of time in the matter of one century: first, when an existing system of property rights devised by self-organising communities were defined by a revenue collecting authority in the nineteenth century and the

rights so recorded were no longer regulated by self-governing juridical bodies like the panchayats and the jirgas but were superseded by modern law courts set up by statute. And secondly, when the whole situation was reorganised and then redefined by a reforming nationalist government after 1947.

Analytic

In the Punjab, Custom as the basis of a legal tradition was distinguished by two features that gave Customary Law a momentum all its own. As Lord Macmillan puts it: "Perhaps its chief advantage is its inherent capacity of self-development and adaptability to changing conditions, its flexibility."[2] Custom was thus at once enduring and stable on the one hand and on the other vulnerable to changes brought about from within the system and from outside.

* *Custom in the Punjab, for one was embedded in the narrative of the agricultural tribes.* This was not uncommon. In the opinion of Robert Cover, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.... Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[3] Such had been the history of the Teutonic and Germanic communities of Western Europe as well. So had it been for the story of the sedentarising pastoral tribes in the Land of the Five Rivers for centuries prior to the British arrival on the scene. Crafting of usages had been a part of the process of living in environments with human ingenuity as the only capital. Thus, according to the Common Law system in England too, antiquity of a custom was an essential ingredient of a custom where "usage must be so ancient that no evidence, verbal or written ... must have existed 'from time whereof the memory of man runneth not to the contrary'."[4] In India, "the Hindu lawyers in common with the Roman jurists, seem to require that the usage or custom should be 'immemorial,' or *inveterata*"[5] to be recognised as valid custom. This apparent similarity in the two customary traditions was recognised by Henry Sumner Maine -- the legal adviser to the Governor General, John Lawrence who had also

been the first Lt. Governor of the Punjab -- and who observed in his speech on the occasion of the passage of the Punjab Tenancy Act in 1868, that "the foundations of a custom *is habitual practice, a series of facts, a succession of instances, from whose constant recurrence a rule is inferred.*"[6]

* Custom was in the second instance entrenched *in a cluster of meanings* as the agricultural and pastoral communities in the Punjab had to deal with diverse contingencies and multiple relationships at different levels of operation. Such diversity was occasioned by both the cultural, and what Vincent Ostrom refers to as linguistic traditions of those who were concerned with the *lex loci* of their lives. For example, within each settlement members of the proprietary body of a family or clan had to deal with pahi kasht cultivators, that is itinerant cultivators, service groups and also with other clans within the tribe and then with other tribes as well. Finally, they had to come to terms with tribute/revenue collecting rulers be they Mughals, Afghans, Maharattas, the Sikhs and finally the British. Needless to say the physical diversity of the Punjab region contributed to these complexities in making the meaning of "custom" or what Ludwig Wittgenstein would have called a "family of meanings".[7] Explaining this in his Philosophical Investigations, Wittgenstein says that certain concepts have "blurred edges," and that just as it would be difficult to draw a sharp image from a blurred vision, so also would it have been a hopeless task to find definitions corresponding to our concepts in aesthetics and ethics.[8] Wittgenstein further raises the question as to whether it was "even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?"[9] Thus it is that we must recognise that Custom as "the word must have a *family* of meanings."[10] (author's emphasis). Elinor Ostrom will label this a "fuzzy set".

In this essay we will confine ourselves to just these two features of Customary Law as a legal tradition in the Punjab, for in doing so we will be able to focus on how the perceptions of all those who had power over the commons affected the relative positions of the commoners. Therefore, here we

will attempt to demonstrate how these perceptions altered Customary Law which was open to change, first, whenever the external and internal circumstances of the actors in the *narrative* changed and second, whenever circumstances led to a *definition* or codification of a custom which was thenceforward confined to that singular meaning. These transformations brought about change both in the context and in the perception of inequality on the commons in the Punjab. They were visible when customs were both ossified and transformed in the course of nearly two centuries because firstly, the narrative of Punjab took a different turn each time there was a political change as it was in the case of the colonial rulers resorting to a tradition of Parliamentary system of indirect and centralised rule of law by Statute and then with a Nationalist Government after Independence. Secondly, these intrusions into a customary tradition encompassed the heterogenous elements of the Punjab agri-pastoral communities under one legal umbrella. Further, "codification" of customs became an administrative procedure so that in this process certain linguistic nuances of customs were lost. Also definition of customs which were distinct in some areas offered scope to standardise them and to apply them elsewhere where the custom was either indistinct or not applicable. Thereby, although a custom became sharply etched, its adaptability was reduced. Hence there was less room for manoeuvre within the communities -- a quality of flexibility much appreciated and specially "appropriate" for indigenous juridical bodies which could use a good deal of discretion in matters related to rights to the commons. On the other hand, such malleability and vagueness of a custom caused "embarrassment" to the British judges in law courts at different levels. At such times the honourable justices frequently resorted to the maxim of "equity, justice and good conscience" or simply precedent, albeit the precedence of Punjab Chief Court judgements.

An example will illustrate this. Membership of the proprietary body in an agricultural community, which also gave access to the commons, was defined by several criteria -- blood relationship "warisan yak jaddi"[11] or membership of an agnatic community, being one of the main. If in certain

instances a member of the proprietary body absented himself from the village, his rights to the village commons was not extinguished, he could by virtue of this right return and reclaim his position and claim his share in the commons even after a lapse of as long as 50 years! That is how "the public voice will admit the title of the individuals to their ancestral shares,"[12] even where the sharer has been out of possession for one or two generations. In this way, large numbers of exiled proprietors in 1851-52 had "recovered possession of their land in Hazara, and other parts of the country in the early years of the colonial rule."[13] Or if a proprietor had sold his land in the village he could still sit on the auditing of accounts or bujharat which dealt with the common assets and liabilities of the village. It was this seemingly indestructible right of the proprietor to his bapota or patrimonial inheritance which drew from Todd the picturesque description in the annals of Rajasthan by Todd as one akin to the akhya dhub or the roots of the ineradicable dhub grass of the north. Be that as it may, this was an amorphous situation, one which the British, with their passion for definition or labelling could not resist by codifying in the records and remedying by legalising "limitation" of claims to a right and the right of "adverse possession".

Narrative and Perception of Inequality on the Commons

Although the issue of inequality on the commons was the central focus of Land Reforms in India, nevertheless, it was only in the 1970s that the issue came up sharply because the Government of India took action entirely upon its *own* perception of this category of communal property as against those of the communities which had nurtured institutions through a millenium of customary traditions. A clash of perceptions such as this needs to be seen in an episodic confrontation within the larger narrative of colonial Punjab. An incident on the Kanjhawla Commons serves to elucidate both the issue of the commons and the importance of perceptions of inequality thereon. Kanjhawla is the tika or head village of a cluster in rural Delhi which was a part of British Punjab till 1912, when the Imperial capital was established. In 1978,

the members of the proprietary body protested the Delhi Administration's distribution of 123 acres of one-acre plots from the shamilat-deh or the common lands to 123 families of landless lower caste members of the village residents, as a part of the Government's poverty eradication programme. The incident brought into the open the inherent tension between two perceptions of rights to the commons in two legal traditions -- that of customary usages of a community and those contained in the clauses of positive law enacted by a nationalist State. The situation had long roots in the narrative of colonial Punjab to which we now turn.

## The Region

The story of Punjab has to necessarily rest on the Colonial records. These were the answers of leaders in self-governing communities, to British query into "customary rights" on the commons. These records themselves were executed by individual officers who had particular perceptions. For example, Robert Maconachie the settlement officer for the district of Delhi in 1880, thought the records "can have little or no official value"[14]; while others "doctored" the records as it seemed to have been done in the district of Ludhiana[15] where the village administration paper or the wajib-ul-arz of 1850 did not really contain "either the customs or the agreements of the people" but expressed rather "what the settlement officers thought to be proper rules for the guidance in the matters concerned."[16] Similarly, in the case of the reports on district customary law -- the Riwaj-i-am -- there were officers like S. S. Thorburn in Bannu district, who candidly admitted having "shaped public opinion on most questions in the direction on which he himself and others of long experience thought equitable."[17] Thus, although these considerations led Rattigan, a well-known barrister in the Punjab, to conclude that the value of the records were reduced to zero, yet historical records of this genre are always valuable and preferable than no records at all for they can provide some insight to the real situation.

These records of customs, particularly those related to the commons bore the imprint of British imperial revenue imperatives. They had to do with the

pragmatics of revenue collection in an area which was widely dispersed, and therefore the principle of "joint revenue responsibility" borne by self-organised communities in existence in mid-nineteenth century provided a convenient and standardised solution. In return, the joint rights of the proprietary body or the malikan-deh to the commons were perceived as a part of this revenue structure and therefore recorded and legally recognised. The narrative of the commons unfolds with the intention of a well-meaning Imperial Government to enquire into the customary rights of these bodies on the assumption that the revenue payers were the actual cultivator-owners. There was "bewildering" diversity in social formations but essentially the situation offered a choice between the tribe and the village as the unit of society. On the one hand, the Afghan Frontier had hardly advanced "beyond that of joint ownership of the tribe, where the only law recognised is the decision of the Tribal Council (jirgah) and where private wrongs must be redressed by private vengeance and whose ideas of law and custom were primitive while on the other hand in the Eastern Punjab the tribes though clearly marked, have been largely sub-divided into 'gots' and clans and these again into separate communities."[18] In the event, the village rather than the tribe or the clan was chosen as the unit of society, or rather of revenue administration. And although there was further subdivision within the village: yet, rights in land were increasingly looked upon as matters affecting groups of agnates -- the warisan yak jaddi -- rather than the village brotherhood generally. In large areas where villages were set up in the wilderness by the British, they acquired a set of customary rights akin to those of the tribes to which they belonged or to those resembling the ones in the neighbourhood. These village societies had a specific recorded set of customs and rules built in as a part of the system whereby their joint character could be maintained, if for nothing else, at least to facilitate the collection of revenue on the principle of "joint revenue liability". Thus it was that blood ties as a basis for a community were replaced by the tie of the land that was held in common and paid for in common. The commons became the symbol of communal coherence.

And as the proprietary rights got increasingly sub-divided among individuals in the course of the nineteenth century, the unity and communal hold over the commons started to decline. With this began the story of an unequal struggle for the commons and "tragedy".

In the situation, the village proprietary body -- the malikan-deh -- became the source of customs for "regulating the internal economy or administration of the general affairs of the village community."[19] At the same time the tribal heads became the source of customary law which determined "the transmission or devolution of private rights, such as inheritance."[20] The argument behind this dichotomy in the source of customs was that the laws and customs of inheritance could not for example be based on the peculiar wants or requirements of a single village or a particular age but should depend rather upon a general notion of equity and justice that the nearest kin should succeed to a man's estate; on the other hand, "it was but natural that the local, social and particular kind of influence would be at work,"[21] on those customs which regulated the affairs of the village economy. Hence the village commons were regulated by two sets of customs -- one at the tribal level in the district and the other at the level of the proprietary body in the village. The village customs thus had little or nothing to do with religion; they governed alike the Jats and the Sayads and the Brahmin, for upon their general observance depended the "maintenance of the village political organisation."[22] Hence, a divergence occurred between village customs and the regional customs being administratively separated. These records were adjudicated at the time of the settlement and the rights in property both private and common then came to be defined by "a rule of law" which recognised *custom* as the *lex loci* of rural society. In the process the access to the commons was protected by the recognition accorded to the joint body of the proprietors and their customs.

*Thus it is that rights to the commons became everything to do with being a member of the proprietary body but very little to do with religion and*

*therefore inequality associated with the commons was not really linked with the caste system of the Hindus specifically.*

The story of the commons however took a different turn when the Punjab Government discerned their interest in the revenue was not so closely dependent on who *owned* the land but rather on who was the actual *revenue payer* that is the man who produced the surplus -- a cultivator. As it turned out, the owners were not the only cultivators; tenants in the Punjab had customarily shared in the revenue liability of the village communities specially when demands from despotic rulers threatened the very existence of the village. This had happened during the Sikh rule too. Come the British, the proprietary bodies had therefore not hesitated to declare the revenue paying status of the tenants at the time of the Settlements. This public declaration at the time of settlement cost them dear. British settlements had linked revenue responsibility to proprietary right and hence to the share in the commons. Tenants by this definition would also qualify for rights which the proprietors had. Thus when in 1864, a Settlement Commissioner by the name of Edward Prinsep made close enquiries in just one district, Amritsar, he was persuaded that the tenants had been granted rights which in time would equal that of the proprietors. This was what a *prescriptive right* was all about. When Prinsep tried to undo the settlement records of Amritsar it set the whole Punjab Administration agog. In this philosophical turn of events, the tenant's rights in general generated a fair amount of debate in the Punjab Administration and as early as 1868 the Punjab Government sought to legislate on behalf of tenants in the villages, who then became quite another class of right holders on the village commons. Tenants of long standing, acquired the status of occupancy rights and with this went the rights to the commons. Thereby tenant's rights to the commons were no longer a subject of custom or even that of settlement records but one of statute. A new legal tradition emerged -- that of positive *law*.

Tenants now acquired rights of occupancy by law on the common lands if they had cultivated it for the requisite number of years specified in the

Punjab Tenancy Act of 1868. Ironically, members of the proprietary body did not have the right of occupancy since no single proprietor could acquire individual ownership rights on common land on which they had joint rights. This was a legal equaliser on the commons! The result however was to create tension in the villages where now the proprietary body found its customary rights to the commons circumvented by law. As opposed to greater equality on the commons, we have court cases to prove that tenants had to fight for their rights and not all tenants could succeed, since going to court was not always feasible. Further, if the courts succeeded in procuring "justice" to the tenants the proprietary body could always take recourse to partitioning of the commons and remove all traces of the commons!

Once statutory intervention diverted the narrative it was a matter of time when the erosion of customs would begin and with it the system of indigenous conflict resolution. The process was hastened with the setting up of the Chief Court of Punjab in 1866. This legal body increasingly found "customs" vague and without recorded precedents. Specially did they point out how laws of private property depended on diverse sources of law with unrecorded customs of dubious antiquity. Their Lordships therefore initiated a second enquiry into property rights via the recording of customs at the district level of tribes which did not owe allegiance to the classical Hindu Law or the Muslim Shara. It led to the passage of the Punjab Land Revenue Act of 1871 and the Punjab Laws Act of 1872 which introduced a full blown system of Western jurisprudence. Such a system scrutinised concepts of custom, equity, rights and justice in the clinical environment of Western legal tradition. While the villager fell in line with this process of even-handed justice, it created a sense of insecurity among those who had been erstwhile decision makers in the village. Consequently it set in a process of hardening of attitudes discernible among the members of the proprietary bodies towards those who had no land but depended on the communal resources of the village. This is evident from the legal suits brought up to the Chief Court of Punjab through the nineteenth century.

The Cluster

The narrative of the cluster runs parallel to that of the region till 1912, but the subsequent period shows a divergence from the general trends. While the region experienced an erosion in traditions of communal hold over the commons, and the community started to dissipate, here in the cluster however the ties continued to be strong. Not only did the commons survive but evidence goes to show that the Jat tribe of Delhi continued to hold village panchayat meetings of as many as 100 villages at a time to decide matters of common interest. They still do so. Oscar Lewis's field notes taken in the 1950s from one of the villages of the cluster shows that in 1915, a joint decision of 100 villages led to the partition of the common lands of the village Rani Khera. This incident reveals several aspects of communal perception of rights to the commons specially those in the long fallows. In this specific case one of the members of the proprietary body had adopted someone from among the relatives of his wife. Consequently the relatives of the wife started to squat on the village commons. If this situation had continued, then the squatters would have taken recourse to the Punjab Tenancy Act of 1868 (amended in 1887) and declared their rights of occupancy. To preempt such a move, the 100 village panchayat decided to partition and privatise the commons of the village. This jointness contributed to controlled access to the commons and the prevention of any one member from acquiring more than his share in the commons; but it also contributed towards a certain exclusivity in which non-proprietors suffered. A large part of the reason lay in the situation of paranoid created by the statute which gave protection to the tenants. Thus while in the region, recording of village customs isolated each settlement from the others, in the cluster the tribal ties continued to be strong. But not for long.

After Independence, a National Government created open access to the commons by the Land Reforms Legislation in 1949 by declaring an end to the proprietary body's rights to the common lands or shamilat-deh . Henceforward they were to belong to the Gaon Sabha which comprised of all the residents of

the village. Decision making was to be in the hands of an elected body and one of the members was to be a woman. On the face of it this was a piece of legislation which aimed at redistributive justice in general and on the commons in particular. The community was redefined and access to the commons was by qualification of residence and not property ownership. Further, as a part of the poverty eradication programme, ownership rights on the commons was created by distributing pieces of land from it. There were three assumptions here. First, it was argued that the inequality in the rural areas was because of the colonial structure of land ownership and rights like those on the commons, which allowed concentration of power in the hands of the proprietary body to exploit; Second, it was assumed that this growing inequality could be checked and prevented by positive law; along with this there was also a general association of caste as the basis of inequality on the commons, therefore the lower caste was given priority to the commons. The Government expected that the dissolution of communal control over the commons by the body of the malikan-deh or the proprietary body would automatically remove inequality on the commons and also bring retribution for the age-old tyranny of the upper caste over the lower one.

In conclusion, it appears that State participation in the narrative of the Punjab led to the substitution of an objective statutory value system for the subjective customary one. Relationships were now on the basis of rules prescribed once and for all and for everybody regardless of the situational differences. Customs regulating rights to the commons were diverted away from a sense of reciprocal sharing to one of confrontation. Thus, what was a story of communities surviving on the commons as a strategy to fight the insecurity from political and economic uncertainty turned out to be a new situation of confrontation and conflict. The malikan-deh, faced with this kind of insecurity to their identity, are less likely to cooperate in building up communal resources for the future.

In conclusion, it appears in this stage-managed narrative that the Colonial Government presumed in the first situation that legislation could

*control* access by defining the rights to the commons and thereby would optimise appropriation and withdrawal from the commons; and the Government of India assumed in the second context that *equal* access to the commons could maximise welfare. In the process, positive law overturned the institutions of access, control and enforcement of traditions laid down by customary law. It thereby overestimated the power of positive law and underestimated the efficacy of customary law. Contrary to expectations, State mediation far from restraining overuse has actually enhanced the attraction of free-riding on the commons; further, instead of correcting the imbalance of social inequality on the commons which may have existed in the traditional set-up, these measures have exacerbated inequality by the destruction of the commons. It is tragic that State mediation in "inequality" on the commons has been destructive of communal organisation and whatever customary reciprocal relationship that the landed-owners acknowledged towards the landless and socially under-privileged disappeared with State sponsorship of de jure equality. The last two centuries of colonial and post-colonial India bear witness to the phenomenon.

## Definition and Inequality on the Commons

### Customs and Inequality

We perceive the commons in north India as an aspect of human order in village communities. The rules governing the commons set up a *nomos* -- a normative universe of standards by which cultivators and pastoralists related to each other. These relationships were autonomous, established by self-organising communities which evolved and sustained customary institutions to govern land use and property rights both within settled and cultivated areas and those which were not settled and uncultivated. Customs were *enabling institutions* which kept an ordered interaction between two major users of both arable and the pasture. Survival meant competing with others for common natural resources for a living. Even with low demographic pressure there were some resources for which there were alternate use. To do this a community needed to protect itself against externalities imposed by other users of the

same or similar resources and for this, mutual "coercion" in the form of rules had to be devised to prevent friction involving both use and misuse. These arrangements were made at different levels -- at the regional level: in the forests of the plains and hills, in the riverain of the major rivers, the upland grazing tracts and in the marshes -- at the local level: in the residential area, in the easements, ponds and pathways, in the short fallows after harvests and in the long fallows or the common pastures of the villages. This demanded *reciprocal* arrangements. Collectively the users could build up stamina to contain free-riding within a group of users and prevent externalities from without. Such reciprocity could not hold in the face of recurring dissension among the users of the commons. It meant building up incentives to arrive at a *consensus* and stick by them on the belief of mythical or actual blood ties or the perception of a common way of life -- *of the brotherhood* or bhumbhai. In the absence of a market and state allocation of resources, communities found the principle of blood relation a basis of *trust* for conducting transactions. The basic unit of the organisation was therefore the family, the brother-hood-in-occupation, clan and the larger group -- the tribe. It could be the other way round too. That is, the tribe could split up on the basis of clan groups related by family ties. The reciprocity among such groups would be based on mutual honour and trust. It was a culture that would depend on "the influential members of the society"[23] which in the case of the Punjab were the heads of families, clans or tribes of the land-owning body of the village or the malikan-deh. One major principle on which such a juridical tradition depended was *ascription*.

Ascription and inequality: We will start with customs based on ascription since joint community of interest in the commons was based on blood-ties to begin with at the time when they first settled in an area. Membership of the proprietary body depended on the fact of birth in a family. This gave rights to hold, manage and use the commons. Therefore, these rights were expressed in shares or hissa of the revenue liability and the benefits. How equal these rights were depended on the tenure of the village and the

custom of inheritance within the family/families. If one family held the village then the tenure was zamindari or pattidari and the principle of division would be equal ancestral shares. The result could become unequal over time depending on the growth of the related families. If however unrelated families held the village then the tenure was bhaiachara and in that case the shares in the common were not necessarily equal but be proportionate to the amount of land each family or individual family held. Within a family, regardless of tenure of the village, the custom of inheritance among the agricultural tribes was either Pagvand or Chundavand.[24] This meant in the first case, a division of land among sons from just one wife, or, as in the second case where there were two wives, the division was equally among the wives first, and then equally among the sons of each wife.

The customary principle of holding common lands on ancestral shares was a device to: (a) prevent the alienation of the share in the common land to anyone who did not belong to the same family, or to the sub-divisions of the family -- the thok, tholla,or patti; (b) to hold at bay the entry of a purchaser of land in the village in the decision making activities; and (c) to disallow inequality in the balance among co-sharers. Ancestral shares were further strengthened by inheritance customs based on the agnatic principle which was a strong influence on the attitude of co-sharers towards their share in common lands. In the event of shareholders leaving, or dying without heirs or selling their land, the shares would not be abandoned or transferred to anyone outside the village proprietary body. This prevented the dilution of interest in the commons and helped to prevent any individual family's interests from being harmed. This is precisely what kept agnatic groups together in the cluster of villages in Delhi.

However, despite these rules, inequality in land-holding did take place over time and this had consequences on the mode of sharing revenue and other liabilities. Even when this happened communities continued to maintain their mode of sharing the commons, both in the incomes derived from them and for partition, on the principle of ancestral shares. In these partitions the old

shares or "fiction of descent was maintained in the purest type of village community and the people used them to distribute common receipts and in payment of fines and cesses."[25] Thus even when the proprietary body asked for the partition and actually carried it, it was on the principle of ancestral shares or what was customary, but seldom on the actual amount of revenue paying private land in possession. Geoffrey de Montmorency, a former Lt. Governor of Punjab thus observed in 1938 that "a kindly Government in reducing or absolving the land revenue obligation of a small uneconomic landholder actually injured or extinguished his right"[26] to participate in his due share of the common lands. According to Montmorency, "this point is not likely to escape the shrewd Punjab peasant." Sometimes however alternate customs were adopted to tackle situations of labour scarcity and inequality in capital ownership. In Karnal district for example when manpower was in short supply even as late as the 1880s, Ibbetson noted the system of "cultivating co-sharing" on the basis of plough share known as "lana" and the product accordingly distributed among all those according to the ploughs and bulls contributed and *not* on the basis of land held.[27] Shares to the commons then were subject to the number of ploughs owned by a family and therefore the requisite bullocks to cultivate. For example in the village of Bairampur in the Hoshiarpur district in 1885 and in 1895 the custom of "plough shares" was applied when the common lands were partitioned.[28]

Reciprocity and Inequality

Customs regarding use of the shamilat or common long fallows were crucial in the relationship of the proprietary bodies to the tenants and the service groups. It was clearly a matter for reciprocal obligations. These arrangements were also discernible from the customs of payment made for the services from the "common heap" before any other charge was made on the total production of the village, the "common of shack" and the collective grazing arrangements that were made in the short fallows after harvest, in the common long fallows for cultivation and pasturage. Nomadic graziers too were admitted as part of these customary arrangements. Common grazing arrangements meant

several stipulations on the proprietary body's rights to use the commons. Cultivation of crops had to follow a set pattern for the fields were scattered and open. For example whenever portions of the common long fallows were given out for cultivation the understanding was that the cultivator's status was that of a tenant of the community. He was always a ghair maurusi that is a tenant-at-will. This was a rule equally applied to the members of the proprietary body as for anyone else in the village. In other words, no permanent diversion of the common fallows to permanent or short fallows was allowed, not at least on a permanent basis. Similarly, the cropping pattern had to be arranged such that the cattle of all had access to the stubbles and at the same time. What is more long distance transhumant cattle were given accommodation on the commons specially in the villages of the riverain, in the foot hills of the Siwaliks and in the valleys of the rivers in the Himalayas. Thus although the common long fallows could be converted for cultivation by the proprietary body, it was incumbent on them to leave sufficient grazing for the others in the village. These were restrictions which made sure that reciprocity was based on sufficient facilities. In return, customs of labour and service for special occasions and in general were expected from the tenants and the service groups in the villages. Anthropologists call these the jajmani system. Grazing rights were seldom restrictive and the individual proprietor had generally no right whereby he could alter the use of the commons in a way which would impose an externality on another individual or co-sharer in the village. No individualisation was really permitted, even though theoretically permitted.

Of all the rights of the malikan-deh perhaps the most important was that of the right to manage. It is this right that was used to devise the customs by which the relationship of the village to the State on the one hand and to the other residents were determined. Customary transactions like leasing of the commons, policing of the common lands and distribution of the earnings and that of the liabilities attached were executed by a body consisting of the family heads. The principle of countervailing power operated to keep a check

on the growth of any oligopolist tendency. Any section could on principle demand an audit of accounts or bujharat and could also demand a separation of their shares by partition of the commons. Physical demarcation of shares was not always frequently resorted to but the possibility always existed as a deterrent to any section of the community taking law into their own hands.

Codification, Customs and Law: Inequality on the Commons

The customary institutions on the commons were not documented until the famous Despatch of Governor General Dalhousie[29] in 1949, which proclaimed that he desired to "uphold Native institutions and practices, as far as they are consistent with the distribution of justice to all classes." This was followed by the proclamation of Victoria in 1858 of a "rule by law". Consequently, the land-use and rights to them which had been devised and recognised by the people directly involved had to be given "legality" and the customs the sanctity of "legal status". The presumption was first that the State alone could be the source of institutions and therefore Law had to be debated among those who would propose legislation. Hence, although communities of proprietors, their rights and customs which "were engraven on the minds of the people"[30] were recorded at the time of revenue settlements they had still to be given the "presumption of truth". The Punjab Land Revenue Act of 1871 did just that. Once again, customs had to be sanctified by the Punjab Laws Act of 1872.

With these Acts as legal supports, administrative settlement of the large expanses of wastelands in the Punjab were effected. New villages with brand new "customs" emerged on the erstwhile grazing tracts of nomadic herders in the forests of the plains, the grasslands of the dry tracts and in the lower hills of the Himalayas. Consequently, the regional commons were scarcely open to the arrangements made on them earlier and cut these large movements in their very tracks. To the British these nomads were essentially problems of law and order and their sedentarisation a necessary accomplishment while their impact on the system of land-use pattern of the region was totally lost on the officers. The very nature of these settlements were to standardise the

proportion of waste to cultivated area, allotted for each settlement which took little account of the number of cattle which had to subsist on them. This was then the primary feature of inequality on the commons. Further, large areas of hill forests were demarcated as common lands and handed over to scattered hamlets to cultivators who had scarcely any notion of collective action and who therefore promptly partitioned the forests and cleared them of their tree coverage.[31] Once again, this diverted the cattle and sheep runs and more serious led to soil erosion in the foot hills of the Siwalik hills and the lower Himalayas destroying 35,000 acres of cultivated revenue paying land. All communities in the foothills suffered this externality without any redress. The Government of Punjab struggled with the problem and finally passed another law in 1900, called The Chos Act. Thus, far from bolstering customs, enactments seemed to make them ineffective and situations of free-riding emerged as a consequence.

Finally, customs were recorded all over the Punjab in the last quarter of the nineteenth century in two documents, one at the village and the other at the district level and these made no distinction between ancient and new customs, all assumed to have begun from a "common legal memory" of the first settlement. Hence, 'created' villages of the hill districts and the south-western plains acquired customs just as they acquired joint rights in the shamilat. These customs could be changed if the proprietary body asked for it and that too at the time of the revision of the settlements. Also, the government could change and modify by legislative activity. Such modifications were bound to change the customary balance in the relationships of the malikan-deh and the other residents of the villages. And they did.

One of these Acts we have already mentioned -- the Punjab Tenancy Act, gave occupancy rights to tenants of long standing and the right could be acquired if they were cultivating common lands. The law defined this as a "prescriptive right" arising out of long occupation. The principle of customary rights of the proprietary body to the common land based on ancestral shares was set aside by "prescriptive rights" acquired by the tenant as right

declared by statute. Limited and cultivating possession was converted into absolute possession. At no point could this be reversed. Was this act fair, much less equal? This was both an advantage to the tenant and a disadvantage. In the riparian areas a tenant was protected by the proprietary body which arranged its long fallows along the rivers such that if diluvion washed away the tenant's plot he was assigned another from the rest of the commons. Fixity of rights by definition became the minimum standards and the proprietary body accordingly was not willing to give more than that. The law brought the situation down to equilibrium at the lower level.

While the Punjab Tenancy Act of 1868 worked in favour of the tenants, the Punjab Land Revenue Act of 1871 turned it around -- prior to this the custom of the village may have allowed the sub-division of shamilat but partitions were infrequent as is evidenced by the settlement reports of Jullundur in 1852,[32] of Ferozepur in 1855,[33] and Karnal in 1872-80.[34] But partition took place with fair amount of speed in the second half of the nineteenth century partly because of the fear of Government interference with rights and partly because of canals enabling extension of cultivation in the waste. This reduced the grazing wastes in the villages. Consequently the interests of the ghair maliks (non-owners) and Kamins (service groups) and other users of the commons were curtailed. Increasingly the proprietary bodies excluded grazing clauses from tenancy leases. This was particularly true where canal cultivation made land very valuable and too costly to be left fallow for grazing. The village of Gijhi[35] in Rohtak district and Gajju Chak in Lyallpur[36] district in 1932 were examples of such exclusion. Grazing disputes between tenants and maliks became frequent in the Punjab in the last quarter of the nineteenth century. Similarly, a decline in the cultivable waste left less for the rest of the village kamin or service group. Kamins also brought in cattle belonging to outsiders and started to look for work outside the village, thus reducing their allegiance to the proprietary body. The latter's resentment showed through by the partition of common lands, enclosure of grazing areas used by kamins, and restrictions on the collection

of fuel and fodder from the village commons. In retaliation to this the kamins, refused to render services either free or even on payment,[37] as Darling wrote in 1933.

This is how reciprocal relations broke down at any point of time both within the villages and between pastoralists and the cultivators. Consensus in the village became increasingly difficult in the last three decades of the nineteenth century, hence customary solutions were fraught with friction. Intractable disputes landed in courts where decisions were increasingly based on the "will of the majority" which effectively replaced consensus or custom. The Punjab Chief Court invariably arrived at solutions by encouraging the malikan-deh to use their right to partition.[38]

Once common lands were partitioned the cause of a dispute was removed no doubt, but this also meant that the adhesive element which kept up joint action and participation in village activity was lost. The Revenue Department and the judiciary noticed the breakdown of the institutions of joint village action but found the move towards individualisation an almost inevitable result of both social and economic progress.

## Conclusion

It would be in order of things to generalise from this particular instance of transition from custom to law. It reveals a process of gradual shift in the structure of human order organised and regulated by a tradition of self-devised customary norms to one by State-codified and amended legislation. In the process State attempt to enable individuals and disadvantaged groups to press for greater equality on the commons appear as "unlawful accommodations" ... -- a "breach in shared communities of understanding, social accountability and mutual trust".[39] Consequently, "The lawfulness of a social order is placed at risk." The risk intensifies as trafficking in accommodations become a political gimmick -- corruption results. Vincent Ostrom sees further that:

> Demands for reform seeking to eliminate corruption by tightening legal requirements and more aggressive enforcement of the law further entraps members of a society by relying upon rigid rules to impede flexibility in achieving 'smooth running of public

> affairs.' Law is [then] viewed as an obstacle to gaining a productive livelihood. Given cultural variability ... a general, comprehensive code of law will impede the achievement of productive potentials.[40]

The resultant situation is one where the institutions of customary law is rescinded accompanied by a decline in the traditional source of authority -- the community. A situation of vacuum emerges where the very "lawfulness" of law is questioned. It questions the very function of positive law as a panacea in the context of disturbed environment in common property resources in the Third World today. This may very well be the consequence of international mediation in the global commons by legislation, which may only succeed in "legalising" the disinheritance of the commoners, but may not prevent the fact of erosion on the commons. If positive law is to be a weapon to fight a disturbed environment then we opt to be on the side of the disinherited -- the *commoners*.

## Notes

[1]Dalhousie's Despatch is reprinted in C. L. Tupper, Punjab Customary Law, Vol. I (Calcutta 1881), p. 49 (Henceforward Tupper, Customary Law).

[2]Lord Macmillan, Law and Custom (Edinburgh, 1949): p. 19.

[3]"I do not mean to imply that there is an official, privileged canon of narratives. Indeed although some canons, like the Bible, integrate legal material with narrative texts, modern legal texts (with the possible exception of some court opinions) do not characteristically do so. It is the diffuse and unprivileged character of narrative in a modern world, together with the indispensability of narrative to the quest for meaning, that is the principal focus of this foreword." Robert M. Cover, "Nomos and Narrative", Harvard Law Review, Vol. 97, No. 4 (1983): 4-68 :p. 4.

[4]C. Boulnois and W. H. Rattigan, Notes on Customary Law as Administered in the Courts of Punjab (1876): p. XXXIV.

[5]Ibid.

[6]C. Boulnois and W. H. Rattigan, Notes on Customary Law as Administered in the Courts of Punjab, 1876, XXXVI.

[7]Burton M. Leiser, Custom, Law, and Morality, Conflict and Continuity in Social Behaviour (New York: Anchor Books Doubleday & Company, 1969): p. 8.

[8]Ludwig Wittgenstein, Philosophical Investigations, tr. G.E.M. Anscome (Oxford: Basil Blackwell, 1958): p. 36. In Burton M. Leiser, Custom, Law and Morality, Conflict and Continuity in Social Behavior (New York: Anchor Books, Doubleday & Company, 1969): p. 7.

[9]Ludwig Wittgenstein, Philosophical Investigations, tr. G.E. M. Anscome (Oxford: Basil Blackwell, 1958): p. 34.

[10]Ibid.: p. 36.

[11]C. A. Roe & H.A.B. Rattigan, Tribal Law in the Punjab (1895): p. 15, para 17.

[12]Selections of Records, Government of India (Home Department), Nos. 1-5, 1853, p. 102.

[13]Ibid.

[14]H. C. Beadon, Customary Law in Delhi, Volume XXII (1911): Preface.

[15]Ludhiana Settlement Report (1878-83): p. 329.

[16]Ibid.

[17]"Sir Charles Roe (settlement officer for more than 12 years) points out 'what took place in Bannu, has also taken place in other districts where custom was in its infancy' -- Tribal Law in the Punjab, p. 18." W. H. Rattigan, A Digest of Civil Law for the Punjab Chiefly Based on the Customary Law, 12th edition, (Lahore: 1938): p. 36.

[18]H.A.B. Rattigan and Charles Roe, Tribal Law in the Punjab (Lahore: 1895): p. 19.

[19]C. Boulnois and W. H. Rattigan, Notes on Customary Law as Admitted in the Courts of Punjab (Lahore: 1876): p. XLI.

[20]Ibid.

[21]Ibid.

[22]Ibid.: p. XXIII.

[23]J.D.M. Derrett, "'Must' and 'Ought': Problems of Translation in Sanskritic Hindu Law," in William C. McCormack and Stephen A. Wurm, eds., Language and Thought: Anthropological Issues [World Anthropology, general editor, Sol Tax] (Mouton: The Hague and Paris, 1977): pp. 251-259.

[24]T. P. Ellis, Notes on Customary Law (1921): p. 42.

[25]Karnal Settlement Report, 1872-80.

[26]Report of the Punjab Land Revenue Committee, 1938, p. 178.

[27]Karnal Settlement Report, 1872-80, p. 212, para 276.

[28]Punjab Board of Economic Inquiry, An Economic Survey of the village of Bairampur, Hoshiarpur District (1922): p. 16.

[29]Dalhousie's Despatch is reprinted in Tupper, Customary Law, p. 49.

[30]Boulnois' Memorandum on the Punjab Law Bill, p. 3, Home Judicial Proceedings 181 B, April 1872.

[31]Kangra Settlement Reports of 1849-52 and 1865-72.

[32]Jullundur Settlement Report, 1852.

[33]Ferozepur Settlement Report, 1855.

[34]Karnal Settlement Report, 1872-80.

[35]Punjab Board of Economic Inquiry, An Economic Survey of the Village of Gijhi, in the Rohtak District, 1932, p. 16.

[36]Punjab Board of Economic Inquiry, An Economic Survey of the Village of Kala Gaddi Thaman, Lyallpur District, 1932, p. 112.

[37]Malcolm Darling to 'Sardar Sahib', Assistant Commissioner, about the Kamins Credit Society in Manan near Tarn Taran in Amritsar District, 8/10/1933, Malcolm Darling's Private Paers in Cambridge, Centre for South Asia Studies, Box No. 1, Item No. 44.

[38]70 Punjab Records 1866 and other court cases in the series of these records of court cases.

[39]Vincent Ostrom, "Institutions of Languages, Systems of Knowledge, and Ways of Life: Conjectures about African and European Experiences," Preliminary Draft of Working Paper D92-19, Workshop in Political Theory & Policy Analysis, Indiana University, Bloomington, Indiana, pp. 14-15.

[40]Ibid.