

## Research article

# Common Spirit of Customary Law: Long-standing Practice of Ethnic Community in Bangladesh

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## Abstract

This paper examines the customary law of the Bangladeshi Santals, an ethnic community. From an anthropological perspective, the authors searched the literature on customary law and applied the concepts to the Santal community within the relevant local, regional, and international contexts of indigenous rights. Methodologically, this article follows the post-positivist paradigm and 'capability approach' to explore the gaps between mainstream and indigenous communities, such as the Santals. Consequently, the identified issue is that the Santals of Bangladesh errantly uphold the Sustainable Development Goals to establish their rights-based society. This has led to community tension in Bangladesh, as is frequently the case both there and in India. The tensions between ethnic and mainstream communities create hurdles to human rights and produce externalities in national development within the global context. This study recommends a sustainable community development framework due to the lack of ratified international documents regarding customary structure.

**Keywords:** Ethnic Groups, Customary law, Community Development, Sustainable, SDGs

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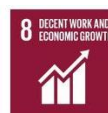
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## 1. Introduction

This paper examines the historical and political contexts as foundational elements of today's ethnic marginalisation situation, including that of the Santals in Bangladesh. It concomitantly presents Amartya Sen's (2009) 'Capability Approach' and Robert Redfield's (1956) 'great tradition and little tradition' approach. To some extent, this study draws on insights from Srinivas and revisits the theory (1956) of 'Sanskritization' to understand the legal and cultural context and its assimilation with external cultural elements, such as Christianity, Majority Bengali intervention, and Hinduization, as a significant tradition within the community.

Bangladesh is a developing and densely populated country where people are confronted with various issues. The Santals represent a disadvantaged community in Bangladesh's North Bengal region, suffering from deprivation in terms of education, health, and wealth. Considering Bangladesh's Education Policy, 2010 and the Small Ethnic Group Cultural Organization Act, 2010, both regulations did not provide the Santals sufficient space to practice their language; instead, forcing them to use the Bengali language to read and write. They also face acute poverty, and political harassment. Consequently, the influence of the dominant group has made them helpless (Barkat, 2016; Sarker et al., 2016).

This study did not observe all the issues, such as health, education, Christianization, impoverishment, and malnutrition, in the field study, but instead focused on issues related to the customary laws, while attempting to address existing political organisations and laws at an individual, family, and community level. The study also sought to understand the state's role in the community through various agencies that impact families or society, exploring the differences between majority and minority communities in terms of social affiliation and political and material control over people's environment. In community life, the Santals' situation is compared with that of mainstream communities in terms of opportunities, freedom, and choice. The prime focus is on access to political power, common natural resources, property rights, or inheritance.

## 2. Customary Law

Historically, at the heart of the present law is the denial of the universality of customary law, and the reflection of the prevailing laws of the various communities in Bangladesh is largely absent, which comes as no surprise. The first fact to note is that ethnicity or regionalism is often intertwined within domestic laws, while the second is the historical tendency not to entitle ethnic minorities to self-rule, as evidenced by the lack of recognition of the tenets of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Thus, in light of the open perspective and the face of general neglect, the issue of constitutional legalism is addressed here.

Valid customs must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though they may derogate from the common law. General customs are those of the whole country, for example, the general customs of merchants. Particular customs use particular traits, while local customs prevail in certain parts of the country (Roy, 2024)

Therefore, the flaws in the sovereign recognition theory of customary law are that the state lacks the moral authority to validate or invalidate the wishes of communities as reflected in their

customary laws, and it may distort the authenticity of such laws in the process of validating them. Moreover, it is unsound to assert that the state is the only valid source of legal rules and that customary laws are already valid by the assent of the community. The major features of customary laws are as follows. Firstly, a component of the customary law framework establishes the link between indigenous peoples and local communities that is fundamental to the notion of rights and control over life. Secondly, the foundation for individual user rights or exceptions exempts continued customary uses and practices from other legal constraints on resource usage. Thirdly, CL is a guide for the assessment of cultural or spiritual offence or injury resulting from the incorrect use of knowledge and culture. Fourthly, it provides a guide for determining how gains from land usage and other resources should be shared fairly within a community (Schauer, 2007; Sheleff, 2013).

### **2.1 Customary Law and Ethnic Rights**

The field of international human rights law is, without a doubt, one that has evolved the most in the last five decades, and had as its starting point the Universal Declaration of Human Rights—UDHR (Momen, 2024) because it gave rise to a whole range of treaties and pacts in favour of human rights as a subject of international protection. However, despite the appearance of a series of legal instruments, the international system for the protection of human rights has had to face situations of resistance on the part of states to apply these instruments in their respective domestic laws. The background to the international recognition of human rights goes back to the independence of the United States of America, the French Revolution and other independence movements in Latin America. When observing the first manifestations of the search for respect for the fundamental rights of the human being as an individual, these rights would later be recognised both at the national level in the national constitutions of some states. In international treaties on human rights, they came to be considered as a recognition of the inherent rights of the human being, thus establishing a range of obligations that the state must fulfill towards those individuals residing within its territory.

In the case of mainstream Bangladesh and its indigenous people, this entailed domestic law and human rights in general from the international point of view.

### **2.2 Customary Law and Community Development**

In the face of modernity and social and development challenges facing the Santal community, the loss of customary law and way of life has become an ever-increasing concern. Customary law is upheld in areas indicated by strong oral practices and unique attributes broadly shaped by cultural behaviours, such as social integration mechanisms, including Sanskritization (Srinivas, 1956). The concern for personal, family, and community well-being is tangible in many small communities devastated by contemporary development interventions and technological and political influences. The scale and pace of change in a small community like the Santals is variable. However, the message is straightforward—the interactive dimensions and spaces that can be argued as key to forming a "community" are changing in ways that impact 'great traditions' (Redfield, 1956). Such polarised conditions hinder the interaction between generations, directly contributing to a loss of customs and intergenerational knowledge transfer.

'Customary Law' has acceptance by the people living in society and has social legitimacy, legal science and acceptance in academic research. Customary law in the Santals is still operational and maintains community harmony, as noted among the Yi-people in China (Pang, 2020). Customary law is important if the general procedure is kept the same or discontinued by state law (Philips et al., 2020; Mayali & Mousseron, 2018; Saussine & Murphy, eds, 2007). Sensitising customary law and appropriate development can address a range of issues while shaping and making sustainable communities for the betterment of all. In ethnic community development, for example, culture upholds the great tradition of the reflective few and the little tradition of the largely unreflective many (Redfield, 1956). Local understanding and interpretation of the Santal community's history reflect past events feeding into and thriving on the demands, sentiments, and interests of those in the present. Indeed, local culture has both backward and forward-looking dimensions with implications for the Santal community with local opportunities. In other words, when state law attempts to regulate customary law, a conflict occurs within the community (Basu & Kanbur, eds, 2009); and lastly, the relationship with the community is headed towards a state of majority-minority friction (Roy et al., 2021; Tripura, 2018). There are many examples in Bangladesh, such as the Phulbari coal mine clash in 2006<sup>1</sup> and the Gobindganj land dispute clash in 2011<sup>2</sup>. Nevertheless, as a member country (from 1972) of the International Labour Organization (ILO), Bangladesh has provided solutions such as anomalies in its Convention 169 under articles 3.1, 4, 8.1, 8.2, and 9.

Customary law is indeed an issue in the community; even statutes, due to the application and interpretation of customary law, became the source of state law at one time (Schauer, 2017). While customary law lacks constitutional jurisdiction within the framework of state law, when the law encounters a crisis for whatever reason, it refers to customary law. Thus, "the basic structure of a prescriptive rule, one preliminary but key question about the custom as a source of law is whether the customary source must be normative" (Schauer, 2017, p.17). If one considers civilisational evolution to be a good change, then it is prosperity in a sense, and hence, true development. There are various aspects and contexts of development, such as economic, cultural and political. Power is the centre of politics, and Benjaminsen & Svarsted (2021) categorised two types of power at the ancient community level. One is social norms, and the other is faith. These types of social norms and faith were practised within a legal framework and transformed into law.

Raja Debashis Roy, a known indigenous activist, king of the Chakma circle, and a leader in Bangladesh, thinks that there is no universally accepted definition of customary law. Nevertheless, it may be regarded as:

An established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the

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<sup>1</sup> In 2006, Government of Bangladesh planned to set up a Coal mine by evacuating the Santals community's from their ancestral land. Finally, the conflict ended with bloodshed shed and the government stopped the project.

<sup>2</sup> In 2011, the Government of Bangladesh tried to occupy the customary ownership land in Gobindaganj that activities led to a clash between Santals and the Police.

memories of the chief and his counselors, their sons and their son's sons (sic), until forgotten, or until they became part of the immemorial rules. (cited in Bekker, 1989, p.11).

The call for wider respect and recognition of customary laws and protocols has also been a consistent feature of international policy discussions on the protection of Traditional Community Exchanges (TCEs), Traditional Knowledge (TK) and related Grievance Redress System (GRS). For example, when the World Intellectual Property Organization (WIPO) consulted with the holders of TCEs and TK on their needs and expectations relating to the Intellectual Property system, one common theme was the need to recognise customary law, because the experiences and perspectives of indigenous peoples and local communities are as diverse as themselves.

However, many indigenous peoples and local communities express concern that the bare content of their distinctive cultural heritage and knowledge systems should be considered within the customary and community context. From this perspective, the form or representation of a cultural expression and knowledge content should not be appropriated without recognising the legal and cultural context that helps define it as distinctively "traditional". Thus, indigenous peoples and local communities have called for wider respect and recognition of their customary law and practices as one aspect of the appropriate protection of their TK and TCEs, because they are intangible and more readily copied. A sacred site that is of importance to indigenous peoples and local communities cannot be violated by a third party, but a sacred symbol, or sacred knowledge, can be appropriated and used in a remote location. One well-known case in the law of TCEs concerns a sacred motif protected under indigenous customary law, which was copied onto carpets produced in a foreign country.

Finally, it is worth noting that customary law is a long-standing practice in a community that leads and controls community members' lives, even though it can also be a suitable solution by states adopting such laws as statutes (see Table 3). Customary law and sustainable community development (SCD) are interconnected concepts in this article (Roy, 2024).

### **2.3 Customary Law as Common Spirit in the Community**

"We believe that aspects of traditional culture [customary law] deserve more attention in understanding contemporary community change and positive development" (Brennan & McGrath, 2020, p.148 in Philips et al., 2020). This study of the Santal community explored the process and significance of customary law practices, mainly based on customs for rendering community interaction, retaining and communicating collective knowledge, and the implications of such practices on sustainable community development.

Mehrab Ali (2002) cites Rajmatul Hanfi Ram (1783), who stated that the Santal people were rehabilitated in the Dinajpur district as agricultural labourers (Ali, 2002, details on page 28). According to the Population Census (1901), there was substantial uncultivated land in the Dinajpur district but an apparent labour shortage, and following government recommendations, Santal workers were brought from India (Ali, 2002; Duyker, 1987). These settlers sometimes participated in movements with the mainstream population, such as in the 'Tevaga' (2/3 portion) Movement (1944-56) or the Santals' rebellion of 1855. Most people believed these movements and struggles motivated the state to codify its customary laws in the British period (1757-1947). As an example, the British government enacted the Aboriginal Act in 1850, as summarised in Table 2.

Table 1: Rebellions of the Santals Community

Rebellion Movement	Period	Remarks
Santals Rebellion	1854-55	Popularly known as Sidhu -Kanu/ rebellion, the names of two Santals' brothers.
Paru Raja rebellion	Historians estimate just after or before 1930, exact year unknown.	Historically it was a local movement against a British company, possibly in the 1930s.
Tevega movement (2/3 shared)	1944-46	Santals people participated spontaneously.

Source: Roy, 2024

The first and foremost description of the codification of customary law is as follows:

Table 2: Different interventions in the Santal community

Period	Intervention	Remarks
1919	Vide Notification No: 837	Land-related rules and regulations for the Indigenous.
1850	Aboriginal Act-1850	To develop socio-economic conditions and reduce land disorder among the Indigenous.
1943	Dinajpur Adivasi Welfare Department under the government management.	To reform the Adivasi community, to ensure their welfare and dissolve land-related issues.
1958	Dinajpur Adivasi Society Development Organization.	To improve socio-economic conditions.
1976	Special Welfare Cell, Minority of Home, GoB	To improve socio-economic conditions.

Source: Roy, 2024

The nineteenth century began with an emphasis on the Santals' customary laws and social systems to improve the standard of living of the indigenous people. In the middle of the 18<sup>th</sup> century, there were attempts to transform law into a rational creation in the Western world. As a result, the legal system began to take written form, and the customary system of law became a relic. In the second half of the 18th century, a legal theory arose that considered the law to be a relational creation (Benjaminsen & Svarstad, 2021). From the table below, we find the history of the codification of customary law in the Western world, and this transformation-initiated changes in all subsequent state structures.

Table 3: Customary law adopted to state law.

Year	Country	Remarks
1808	USA	However, later countries such as Spanish Cuba, Puerto Rico, and Honduras began to abandon customary law as a source of civil law in 1899.
1831	Bolivia	
1841	Costa Rica	
1845	Dominican Republic	
1825	Haiti	
1850	Colonised India, [today's Bangladesh.]	
1811	Austria	
1859	El Salvador	
1861	Ecuador	
1906	Honduras (second time)	
1868	Uruguay	
1869	Argentina	

Source: Roy, 2024

However, later countries began to abandon customary law as a source of civil law, such as Spanish Cuba, Puerto Rico, and Honduras in 1899. These were all colonies of Spain and wanted independence or the end of colonisation, which, after a long combat, Spain agreed to grant. In 1899, they all started to reform their legislature and judicial system, consequently abandoning customary law as a source to rule over the people. In this way, customary law acted as the source of civil law, wherein the interests of minority people were naturally protected, which is the primary concern of Sen's 'The Idea of Justice' (2009). The preservation of minority rights gives minorities a robust social standing, while small ethnic groups (SEGs) are confronted with two options, either customary law or state law. However, they cannot choose a single law to govern their society. That is the issue in terms of sustaining the community. It is worth noting that state legislation disregards customary law, placing tiny ethnic groups in conflict with collective interests, and SEGs see themselves as an isolated group inside the state (Mamdani, 2012).

The Constitution of Bangladesh (1972, articles 27 and 28) pledged to build a society free of discrimination and with equal rights for people of all levels. The Government of Bangladesh has not yet signed the United Nations Declaration on the Rights of Indigenous Peoples 2007, which seeks to eliminate all discrimination against ethnic peoples. Instead, the state later ignored smaller

ethnic groups following independence in 1971, formulating and implementing laws and regulations which evicted and made indigenous people refugees from their lands. Moreover, this process accelerated when the Government of Bangladesh declared some areas as protected, such as forests, wetlands or Jolmohal; this type of decision put SEGs in crisis instead of improving their quality of life (The Biodiversity Act 2017; Act 2010; Education Policy, 2009; The Forest Act 1927 as modified 2000; The Protected Areas of Tourism & Special Tourism Zone Act 2010; The Water Act 2013; The Protection and Conversation Fish Act 1950 as amendment 1985; The Bangladesh Environment Conversion Act 1995, and Rules 1997; Protected Area Management Rule 2017).

The law, therefore, should be reflected in the formulation of state law with active consideration of the Santal community's customary law, as in Table 3, to maximise the Sustainable Development Goals (SDGs)-11 (later SDGs16) of the ethnic community. Many scholars believe this process will ensure the sustainable development of the Santal community (Rahman, 2002; Rahman et al., 2021; Besra, 2014) and uphold their capabilities.

### **3. Sustainability among the Ethnic People: Upholding the Capabilities**

As with many campaigns for rights, sustainability, which originated as an "indigenous problem" and quickly acquired the significance of a genuine "indigenous movement" (not only in South Asia or Bangladesh but globally), was allegedly a political exercise by excluded and subordinated individuals fighting for recognition, participation, and emancipation.

However, the indigenous struggle is becoming considerably more complicated, which calls into question the political and social ontology upon which the economic and institutional architecture of the modern world is built. A demand movement from the 1970s (with a notable acceleration since the late 1980s) has shown potential for resistance. At the same time, development and change have drawn public discussion and scholarly interest. A matter of innovation in two areas of political and legal activity that primarily defined the late 20<sup>th</sup> and early 21<sup>st</sup> centuries, witnessed the growth of human rights and the change in the contemporary nation-state (and with it, the corresponding concept of citizenship). The journey to recognition of the collective rights of indigenous peoples by the United Nations, at least during the Indigenous Decade of 1994—2004, is the most sophisticated and complicated innovation recorded in recent decades in human rights. Concurrently, constitutional reforms, which resulted in the assumed nature of indigenous movements, marked the final season of reform in a number of nations, beginning with the Maori and First Nations of Canada.

Sen (2009, 1993) linked sustainability to human capabilities based on two concepts: freedom and choice. Considering the Brundtland Report (1989, p.8), although the term "sustainable" was derived from the Club of Rome consisting of 30 people, later the idea appeared in 'The Limits to Growth' (Meadows et al., 2018), and this pioneered the sustainability discourse in the world. However, the definition from Sen states:

Sustainable development as development that meets the needs of the presents without compromising the ability of future generations to meet their own needs. So, focusing on the quality of life can help in this understanding, and though light on only the demands



of sustainable development, but also on the content relevance of what we can identify as environmental issues. (Sen, 2009, p. 248).

Along with Sen, we need to consider the community life of the Santal people according to the SDGs, because sustainable communities were mentioned in SDGs-11: "Development is fundamentally an empowering process, and this power can be used to preserve and enrich the environment and not only to decimate it" (Sen, 2009, p.250). A community will be sustainable if the community enjoys two things: freedom and choice. Sen (2009) claims that to increase the capability of communities, we should give them space and the will to make decisions and exercise power within their community based on customary law. From such statements, the framework of UNDRIP and the International Labour Organization-1989 (known as ILO Convention 169 (ILO 1989) was developed. If an ethnic community can choose its traditional law, it will find solidarity, while social instability in law and order will disappear, leading them towards development.

According to the Population Census (2022), the people of Bangladesh fall into five religious groups: Hindus, Muslims, Buddhists, Christians, and others (GoB Census, 2022). It does not specify who the 'others' are, but sensing reality, 'others' represent all people who are outside the four mainstream categories. Following Sen (2009), these five groups are divided broadly into two compartments: the Majority as rulers, and the Minority, who are in a vulnerable position. Small ethnic groups, such as the Santals, Orao, Chakma, Marma, and Tripura, to name a few, belong to the latter. Therefore, the Santals had to protect their rights based on state law, which is summarised in Table 3, reflected in UNDRIP 2007 and ILO Convention 169 of 1989.

Now let us look differently at how the Santal minority group is documented, according to Sen. Lengthy cohabitation has affected the Santal community and its distinct sectors, which is one of the principles of this study. Furthermore, all the publications on which we depend for historical studies (like Hunter, 1876, 1878; Bodding, 1942; O'Malley, 1910; Risely, 1892; Dalton, 1872) offer ethnographic data about the Santal community's socio-economic character. However, these studies' portrayal of customary law could have been more intentional than strengthening customary authority, and their writing aimed to gain control over the community. On the other hand, as in the other countries listed in Table 4 above, there was the possibility for Bangladesh to incorporate customary law into legislation. For instance, customary law was absorbed into the South African legislative framework, leading to the quandary (Saussine and Murphy, eds, 2007; Pulea, 1993) of why this did not occur in the sub-continent? Instead, the East India Company started the conflict between the state and the ethnic community people (see Table 1 above), the aftermath of which is still ongoing. Historically, ethnic groups have striven for 'self-control' or 'self-determination' and it is regretted that colonialist and neo-colonialist works of history ignored various tribal movements that occurred in the nation (Doshi, 1990; Mahapatra, 1986).

### **3.1 Capability Approach: Sustain the Quality of Life in the Community**

The following section explains how the Capability Approach (hereafter CA) contributes to the well-being of the ethnic Santal people. CA is defined as: "A functioning is an achievement, whereas a capability is an ability to achieve. A functioning is, in a sense, more directly related to living conditions, since they each represents a different aspect of living conditions. Capabilities, in contrast, are "notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead" (Sen, 1987, p.36). The CA adopts a holistic view of development,

highlighting the multiple dimensions of sustainable development as the growth of people's well-being, including social, cultural, and political spheres. Sen emphasises the material aspects of development, the significance of a minority people's (here the Santal people's) cultural diversity, traditional knowledge, and worldview. The CA involves an in-depth understanding of the diversity of ways lives might augment ethnic peoples' perspectives on development and is linked to community development through customary law. Sen (2009) also believes that the "Rational theory of history is required to know the customary law linked with community development" (Sen, 2009, p.143).

Rationality, Theory, and History are the three core words to understand the Santal community's traditional political organisation. In order to understand the rational behaviour of the Santal community, it is necessary to trace their customary laws, which are interconnected with Theory and History. The Santal people behave rationally, in that they seek positive change or development, and this tripartite relationship consists of interconnected factors which are also related at the community level. Thus, Sen emphasises the concept of capabilities, which represents the potential or opportunities of a person to achieve esteemed functioning.

Another major conceptual guideline is the great traditions and little traditions, coined by Robert Redfield in 1956:

The great tradition is cultivated in schools or temples [also Church in the research field]; the little tradition works itself out and keeps itself going in the lives of the unlettered in their village communities. The tradition of the philosopher, theologian, and literary man is a tradition consciously cultivated and handed down; that of the little people is, for the most part, taken for granted and not submitted to much scrutiny or considered refinement and improvement. (Redfield, 1956, p.70)..70)..

Redfield demonstrated the transition in agrarian Mexico and his study of sociological expansion in India. This term was, however, first used by Redfield in his book "Peasant Society and Culture: an anthropological approach to civilisation" (Redfield, 1956), based on his research on Mexican communities. Firstly, he examined Indian civilisation, practically closer to the field site. Second, Redfield's conceptual framework complements Sen's capability approach when accounting for changing dynamics. The complicated totality of great and little traditions is acknowledged. The great tradition belongs to formal structure, with a society's elites regulating the literate tradition of civilisation. In contrast, the little tradition refers in this study to the informal, oral and customary tradition of the rural Santal people living within a civilisation of nation-states in the presence of external forces such as the civilising mission and a long colonial history.

### **3.2 'Capability Approach': Customary Law to Community Development**

It is important to understand the various aspects of the marginalisation causes of the ethnic Santal community in the light of either history or the colonial context. Otherwise, injustice may occur regarding accurate information about today's exploitation, inferiority, deprivation and disgrace seen in this community's customary practice. Twentieth-century social justice theory did not improve their quality of life; instead, the state and colonial governance system pushed them into an existential crisis (Jahan, 2020; Debnath, 2010). As a forward way in this, Sen (2009) suggested that the state should take responsibility and protect the rights of the minority community by

increasing their Capability. He argued in favour of political and moral philosophy to increase the Capability of the minority community people. From an anthropological viewpoint, despite all the ethnic features of the Santal community, they are struggling to establish a separate identity in society. In an early study, William Hunter (1876, 1878) noted that the Santals had been suppressed and oppressed by Aryans since they were non-Aryan (pp. 145-146). This phenomenon persisted from the period of the East India Company in 1757 right up to 1947. Consequently, participation in different rebellions and movements has been seen, and the Phulbari conflict in 2006 between state forces and the Santal people is the result of such continuation (Hasan, 2020).

Later in the Pakistan period (1947-1971) and post-Independence 1971, no government did justice to the ethnic peoples (Tripura, 2016, 2018), which is why today's ethnic communities feel isolated from the state and this memorialises the historical link with the pre-Aryan society. Novak (1993) stated that:

All Bangladeshi people have a two-tiered mind. One is reflected in the mainstream Hindu-Muslim-Buddhist-Christian's mind. They draw ancestral traits based on the belief in the moon, sun, and village gods. Another one they feel the history of animism is their ancestral [Indigenous]. (Novak, 1993, p. 142).

Sen's theory (2009, 1999) negates the social justice theory and asserts that it does not work for such an ethnic society (such as the Santal community) for three reasons:

First, Social Justice has universal traits that cannot include and determine ethnic features. Second, social justice depends on individualised perspectives and Third, Amartya Sen thinks they need first exist, then justice [Santal as minority people]. Because they should have the right to self-control (ILO, 1989 / C 169; UNDRIP) and 'self-determination' (UNDRIP).

Capability theory (Sen, 1987, 1993), raises the question of how a community's rights will be determined, and how this will affect its development. Sen (2009,1999) believed that the majority of people will rule the community or society as a condition, that is, the ruler will protect the rights. The Santal people's rights are always guided by their social norms and faith, which are rooted in customary law. The fundamental elements of the rights of a minority people are based on social norms and trust (Mayali & Mousseron, eds, 2018; Saussine & Murphy, eds, 2007), and both are parts of customary law. Since the social norms and faith are unique and differ from place to place, community to community, these customary laws also vary. Customary law can comply with 'Freedom and Choice' (Sen, 1999), with the community upholding the Capabilities (Basu & Kanbur eds., 2009). For sustainable community development (SDGs 11), therefore, this is relevant to ethnic people. Hence, the current study takes customary law as the fundamental rights of that community, consisting of social norms and faith in accordance with international legal guidelines such as UNDRIP and ILO-1989/169. One contemporary example is germane; in 2006, the Bangladeshi government wanted to begin coal power generating in the Phulbari sub-district of Dinajpur to expand energy output – even though this would violate the customary rules of the local ethnic group. Consequently, the Santal fought against state troops (Faruque, 2018), causing a few fatalities and several hospitalisations, not to mention that initial government investment is still dormant.

### 3.3 Capability Approach and Linkage with Sustainable Development

Well-being and development should be discussed regarding people's capabilities to function based on their actual opportunities to undertake the actions and activities they want to engage in and be who they want to be. These beings and doings, which Sen (1990, 1993, 1999) called achieved functioning or actual opportunities, constitute what makes an individual's or community's values. Opportunities include choosing customary or state law, being healthy, being part of a community, being respected, and so forth. The distinction between real opportunities and opportunities is to realise how much a person feels 'well' in the community. People should have the freedom (ability) to lead the kind of life they want to do what they want to do and be the person they want to be. Once they have effectively achieved these freedoms, they can work on those freedoms in line with their traditions or the history of how they want to live. For example, everyone should have the opportunity to be part of a community and practice customary law.

However, they should also have this option to practice state law. The Santal community will decide what makes them satisfied [that is, utility, according to Sen] in the community. In other words, Sen (1993) called this the preservation of minority rights by the majority or ruler. However, the state will arrange freedom (self-determination) and choice (customary law) for the minority community (Guhathakurta, 2022). According to Sen (2009), in the twenty-first century, a state can give freedom to protect the traditional institutions that will reflect the community, leading to better community management.

Wherever we start development, it must touch the life of an individual, a family, or a community. Sen (1993, 1999) judged these three elements as capability and refers to freedom, forming two concepts of 'well-being and advantages' (Sen, 1999). Well-being means how much a person's wellness of being is located in a community, while advantage means the real opportunity a person enjoys compared with others. Therefore, a person in the community has two choices: to follow customary law and/or state law to control or exercise power to solve social issues in the community. However, this individual does not have freedom, which creates a problem in the community, and further research should discuss this matter.

## 4. Conclusion

The core argument that customary factors influence ethnic actions is a frequent theme in existing academic studies. Customary law is a long-standing practice, and without incorporating it within-state law, development might not be equitable and sustainable, which have been searched and shown arguments in this article. Admittedly, there is a lack of well-informed and reliable anthropological texts on the history of ethnic minorities in Bangladesh. Although some books were written for administrative purposes during the colonial period, later books on minorities were written for political interest, indeed, avoiding the customary laws.

However, the first author had conducted previous fieldwork to explore customary law in the Santal community using the ethnographic method, involving in-depth interviews and observing customary behaviour in the community. There is delimited work on the Customary law of the Santal community in Bangladesh, while, unfortunately, the Government of Bangladesh classifies the Santals as a minority within the ethnic communities in all texts and documents. However, the

problem is that Bangladesh did not ratify UNDRIP and ILO Convention 169 to give them all the opportunities to make their life affluent. Consequently, this current study negates those findings incorporated here, instead searching for an alternative explanation in Bangladesh including ratification of international documents.

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