

CUSTOMARY GOVERNANCE AND STATE LEGAL SYSTEM IN NEPAL

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Abstract

Indigenous governance systems are sui generis judicial, administrative, economic, and political systems for exercising authority and upholding the Indigenous governance system of Indigenous peoples. Those institutions help them to realize self-government, autonomy, and self-determination as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples inter alia other legal instruments. In Nepal, the 2015 Constitution opened up avenues for the de jure acceptance of the Indigenous customary governance system at the local levels. De facto recognitions were in place for a long time at the local level despite national laws' reticence and prejudice. This article looks into the convergent and divergent between customary governance and "nation-state" governing procedure and evaluates the long-term effects on self-rule, autonomy, and self-determination of Indigenous Peoples while interfacing with the contemporary state mechanisms. The indigenous worldview and inclusion/exclusion perspective is the theoretical/conceptual lenses for analyzing the phenomenon in this study. Talking circles, key informant interviews, focus group discussions observations, informal conversations, and participation in periodic assemblies of customary institutions were the strategies of data gathering. Despite the nonrecognition of federal laws, local governments in some parts of the country initiated recognizing customary governance. However, such initiatives, instead of allowing them to operate independently and guaranteeing self-determination, self-rule, and autonomy as the indigenous peoples' movement demanded at the time, tended to subordinate and bring the customary governance system under the control and jurisdiction of the state law. That will be detrimental to the functioning of Indigenous political institutions in the long run.

Keywords: *Indigenous peoples, customary law, customary institutions, self-rule, self-determination, indigenous worldview, exclusion/inclusion*

Introduction

Indigenous Peoples' customary governance is their most fundamental and sui generis

judicial, administrative, and political system. They use it to exercise authority and maintain sociopolitical, economic, judicial, cultural, and spiritual facets of their lives. Customary institutions are the prime mechanism for administering their governance system. The system enables them to exercise self-governance, autonomy, and self-determination within their ancestral lands and territories. The United Nations Declaration on the Rights of Indigenous Peoples, 2007 (Article 5) inter alia other legal instruments guarantee their rights to uphold and develop their unique political, judicial, social, economic, and cultural institutions. Still, despite the rising acknowledgment of its significance, many nations still do not recognize it at the state level, and even in those that do, there is a frequent conflict between statutory regimes and customary law (Cuskelly, 2011).

More than 476 million Indigenous People live in over 90 countries, belong to more than 5,000 communities, and speak more than 4,000 languages (Amnesty International, n.d.; World Bank, n.d.). In Asia, where there are more than 2,000 different Indigenous groups and languages, two-thirds of all Indigenous Peoples, which account for 70%, are found (Amnesty International, n.d.; UNPFII, 2014) and they are known by different names, including Tribes, Hill Tribes, Scheduled Tribes, Janajāti, Orang Asli, Masyarakat Adat, Ādivāsī, Ethnic Minorities or Nationalities, Pahari, Jumma, Ethnic Groups (Errico, 2017; UNPFII, 2014). In this region, customary laws are recognized at different levels of formal legal recognition: some constitutions recognize them whereas others do not (Roy, 2005). South and East Asia have the highest rates of constitutional acceptance of customary law, where out of 22 constitutions 15 of them have pertinent provisions (Cuskelly, 2011). Nevertheless, the vast majority acknowledge a general right to culture whereas only a few are on institutional structures and land tenure (ibid). For instance, Bangladesh has adopted some substantial legislation to improve the conditions of tribal communities, while India has developed a comprehensive legal and policy framework that targets scheduled tribes (Errico, 2017). In Indonesia and Malaysia, national human rights commissioners and courts have begun to take a proactive role in recognizing and defending indigenous peoples' rights (ibid). Special protections for the residents of Sabah and Sarawak are included in the Federal Constitution of Malaysia, including acknowledgment of local customary law (United Nations, 2018).

In Nepal, despite being a lands of diversity in South Asia with 142 castes/ethnicities, 124 mother-tongue-speaking communities, and ten religious groups (National Statistics Office, 2021), customary laws and institutions are not acknowledged by the state legislation. However, Indigenous Peoples have been administering their social, political, and economic affairs through their native law and institutions within the jurisdiction of their lands and territories. Therefore, despite the reticence of national law and policies, de facto recognition has been observed for ages at the group levels. The National Foundation for Development of Indigenous Nationalities Act , 2002 recognized 59 of

these groups as Indigenous Nationalities (Ādivāsī Janajāti). The foundation categorized Indigenous Peoples into the following categories based on their socioeconomic status: endangered (10); extremely marginalized (12); marginalized (20); disadvantaged (15); and advanced (2).

This article provides a comparative picture of the “nation-state” governance system and customary government practices, focusing on political customary institutions, with a critical assessment of the existing state legal frameworks in Nepal. Furthermore, it also evaluates the implications of such regulations for indigenous institutions, legislation, governance, self-rule, autonomy, and practice of self-determination in the long run.

Indigenous Worldview and Customary Governance

Indigenous Worldview

Indigenous peoples have a holistic worldview that values humans, nature, and living and non-living things equally. It has strong ties to both spirituality and nature. Such deep connection and interaction with the environment led to their worldviews. Thus, indigenism stands for universally accepted values, a worldwide empirical coherence that was previously imposed (particularly with nineteenth-century evolutionism) by fictitious, morally ambiguous distortions of “savage” knowledge and living (Niezen, 2003). Their experiments and personal experience are the sources of their wisdom, knowledge, and truth (Simpson, 2000, as cited in Hart, 2010; Barnhardt & Kawagley, 2005). Additionally, their worldview holds that everything is equal and must be respected to maintain balance, peace, and life’s general well-being (McKenzie & Morrissette, 2003, as cited in Hart, 2010; Simpson, 2000, as cited in Hart, 2010; Barnhardt & Kawagley, 2005). Therefore, they appreciate all aspects of the natural and animal worlds equally while exercising government through their institutions. Since they had a thorough understanding of the lands they lived in, the plants, animals, and other living things in their surroundings (Deloria & Wildcat, 2001) their worldview accentuates the interplay and interdependence of the human, physical, and sacred worlds (Aboriginal Art Association of Australia, n.d.; Foley, 2003). The Following chart illustrates the interaction and interdependence between those three worlds.

The human world refers to the facets of human beings like, human behaviors, human being, family relationships, the capability to embrace change, and ceremonies. Collective efforts for the collective good of human beings are a crucial aspect of the human world. Further, the preservation of nature, the environment, the earth, and all living and non-living creations of nature is also a significant aspect of it. The physical world indicates lands, celestial bodies, and animals. Thus “physical world encapsulates the land, the sky

and all living organisms” (Foley, 2003, p. 46). For Indigenous Peoples, land refers to the resources located above and below the earth’s surface, including trees, places, rocks, water sources, and other attributes of nature. Further, Lands have spiritual, cultural values and dependence linked to their life, survival, and existence. Thus the “land is our food, our culture, our spirit and identity” which owns us as a mother rather than we own it (Aboriginal Art Association of Australia, n.d.). Indigenous people see the earth as a whole rather than divided among individuals, corporations, or nation-states. So, they refer to mother earth. No matter how many children a mother has, she cannot be divided. In the sacred world, stories explain the universe, such as creation, destruction, changes in relationships; punishment; increased country care; healing; and laws. Thus the indigenous world view is the “triangulation” of those worlds(Foley, 2003, p. 47) and are inseparable to each other.

As Indigenous Peoples believe that the “world is dynamic, not static” (Deloria & Wildcat, 2001, p.88) their worldviews are adaptable, and changes occur depending on circumstances, such as place, time, and group members’ needs. That repudiates the criticism of opponents of being rigid and stagnant. Nevertheless, they reject the negative impacts on their core values and existence caused by external invasion and influence, such as colonization and conquest, on their belief system. But the external pressures and interventions introduced by advancements in communication and transportation and “globalization” are considerable threats to their customs, traditions, and belief systems. However, Indigenous Peoples worldwide have retained their unique worldviews and linked knowledge systems for generations, despite experiencing substantial societal changes due to transformational forces outside their control (Barnhardt & Kawagley, 2005).

Indigenous customary governance

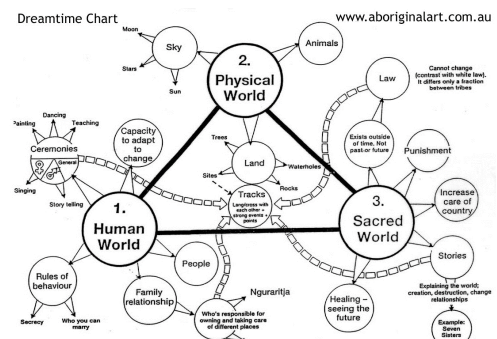
Indigenous worldviews and bodies of knowledge are inextricably a part of their collective sociopolitical, economic, and cultural governance. According to their worldview, governance is circular, consensual, based on shared resources, and prioritizes the welfare of the groups, in sharp contrast to “nation-state” governance structure, which is hierarchical, competitive, based on mandated resources, and prioritizes the accomplishment of the individual (Alberta Council of Women’s Shelters, n.d.). Unlike most modern state governments, Indigenous Peoples operate their social affairs without formal legislation and enforcement agencies, instead setting norms, values, and protocols based on an experience collectively, orally transmitted worldview and belief. Further, their systems of law, custom, and tradition, which are anchored in land, spirituality, and culture, are undergirded by indigenous peoples’ worldviews, cosmovisions, and typical epistemologies (Tobin, 2014). Further, the Indigenous governance system is be yond

mere maintenance of social order by regulating individual behavior as it looks after nature, the environment, lands, forests, every living and non-living entity, etc. Thus the customary self-government of indigenous peoples refers to their capability to practice their intrinsic, inviolable, inseparable, and natural right to self-determination, spiritual power, and collective power through the freedom to rule without obstruction by external forces or colonialism (Bhattachan, 2023). On top of that, the governing concepts of their form of government are founded on natural laws (Figure 2). Further, the Indigenous belief system, worldview, customary laws, and protocols are philosophical drives materialized into practice by the expert authorities and institutions such as traditional healers, hunters, gathers, and Indigenous institutions for the common good of individuals, families, clans, community, nations, and society. Thus, Indigenous governance is a unique form of social management and regulation originating from the community experiences and transferring from generation to generation orally with modification and contextualization.

Indigenous customary institutions and authorities are the means to administer those oral legal practices for the common good of respective indigenous peoples. Such institutions and authorities are developed based on necessities, spiritualities, and expertise. Indigenous Peoples create, preserve, and operate customary institutions based on their experiences and the need to embed their worldviews into everyday life. Such specialized, unique governmental organizations manage every facet of indigenous societies' political, social-cultural, judicial, and economic affair.

In Nepal, as elsewhere in the world, Indigenous Peoples have their own unique specialized Indigenous customary institutions to deal with their everyday collective concerns and issues pertaining to political, socio-cultural, economic, and judicial affairs. However, the scope of these institutions sometimes overlaps and deals with multiple areas and sometimes have particular areas of intervention. In fact, the political institutions deal multiple form of issues of respective groups whereas other thematic institutions function focusing in the specific issues. As part of its role, indigenous political institutions manage political affairs such as social development, maintaining relations with the contemporary state, undertaking developmental activities, fostering intergroup and intragroup relations, developing, maintaining, and enforcing community protocols, as well as making crucial decisions about resource allocations, preservations, and management. Barghar of Tharu (Chaudhary, 2021; Chaudhary, 2015; Khadka, 2016; UNDP, 2009; United Nations Resident and Humanitarian Coordinator's Office, 2011), Ghampa of Thakali

Figure 1 : Indigenous worldview



Note: This chart is adopted from IAD

(Bhattachan, 2023; Bhattachan et al., 2018), Majhi Hādām of Santhal (Subba et al., 2017), Mājhi Wārāng System of Dhimal (Dhimal, 2016), Majani system of Danuwar (Khattry, 1995), Thiti system in the Nhāson Valley of Manang district (Poudel, 2020), Bhejā of Magar (Chidi, 2013), King (Baigā/Gaubudhā) of Kisan (Dulal, 2021) are some of the examples of such governing institutions (See Table 1). Those institutions hold periodic assemblies (annually, biennially, Triennial etc.) as their supreme body and it select leadership and make important decisions that directly indirect concerned to their particular groups (Bhattachan, 2023; Chidi, 2013; Dhimal, 2016; FAO, n.d.; Gautam & Thapa-Magar, 1994; Hyolmo, 2015; Subba et al., 2017). During such gatherings, the group members review the accomplishments of the previous year and provide their collective approval or disapproval. Disapproval indicates the wrong doings of authorities and collectively decides fines and penalties for this. Currently, very few Indigenous groups have such institutions. Many Indigenous Peoples lost their political customary institutions forever due to the suppression and oppression of the “nation-state” ruling mechanisms.

Socio-cultural institutions deal with issues pertaining to the celebration of birth, death, marriage, ceremonies, ritual, entertainment, etc. Guthi of Newar (Sarveswar & Shakya, 2021), Rodhighar of Gurung (Andors, 1974), Maharaj Than of Rajbanshi (B. P. Rai, 2016), Dumi Rai’s chulo pujne (M. Rai, 2073) are some instances of such institutions.

The management of lands, forests, and resources, collective farming (shifting cultivation), fixation of prices of local products, and operation of other economic activities fall under the jurisdictions of economic customary institutions (Bhattachan, 2002; Chidi, 2013; Phuntsho et al., 2015; Sherpa, 2016). Barter, Parma (labor exchange), Adhiya (crop sharing), Paiñcō (lending money and goods), collective farming (shifting cultivation), and traditional cooperative system (eg. Kutusa of Newa: of Khwona, Dhikuti of Thakali etc.) (Maharjan, 2075; Messerschmidt, 1978; Seibel & Schrader, 1999; Seibel & Shrestha, 1988) are some models of indigenous forms of economic institutions.

Customary judicial institutions play a pivotal roles in conflict resolution and justice dispensation (Bhattachan et al., 2018; Dahal, 2021; Subba et al., 2017). Unlike, the contemporary state judicial system it contributes to strengthen social harmony and sustainable peace and security.

Table 1: *Some of known Indigenous Customary Governance Institutions, Leaderships, and Authorities in Nepal*

Indigenous Group	Indigenous Customary Institution
Danuwar	Manjani
Dhanuk	Maijān
Dhimal	Majhi Wārāng
Dumi Rai	Chulhā Kasam (chulā pujne)
Gurung	Ttho, Nalsabha, Rodhi, Dhikuri
Gurung of Nhāson Valley of Manang	Thiti
Hyolmo	Hyulthim
Kisan	King (Baigā/Gaubudhā)
Loba	King, Lama, Ghenbā, and Dhongbā
Limbu	Chumlung, Chotlung
Lohorung Rai	Sheer Uthāune
Magar	Bhejā
Majhi	Majhesāwa
Marhpatan	Mirchāng
Newa:	Guthi
Newa: of Khwona (Khokana)	Kutusā (Cooperative)
Ngisyangwas	Dhāwā Shyārpā
Rajbanshi	Maharāj Thān

Raute	Mukhiyā
Santhal	Majhi Hādām
Syangtan - Panch Gaule	Hyul Jhompā/Posāng
Tamang	Choho
Thakali	Ghampa, Dhikuti/Dhukuti
Thangmi	Guru, Mādālyā, Bāirmi, Gānbā, etc.
Tharu	Barghar/Mahatawā/Bhalmansā
Tsum Nubri	Shagyā

Note: The author compiled the list from several sources. There are still a lot of more indigenous customary institutions/authorities to be documented, thus this is not an exhaustive list.

Exclusion/inclusion: A perspective

Exclusion is a worldwide phenomenon that barriers to particular segments of society based on social, political, economic, caste/ethnic, racial, spatial/regional, legal, technological, religious, health care, education, lingual, gender, age, ideological, spiritual, disabilities, urban/rural attributes, and other factors. This concept covers the scope of the larger social and economic problems of the society (Sen, 2000) which establishes the supremacy of a particular group(s) (often a minority group) over the majority of people(s) in the sociopolitical, economic, and cultural arenas. Thus, it is defined as a “dynamic,” “complex,” and “multidimensional” process stimulated by unfair power dynamics in the economic, political, societal, and cultural realms resulting in the denial of resources, rights, goods, and services, which affect capability, equity, quality of life, health disparities, and cohesion at the individual, household, group, community, society, country, and global levels (Levitas et al., 2007; Popay et al., 2008). Hence, exclusion draws a line based on various above criteria and other attributes to include and exclude individuals and groups.

René Lenoir of France was the first to conceptualize exclusion in order to address socioeconomic issues in his country. He defines excluded groups as “mentally and physically handicapped, suicidal people, aged invalids, abused children, substance abusers, delinquents, single parents, multi-problem households, marginal, asocial

persons, and other social ‘misfits’” (as cited in Gurung, 2019; Rawal, 2008; Sen, 2000; Tamang, 2014).

One of the root causes of marginalization and derivation in Nepal is legal exclusion that set the social hierarchy based on the Śāstras, Manusmṛiti, and purāṇas (Adam, 1936; Subba et al., 2017) such as, King Ram Shah’s (1606- 1633 A.D.) first codified the law of Nepal and the Mulukī Ain of 1854 that come into force during the tenure of Jung Bahadur Rana (1846–1877 AD). The Mulukī Ain has been instrumental to established caste-based hierarchy and discrimination in Nepal. It broadly divided majority of caste/ethnic groups in Nepal as: Tāgādhārī (sacred thread wearers); Matuvālī (alcohol consumers); and Śūdra (impure, yet touchable and untouchable) (Hachhethu, 2003; Höfer, 2004; Khatiwoda et al., 2021). Thus, the code turned plurality into inequity by incorporating ethnic groups within the Hindu caste system (Hachhethu, 2003). Furthermore, the party-less Panchayat system contributed to strengthened the legal norms, values, and practices based on the Hindu caste system and promoted the policy of Ēk Jāti, Ēk Bhāṣā, Ēk Bhēṣa (one ethnicity, one language, and one attire) discarding the survival of diversity and pluralism. Despite the legal and constitutional changes after the 1990 epoch still the Hindu religions based legal framework is directly or indirectly prevalent in Nepal. For instance, “the provision of secularism in the current Constitution (Art. 4) with the “explanation”. Sanātan Dharma, which appears to support and promote the Hindu religion, was a term used in the original text; Sanātan is the name of the Hindu gods Shiva, Viṣṇu, Brahmā, Lakṣmī, and Saraswati. It also denotes the modern Hindu religion based on Veda, purāṇa, Tantra, and idol worship” (Thami, 2022, p. 4).

Figure 2:
Indigenous Governance Model



Inclusion is a corrective measure of exclusion. It is the method of enhancing the status of underprivileged people on account of their age, gender, disability, race, ethnicity, place of origin, religion, economic status, identity, or another status through strengthening their ability, opportunities, dignity, access to resources, voice, and respect for rights (United Nations, 2016; World Bank, 2013).

Nepal’s national policy formally incorporated inclusion through periodic plans at the beginning of the twenty-first century. Since it was included as one of the four foundational elements of Nepal’s Poverty Reduction Strategy Paper (PRSP), also known as Tenth periodic plan, in 2003, inclusion as an official strategy began to permeate government

policy (Rawal, 2008). The primary goal of the Tenth Plan was to reduce poverty through the effective mobilization of means and resources through the shared participation of local agencies, government, non-governmental sectors, the private sector, and civil society to diversify economic opportunities (NPC, 2002). In addition, the plan aimed at improving general economic, human, and social indicators by providing more employment opportunities, improving access to subsistence means, and empowering women, Dalits, people living in remote areas, and other underprivileged and backward communities to achieve economic success. Indigenous Peoples, Dalits, Madheshi,

Muslims, women, and other groups that make up the majority of society in Nepal are among the excluded groups. Among them the Indigenous Peoples are the largest section having around 40 percent of the total population are the most disadvantaged groups. The government of Nepal officially recognizes 59 communities as *Ādivāsī Janajāti* (NFDIN, 2003). Like other social movements in Nepal, the indigenous peoples⁶ rose to resist historical discrimination, oppression, and marginalization. Since 1990, indigenous peoples and other historically oppressed groups have challenged Nepal's monopolized political system. Indeed, the rise of ethnic activism is a consequence of the restoration of democracy based on ideas of popular sovereignty, equality, freedom, and cultural rights (Hachhethu, 2003, p.233). It was, in fact, an expression of the global ethnic convulsion brought on by the third wave of democracy (Hachhethu, 2014, p. 136-37) as the latter four decades of the 20th century, several intellectual and political movements emerged headed by indigenous peoples and other minorities sections of the societies (Parekh, 2000). Historically oppressed and repressed Indigenous Peoples in Nepal united institutionally and campaigned for their recognition and rights, embracing the post-1990 free political environment. Individual activists initially started the campaign in the final years of the Panchayat System, which was ruled by the king (1960-1990) (Onta, 2006). "Before 1990, demands of organized indigenous peoples were branded as "anti-national", "anti-king", "anti-political system", "anti-constitution", "divisive", and "secessionist" by dominant groups" (Bhattachan, 2008, p. 55). Among the 54 indigenous peoples' organizations, 82 percent were established after 1990, and only 18 percent were formed before that as cultural preservation groups (Mabuhang, 2070) (Chart 1). Currently, there are 56 Indigenous Peoples Organizations (NEFIN, n.d.) formed under the Associations Registration Act, 1977. This Act aimed at providing legal recognition to "social, religious, literary, cultural, scientific, educational, intellectual, physical, economical, vocational and philanthropic associations" (Preamble) that are considered as non-governmental organizations (NGOs).

6 Following the political change in 1990, the movement for indigenous peoples in Nepal got organized using the open political environment made possible by the constitutional provisions. Previously, Nepal had an autocratic, partyless, and oppressive political system.

Methodology

This study is the outcome of my continuous involvement in researching in customary governance and justice system of Indigenous Peoples in Nepal, primarily since 2017. Thus, the selection of the Indigenous groups and research site for this study is purposive. Geographical division, the prevalence and effectiveness of indigenous customary governing systems, level of recognition of such governance system (either De-jure or De-facto), the socioeconomic status of each group, population density of the particular indigenous groups in the location and their customary lands were criteria utilized to select research locations and indigenous groups.

Geographically, it covers the districts from the far-east (Morang), far-west (Bardiya), and Himalayan region (Mustang). Those districts are selected to accommodate the geographical diversity. Due to the absence of vibrant customary governance among Indigenous Peoples, the Hill region could not be included in the research. Bardiya, Morang, and Mustang are known as the customary lands and territories of Tharu, Santhal, and Thakali respectively. I have selected Jahadā Rural Municipality in Morang, Thāsāng Rural Municipality in Mustang, and Bārbardiyā Municipality in Bardiya considering the population concentration of the selected Indigenous groups and the vibrant and effective functioning of customary governance systems.

Ethnically, it covers Santhal, Thakali, and Tharu. Based on their socio-economic status, Santhal was categorized as highly marginalized, and Thakali and Tharu were classified as advanced and marginalized respectively (NFDIN, 2022). In terms of population size Santhal and Thakali are the small groups having less than 1% of populations. Santhal and Thakali are the 52nd and 87th largest groups among a total of 142 listed caste/ethnic groups in Nepal having populations of 57,310 (0.2%) and 11741 (0.04%) respectively (National Statistics Office, 2021). In Morang district, the total population of Santhal is 21,571 (1.88%) (Male: 10,522; Female: 11,049). In Jahadā Rural Municipality, the Santhal population is 7,170 (Male: 3,514; Female: 3,656), which is 15.1% of the total population of the municipality. Similarly, the total population of Thakali in Mustang district is 1968 (male: 1,007; female: 961), 13.62% of the total population of the district. In Thāsāng Rural Municipality their population is 882 (Male: 446; Female: 436). It is 30.88% of the total population of the district. The total population of Tharu in the Bardiya district is 232,990 (Male: 110,010; Female: 122,980), which is 50.66% of the total population of the district. In Bārbardiyā municipality's total population of Tharu is 52,618 (Males: 25,012; Female: 27,606), which is 72.54% of the total population of the municipality.

Review of existing literature on the themes, including laws and policies, and field visits

to the respective Indigenous groups are the main strategies for the data collection for the study. For locating secondary data, online resources such as Google Scholar, Directory of Open Access Journals (DOAJ), JSTOR, Open Research, ProQuest, ScienceDirect, Nepal Journals Online (NEPJOL), Tribhuvan University eLibrary, and UN Digital Library Nepal were used. For primary data, several field visits were made between 2017 and 2023. In total 24 days were spent in Mustang (in 2017, 2019, and 2020) and four weeks in Bardiya (2017, 2018, and 2022). Similarly, 28 days were spent in Morang (2019, 2020, 2022, and 2023). Apart from that meetings, workshops, and conferences of customary leaders in Kathmandu were also attended. Talking circles, key informant interviews, and focus group discussions method were used to collect data. Further, observations, informal conversations, and participation in periodic meetings of those customary institutions have also been used as methods of data collection. Structured and unstructured questionnaires, email/Internet, and telephone were used as tools for gathering data. Customary leaders, elders, youths, women, lawyers, elected state representatives, and political leaders were the research participants. The collected data were transcribed, thematically organized, compared and contrasted, verified, and analyzed using the interpretive method.

Result and discussion

Customary Institution and Authority: Composition, Selection, and Administration

Human society develops and upholds the specific nature of organizations and institutions to regulate their individual or collective interests. Thus, institutions are among the most significant social structures since they offer the framework for social interaction (Hodgson, 2006). The indigenous customary governance institutions are unique decision-making structures for regulating social, political, economic, cultural, and judicial affairs. These institutions are also referred to as “informal,” “volunteer,” “traditional,” “customary,” “Native,” “Tribal,” and “Indigenous” institutions. They comprise traditions, customs, moral standards, religious beliefs, and all other codes of conduct that have stood the test of time and represent the community’s existing worldview, the accumulated knowledge of the past, and a current set of values that are part of a community’s heritage called culture (Pejovich, 1999).

One of the primary areas of intervention of such institutions is the selection of qualified leadership with the engagement of members of the indigenous group they represent to lead society. Indeed, the selection process of indigenous authority is a celebration that reflects their cultural value and social cohesion. Open discussions on social issues, consensus for leadership appointment, review and reflections on past experiences, and set vision for the future are the fundamental activities of the leadership selection process of Indigenous Peoples. The uniqueness among Indigenous Peoples is that specific terms are employed to indicate both customary institutions and authorities. For instance, the

Santhal refer to their institution and authority as Majhi Hādām or Majhi, the Thakali use Ghampa, and the Tharu employ Barghar/Bhalmansā/Mahatawā. This section of this article presents an overview of the customary institutions and authorities of the indigenous Santhal, Thakali, and Tharu.

The Tharu select their authority Barghar/Bhalmansā/Mahatawā every year in the Māgh (January- February) month of the Bikram era through an assembly, called Bakheri, of all household representatives. The first day of the month is observed as Māghi, one of their great festivals. After observing the Māghi festival, the selection process of authority begins and continues for the entire month, and they choose their leaders at their convenience. Every settlement (tole) or village or cluster or ward chooses their respective leaders holding Bakheri. The territorial jurisdiction of such authorities used to determine themselves collectively in the past. These days, however, they rely on the geographical division of the Nepali “nation-state”: village level, settlement level, cluster level or ward level. Tharu themselves determine the demarcation of the working scope of customary authorities based on their capacity and necessity. For them, the leadership selection is a collective consensus enterprise. Group members propose potential leaders based on expertise, capabilities, social acceptability, and experiences. No one claims the position themselves. However, if exceptions emerge and difficulty appears to forge consensus due to multiple claims to leadership, they adopt the lottery technique. Apart from Barghar/Bhalmansā/Mahatawā, the Bakheri also selects Chirākiyā (messenger to disseminate information) and Guruwā (religious and cultural leader), Chaukidār (the person assigned to provide security in the society), Kesaukā (assistant of Guruwā), Likhandār (Writer, who support to take a minute and draft letters). The selected authorities and leaders work under the leadership of Barghar/Bhalmansā/Mahatawā. The Barghar/Bhalmansā/mahatawā holds periodic meetings, Juthyālā, that make necessary decisions and play roles to enforcement of the mandate of the Bakheri.

Similarly, the Thakali Indigenous group select their leadership, Ghampa, through the gathering, known as Hyul Jhompā in their mother language, of the representatives of all the households collectively. The Hyul Jhompā generally takes place in June-July of every year. The authorities are selected based on their expertise, community respect, trustworthiness within their group, contribution to community development, and capability to provide leadership. The Ghampa is regarded as both a customary institution and a leader. The Ghampa, as a customary leader, plays a decisive role in the social, economic, and political aspects of Thakali. Similarly, Ghundal (Assistant to Ghampa), and Chowa (messenger) are also selected by the assembly. Ghundal are the household representatives to assist Ghampa selected on a rotation basis. They are selected for a year whereas the Ghampa and Chowa are selected for a period of three years. They select those authorities unanimously with consensus in the Hyul Jhomā. They are mandated

to follow the mandates of the Hyul Jhompā. Further, the Ghampa also take decision on other urgent social, political, and judicial issues in consultation with group members.

Same way, the Santhal select their authority Majhi Hādām annually having a convention having representatives of households and members of society. However, based on the roles of the sitting Majhi Hādām the tenure either terminated within less than a year or extended for several years. Majhi Hādām's wife, Majhi Budi, also shoulders crucial roles in dispute settlement and decision-making. She gets involved when there are issues relating to women. With Majhi Hādām the annual assembly also selects Pranik, Jag Majhi, Jag Pranik, Naike, Kudum Naike, and Gudit to ease the work of customary institutions. The pranik has supportive roles to the Majhi Hādām. He/she takes responsibility in the absence of Majhi Hādām. Generally, the Pranik are younger than the Majhi Hādām. The appointment of younger Pranik is crucial for two reasons: First, they ease the work of Majhi Hādām playing active roles; second, it is crucial for leadership development/transformation. The current Pranik can take the role of Majhi Hādām in the future gaining adequate skills and knowledge closely working with the Majhi Hādām. However, it is not sure that the Pranik take roles as the decision is taken collectively. Jag Majhi is responsible for maintaining peace and security during festivals, ceremonies, and rituals. If conflict or quarrelsome erupts during any event Jag Majhi is responsible for managing and resolving such conflicts. Such conflicts do not come under the jurisdiction of Majhi Hādām until and unless it is severe. Jag Majhi Budi, wife of Jag Majhi, also gets involved if such issues are connected to females. Jag Pranik is assigned to deliver support to Pranik and Majhi Hādām. Jag Pranik takes a role and responsibility when Pranik and Majhi Hādām are absent. Nāike looks after the issues of religious rituals and events in society. Apart from that the Nāike is the in-charge of the Majhi Thān, the sacred site of Santhal. Kudum Nāike is an assist to Nāike. His/her role is to support the Nāike during religious rituals. Gudit delivers messages on behalf of the Majhi Hādām regarding socio-cultural events and other conflict-related issues.

All the aforementioned customary authorities and leaders serve their respective groups without taking any financial or other benefits. The voluntary service sometimes leads to financial hardship for them. Leaders and authorities are primarily responsible for implementing the mandates of respective groups and taking necessary measures for peace, security, harmony, and social development. Community members are also responsible for enforcing those decisions and respecting those decisions. As part of their role, they offer free labor for developmental activities, participate in decision-making processes, offer suggestions and advice for the collective good, and provide financial assistance for the works of leaders and authorities.

Convergent and divergent between state government and customary governance

The commonality among the afore-discussed customary governance systems is that they are inclusive and accommodative. It is open to all ages, genders, classes, and clans to participate in the governing process. The most important aspect is that all the decision-making, implementation, and selection of leaders are done with consensus collectively. Even so, elder male dominance in leadership positions persists despite the opportunity to participate without segregation and discrimination (Bhattachan, 2023; Hachhethu, 2014b). The members of the Santhal, Thakali, and Tharu groups expressed that the roles of elderly males are crucial in customary governance as they are knowledgeable, experienced, accepted by society, respectable in society, and have skills and qualities for leadership. In response to the issue regarding low participation of women, Santhal, Thakali, and Tharu women all state that women also have considerable responsibilities at home, so they cannot devote adequate time to them. In addition, they also claim that as the process is collective and all participate in the decision-making process being a leader is only is not everything, every individual has equal status and responsibilities to bear. Bhattachan (2023) also observed this while researching Tamhang (Thakali) self-government systems. Nevertheless, the participation of women in leadership positions has increased in recent times. Another noticeable aspect of the customary governance system is that no individual household is excluded from the process. Participation of representatives of all households is mandatory in annual conventions or implementation processes. Unlike state governance systems they focus on households. State legislation focuses on individuals. This creates an environment of ownership and inclusion.

While talking about the structure of the Nepali “nation-state,” Nepal adopted the three tier of state structure after the 2015 Constitution promulgation: Federal, Provincial, and local. Since the Indigenous governments mostly interact with the local government it is worth to discuss here about the local level government, particularly the ward level. In Nepal, there are 753 local-level governments, which comprise Metro political city (6), Sub-metropolitan city (11), municipalities (276), and Rural Municipalities (460). Within that structure, there are 6,743 ward-level governments and the Indigenous Customary government mostly functions within ward territory and interacts with ward-level state structure. The authority of the local governments is elected every five years of the period based on the First-Past-The-Post (FPTP) elector method and is bicameral as Indigenous customary governance. At the ward level, a five-member executive committee is elected every five years based on the adult franchise. The ward government comprises of chair, a woman member, a Dalit woman member, and two members (Sthānīy Taha Nirvācan Ain, 2073, Section 6, Sub-section 1 &2). Further, to take part in the election process as a voter one should be the age of 18 necessary to be registered in the name list of the Election Commission (Matadātā Nāmāvalī Ain, 2073, Section 6). Those who are not

registered cannot take part in the process. Similarly, to be a candidate for the elections at the local level one should be the age of 21 (Sthānīy Taha Nirvācan Ain, 2073, Section 12, Sub-section A). In the same way, there are certain pre-conditions for being a candidate: one should be a citizen of Nepal; should be complete the age of 21; the Name of the individual should be registered in the voter name list of the respective ward office; and a person should not be disqualified by any laws (Sthānīy Taha Nirvācan Ain, 2073, Section 12).

From the above instance, it is apparent that the Indigenous governance systems are more inclusive and accommodative than the state mechanism. The state mechanism tends to exclude individuals based on age and other aspect. The age bar for being a voter and candidate excludes certain age groups of people from enjoying democratic practice. Similarly, those who are not registered in the list of the election commission and those who are out of the village or country cannot take part in the process. This is a crucial issue as there is a high volume of migrant workers from rural to urban and from country to abroad. The declining trend of voter turnout in the parliamentary elections is evidence of this fact. For instance, in the 2022 parliamentary elections, the voter turnout was 61.35% whereas it was 78.34% and 68.67% in 2013 and 2017 respectively (International IDEA, n.d.). But those percentages are calculated based on the registered voters, i.e. 18,136,482. If we look into the voter turnout based on the “voting age population” the situation is frustrating. Data shows that in 2022 the total “voting age population” was 20,665,380 and only 87.8% (18,136,482) registered in the voter list. Those registered are bonified voters and only they can take part in the election process. Among the registered voters, 11,126,226 (61.35% of the registered) cast their votes. Which is only 53.84% of the “voting age population.” Invalid votes were 566,325 (5.09%). So, the valid votes are 10,559,901. Thus, in this election votes of 51.1% of the total “voting age population” were used and other huge number of individuals were excluded from the process. When winning candidates votes are counted it would be considerably less than the total voting age population. Because, the local levels elections in Nepal adopts the majoritarian electoral system where the most vote recipient candidates win and occupy the position and hold power. In such situation there is no space for the losers. Often a winner gets elected with a thin margin of votes. This means the prevails method of election is not representative and inclusive in compare to the customary system of governance. In terms of participation of the social groups as well the electoral system is exclusionary where Bahun/Chhetri hold 57.6% of the total seats (Biswokarma et al., 2023). If we look at the 2022 local level elections results, it apparently exhibited the unequal participation, same as the parliamentary elections, of social groups even after the introduction of the federal democratic republic. At the local level, 48% of heads of local government (municipalities and rural municipalities) are held by a ruling caste group (Bahun/Chhetri)

whose population is 31% of the national population whereas Indigenous Peoples, Dalit, Madhesi, and Muslims are underrepresented by their populations.

Justice governance: Justice, peace, and social harmony

Conflict management and justice dispense come under the jurisdiction of the afore-stated customary Institutions and Authorities. Family disputes, personal disputes, property disputes, and conflicts relating to natural resources, such as forest, pasture lands, irrigation, etc., are some of the recurring conflicts those customary institutions and their leaders deal with. Customary leaders, such as Majhi Hādām, Ghampa, and Barghar, play a crucial role investigating root causes conflict and take necessary actions for settlement peacefully and amicably. In the hearings of such dispute, the leaders listen to both parties, collect the required information from other sources/verify them, and listen to the group members closely linked to the conflict as witnesses, such as elders, and women. The hearing process is open to reputable members of society, elders, and those who wish to attend. Following listening to both the conflicting parties, elders, and eyewitnesses the customary leaders make decisions. In most cases, both parties realize their mistakes and embrace the decisions of leaders. “After the decision, both parties return to home forgiving each other and forgetting the conflicts” a household member in Mustang district opined. As in the state judiciary system, the customary justice system does not hire layers. The conflicting parties act as a lawyer on their own and defend the hearing process on their own.

Members of the Santhal, the Thakail, and the Tharu Indigenous groups urge that the use of the state judiciary system is “harmful to the social cohesion and harmony”. They seldom approach the state courts for justice. They have experienced that if someone goes to court or the police for any kind of conflict there would be an enmity between conflicting parties their whole life and sometimes for generations after the court verdicts. In contrast, after the decision of the customary justice system, the rivalries return home happily forgetting past disagreements after the decision of their customary leaders. Unlike the state judiciary, the customary justice mechanisms are accessible, less time-consuming, economical, familiar, and less bureaucratic. The Santhal, the Thakali, and the Tharu respondents claim that their justice dispensing mechanisms are free, fair, impartial, and effective in dealing with social conflict-related issues. Further, they also urged that they do not feel safe and comfortable approaching the state judiciary system due to a lack of knowledge of court procedures, language barriers, alien officials, time-consuming process, and costliness.

Customary authority-state government interface

The loss of Indigenous Peoples' sovereignty over their customary lands and territory due to the expansion and establishment of modern states through various strategies such as suppression, oppression, and subjugation led them to either confine within the jurisdiction of those states or lose their customary practices through forceful imposition of alien laws and structures. Despite their resistance against the colonialism and impositions of state legislations and structures they compel to adapt and co-exist with those systems. In Nepal, this begun when Prithvi Narayan Shah accomplished the political project known as "unification" in 1789 with the stated goal of establishing "asali Hindustān." Before that they have their customary systems of governance and administration within their ancestral lands and territories (Adam, 1936; Gurung, 1996). Muluki Ain's introduction in 1854 cemented the ruling caste group's supremacy and undermined Indigenous institutions of government, culture, and custom. It is gradually strengthened and institutionalized by consecutive regimes, such as the Rana oligarchy, Panchayat regime, etc. Despite the political changes of 1990 and 2006, there has not been a groundbreaking shift to this. Thus, the Indigenous groups are struggling to pursue their customary forms of governance within their territory complying with the contemporary state structure. Thus, a meeting point between Indigenous governing systems and nation-states occurs when these two distinct systems interact within the broader territory of the modern state by recognizing the customary governance system, accepting autonomy and self-rule. Despite constitutional and legal omissions at the federal level, local governments of nation-states fill this gap either de jure or de facto.

The 2015 constitution grants local governments the power to enact laws governing local matters such as community development, safety, communication, and other issues (Schedule 8). Exercising this authority, municipalities in western Nepal formulated legal framework to regulate Tharu Barghar systems at least in 15 municipalities such as Bārbardiyā, Madhuvan, Rājāpur, and Thākurbābā municipalities of Bardiya district, Lumbini province, and Suklāphātā municipality of Kanchanpur district, Sudurapaścima province. Due to lack of constitutional provisions most of them took reference of United Nations Declaration on the Rights of Indigenous Peoples and Indigenous and Tribal Peoples Convention (No. 169) for developing laws for regulating Barghar in those local units (Bārbardiyā Municipality, 2077; Madhuban Municipality, 2077; Rajapur Municipality, 2078; Suklāphātā Municipality, 2078). Since Nepal is a signatory to both, the government is obliged to enforce those international treaties as national laws (Nepal Treaty Act, 1990; The Constitution of Nepal, 2015).

The Laws enforced by the municipalities are aimed at "documentation, promotion, protection, promotion, development, and manage" of Bargahr/Bhalmansā of the Tharu

community at their respective jurisdiction (Bārbardiyā Municipality, 2077; Madhuban Municipality, 2077; Rajapur Municipality, 2078; Suklāphātā Municipality, 2078; Thakurbaba Municipality, 2078). These laws divided the Barghars' scope of responsibility into three levels: village/tole (cluster), ward, and municipal (Section 3 of those laws). Historically, there was no stratification of domains of this kind. They were typically organized based on necessity within their borders, outside the state-defined territories. Under this stratification, the village Barghars are authorized to lead and function within a specific settlement, while the ward Barghar should coordinate and cooperate with the village Barghar living in the ward (smallest unit of the state structure). The municipal Barghar cooperates and coordinates with the ward and village Barghar at the same time.

Similar kind of draft legal framework was developed by Jahadā Rural Municipality (2079) of Morang district to regulate the Majhi Hādām of the Santhal in Indigenous group. It is yet to be formally promulgated by the rural municipality assembly. After this is adopted, the hierarchical structure and operational procedures will remain the same as in Barghar. In the case of Ghampa of Thakali, there has been no intervention of state mechanism till now. However, this system falls among the best examples of good practices of enactment of self-rule by Indigenous Peoples in Nepal.

There is effective coordination, cooperation, and interaction between the state mechanisms and Indigenous customary governing institutions at the local level in the aforementioned context, regardless of whether they are recognized by state law or not. Customary leaders are invited in meetings by local governments on social and development issues. Furthermore, the local government also recommends cases to the customary institutions in conflict related issues.

Despite their coordination, cooperation and recognitions, there are restrictions and threats to the customary governments by the state mechanism. One of the major challenges to their autonomy and self-rule after enactment of laws at the local levels. Self-rule and autonomy are the inevitable aspects of customary governance system. Further, those institutions are accountable to groups they represent and participate in collaborative decision-making with the participation of those concerned groups of people. But the introduction aforementioned laws make those institutions and their leaders accountable to the state authority and institutions, the municipality in this case, rather than people and group. Under those laws the Barghars need to be registered to the municipalities office and it will issue certificate election and identity cards to the selected leaders (section 4 of all those Acts). And there is mandatory provision for annual renewal of Barghars presenting progress and financial report to the municipality (section 5 (1) (2) of those Acts). Because of these regulations, Indigenous Peoples' customary institutions are no longer considered to be self-governing, autonomous, entities that practice self-

determination, but rather Non-governmental Organizations (NGOs). Those terms are applying to non-governmental organizations (NGOs) registered under the Associations Registration Act, of 1977.

Apparently those law claim that the Barghars are established by the local government to carry out tasks including security, justice delivery, conflict settlement, development, cultural preservation, promotion, coordination, and collaboration (Bārbardiyā Municipality, 2077; Madhuban Municipality, 2077; Rajapur Municipality, 2078; Suklāphātā Municipality, 2078; Thakurbaba Municipality, 2078). In addition to that the law included the fixed set of qualifications and roles and responsibilities and function of Barghar. That creates a rigid regime of rules which will difficult to change in accordance to time and context. The existing process is that the individuals gather annually and make rules with collective consensus and agreement. That will not be the case in the written law. There has to be certain procedure and need to get approval of the municipality because the municipality is the regulating mechanism under this law.

Ironically, the preambles of those Acts show commitment to implement and respect the rights enshrined in the UNDRIP, ILO Convention No.169, the international legal and human rights instruments destined to promote and protect Indigenous Peoples' rights. Article 27 of the UNDRIP guarantees that the right of Indigenous Peoples to their lands, territories, and resources, including those that were historically owned or otherwise occupied or used, must be recognized and decided by a fair, independent, impartial, open, and transparent process that takes into account the concerned Indigenous Peoples' legislation, customs, practices, and land tenure arrangements. In doing so, the inclusion of Indigenous Peoples in the process is guaranteed (Art 27), and states must have their free, prior, and informed consent before adopting and putting into effect any administrative or legislative actions that may have an impact on them (Art. 19). In the case of draft bill prepared by the Jahadā Rural Municipality for regulation of the Santhal customary institution, Majhi Hādām, also accommodated the same kind of provisions that also limits the jurisdiction of their governing body. But, the Ghampa of Thakali still manage to continue their autonomy not allowing the state mechanism to intervene. However, they have been also demanding for the state recognition.

Conclusion

Customary governing systems, functioning and existing as a unique mechanism, exercise autonomy, self-rule, and self-determination for Indigenous Peoples. For generations, Indigenous Peoples have been practicing the system and are the most effective system for conflict resolution, development, justice dispense, and other sociopolitical governance and maintaining order in their respective groups. Those systems are based

on their worldviews and past experiences for collective good of their respective groups. Besides that, the Indigenous governance system is circular, consensual, based on shared resources, and prioritizes the collective welfare whereas the “nation-state” governance structure is hierarchical, competitive, based on mandated resources, and prioritizes the accomplishment of the individuals.

Historically, Nepal’s National law is not friendly to the Indigenous customary system. Massive suppression and oppression were present in the past. Current national legislation also does not recognize Indigenous institutions and governance. Adaptations to the federal state structure created some opportunities for local governments to recognize Indigenous governance systems within their jurisdiction by utilizing constitutional rights. The municipal laws of some municipalities in Lumbini and Sudurpaschim provinces of western Nepal introduced a legal arrangement for the safeguard, promotion, and development of the Barghar system. And same kind of legal framework was drafted by the Jahadā Rural Municipality of Morang district to regulate the Majhi Hādām. On the surface, it appears like the state is eager to recognize traditional institutions and governing structures through municipal laws. However, in the long run, it leads Indigenous governance to assimilate into the state system as it reduced their significance and importance putting their status similar to NGOs.

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