

Commentary

# Recognition of Naga Customary Law and Practices in Northeast India: Convergence or Conflict

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## Abstract

India is a unique example of unity in diversity. The diversity and variety of the language, caste, culture, tribe and religion is remarkably distinguished as a wonderful mosaic of anthropological splendor. Tribal peoples generally prefer having their disputes determined by the customary courts because their procedures are simpler and cheaper compared to formal law courts. The courts are also located near the public and the justice is available at the doorstep of the people. The courts apply orally transmitted rules and norms while rendering decisions. Village Court in Nagaland is unique not only in the country but also in the world. In India, the national justice system is well structured and independent based on the adversarial system of English Common Law. But the justice system of the tribal peoples in Northeast India, specifically in Nagaland, is quite different. In Nagaland, the tribal peoples have a high degree of integrity governed by their customary laws. Customary laws emerged from the community and through them the socio-cultural identity of the tribal community is preserved. Customary laws in Nagaland vary from tribe to tribe and are largely unwritten. The tribal communities cherish their laws as inherent to their identity. Customary laws and practices in Nagaland regulate certain customary rules of behavior and include enforcement procedures and punishment for violations, turning them into a guardian of tribal values and norms. Many aspects of customary laws are good and need to be preserved, such as simplicity of procedures and preference for reconciliation rather than litigation. In recent years, there have been considerable changes in the contents, interpretation, and enforcement of customary laws. Particularly, this seems to appear in the State of Nagaland where the traditional people give them the strict interpretation and resist changes in traditional laws. This paper examines the constitutional and legislative framework within which the customary law and practices operate.

## Keywords

Naga, Custom and Customary Law, Legal Pluralism, Tribal Justice System, Customary Courts, Tribal Autonomy, Nehruvian Panchasheel, Traditional Mode of Settlement of Disputes

## 1. Introduction

India, a land of diversity, is home to a large number of tribal factions who are still far away from the life style of the modern world. Different tribal communities and ethnic groups inhabit in the region of Northeast. All tribal communities have their own traditions, culture, language and way of living. This

has made Northeast as one of the highly culturally diversified region in the world. The Northeast is inhabited by over 300 ethnic tribal groups. India has claimed to have the second biggest tribal population in the world after Africa [1]. The

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tribal peoples<sup>1</sup> in India are officially recognized as “Scheduled Tribes”.<sup>2</sup> Each tribe has a specific culture organized by narrative, social, and diplomatic aspects. Many tribes from the hilly regions in the Northeast, particularly Nagas<sup>3</sup> do not have any written laws [2]. The tribes regulate themselves according to customs and traditions, developed inside the particular tribal communities, known as customary or tribal laws and practices.<sup>4</sup>

The colonial administration rarely interfered with tribes’ customary laws and practice [3]. The British administrative officers let Naga people deal with cases, both civil and criminal, through the agencies of their indigenous institution and village courts except those cases which were of heinous nature [4]. The serious offences were dealt by formal legal system. In 1874, Scheduled District Act was introduced by the British administration to protect and to preserve the Naga culture and the way of life. This was the first step taken by the British to give maximum autonomy to the Naga ways of life, customs and laws [5]. Since the time of British regime, the Northeast tribes have enjoyed notable freedom in administrative, financial, and judicial matters. In post-colonial India, the Sixth Schedule to the Constitution bestowed upon the Northeast States complete autonomy in several matters including self-governance and administration of civil and criminal justice. These states were exempted from applying formal substantive and procedural laws of the Indian state including rules of evidence.

The codified law and its related adversarial court procedures are of little significance, in the tribal belt of Northeast, particularly in Naga community. People who feel they have been “wronged” by another person or group of persons, prefer to seek a solution by reference to customary law and practice, as declared and/or interpreted by village chiefs or other elders of community [6]. These processes are commenced, conducted and concluded without any recourse to the police, the Office of the Public Prosecutor or the ‘formal’ court system

[6]. The term “wronged” here means both civil and criminal wrong as the demarcation between civil and criminal wrong is not clear in customary law. In this essay examination of customary law and procedure is narrowed to a particular Naga community in the Northeast, except some references of other tribal communities wherever necessary.

In India, tribal peoples are considered as the weakest sections of the population in view of common socio-economic and socio-demographic scales. They are the most marginalised and vulnerable communities in India. They are not only backward from general population of all India in different parameters but totally isolated from the mainstream land. Tribal peoples are mainly the indigenous population in India that the Government of India identifies as socially and economically backward and in need of special protection from social injustice and exploitation. They are suffering from social, religious, legal, political, economic, educational, and other problems. Problems of tribes are mainly related to forest rights, land alienation, exploitation by money lenders, mining and displacement in tribal areas. Development projects, such as industrial projects, dams, roads, mines, power plants and new cities, displace the tribal peoples and scheduled tribes from their homes resulting in destitution and unemployment. India’s Constitution provides special protection and assistance to vulnerable groups in India including Indigenous Peoples (Adivasi) in order to help alleviate extreme levels of poverty, illiteracy, disease, and early mortality [7], so special provisions are made in the Constitution for the protection of their interests.<sup>5</sup> The advent of colonialism saw the diminishing of exclusive native domain in dispute resolution. The colonial government introduced two sets of laws: one to govern the natives and another for the British and their interests.<sup>6</sup> Tribal peoples were allowed to exercise considerable freedom in the application of their own customs to settle disputes within their community, particularly in the Naga tribal areas whereas English law was imposed only on matters that involved colonial interests. This system continued with slight variations after independence when colonial law was replaced by the Indian Constitution. Statehood in 1963 gave constitutional recognition to the Naga tribal customary laws. In *State of Nagaland v. Ratan Singh* [8], the Indian Supreme Court upheld the validity of customary law after considering the length of law-making history in the Naga Hills. The Court held that:

Laws of this kind are made with an eye to simplicity. People in backward tracts cannot be expected to make themselves aware of the technicalities of a complex code. What is important is that they should be able to present their defense [sic] effectively unhampered by the technicalities of complex laws [8].

1 In India, people of indigenous characteristics are known by many names, such as ‘tribes,’ ‘adivasi,’ ‘jangali,’ ‘grijan,’ ‘vanvasi,’ ‘vanyajati,’ ‘hill tribes.’ Tribal people are called ‘Scheduled Tribes’ in the Indian Constitution for all purposes.

2 In central India, the “Scheduled Tribes” are usually referred to as Adivasis, which literally means Indigenous Peoples.

3 The term ‘Naga’ is used as a generic term to refer to the various (Naga) tribal groups residing in Nagaland, Arunachal Pradesh, Manipur and Myanmar, who are substantially different from each other. The total Naga population is about 3 million, consisting of more than 40 tribes who mainly lives in Northeast India. When Nagas refer to Nagaland they mean the entire area inhabited by Nagas which have been partitioned by the British between India and Burma. The Indian Union created a State in 1963, named Nagaland comprising of only one third of the land inhabited by Nagas. The rest lives in Arunachal Pradesh, Manipur and Myanmar. They speak over 30 different and sometimes mutually unintelligible tonal languages of the Tibeto-Burman language family. They are known for their rich cultural heritage and varied precious customary laws. They have minute customary laws for everything.

4 By the term ‘customary law’ we mean a set of long established customs which evolved from people. Customary law emerges from the community and through customary law the socio-cultural identity of the tribal community is preserved. Customary law is an ever-changing and communally agreed principle. Nevertheless, it varies from tribe to tribe and is largely unwritten. Many experts appreciate some aspects of customary law, particularly the simplicity of procedures and preference of restitution and reconciliation method in the settlement of disputes rather than litigation.

5 Article 46 of the Indian Constitution provides that the State shall promote with special care the educational and economic interests of the weaker sections of the society and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.

6 The colonial interests in Northeast, such as managing tea estate and other trading ports led defensive action against raids from the local ethnic groups. In such conflicts colonial regime interfered in the civil and criminal administration of justice.

In view of the peculiar substantive and procedural law as contained in the Rules<sup>7</sup> applicable to Hill districts of Nagaland, the village dispute, particularly with regard to the source of water and the land in which it is situated, was required to be decided not as an adversarial litigation but as a subject matter requiring solution in a spirit of ‘accommodation and adjustment’ of conflicting rights of the members of two contesting clans. In the village courts customary law is required to be applied and the adjudicatory process requires the adjudication fora to make all possible efforts to resolve the dispute by mutual consent of parties involved in the disputed case regarding access to the source of water and right and title to the land in which the source exists, needed a resolution so as to best serve the demands of all members of the two village communities who had raised the dispute.<sup>8</sup>

The customary way of dispute settlement has been appreciated because it is cheap, speedy, and simple in procedure. It is easily accessible to all clans of the tribal society and one can comfortably present his case unimpeded by the procedural technicalities of state law. In states like Arunachal Pradesh, Nagaland, Manipur, and Tripura, where several tribes and sub-tribes reside, the customary laws and social norms differ from tribe to tribe. In such a case, the tribal or village institutions are not in a position to deal with the case. In this paper the terms “customary laws,” “custom,” “traditional law,” and “tribal custom and tradition” have been used reciprocally. Customary law and practice has become an integral part of the life and custom of tribal peoples and local communities in Northeast, particularly in Nagaland.<sup>9</sup> It is an established pattern of behavior within a community which is seen by the community itself as having a binding force of law.

India is a strong supporter of the tribal peoples’ rights. It supported the adoption of UNDRIP in 2007. India is of the view that the concept of indigenous peoples relates to the specific situations where people suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources. Right to land is a major challenge for Indigenous Peoples in India. There is a plethora of laws that prohibit the sale or transfer of tribal lands to non-tribal peoples and the restoration of alienated lands to tribal landowners. However, these laws are still ineffective, are not invoked or are intended to weaken them. In addition, a large number of tribes that lived in the forests were denied their rights and the tribes continued to live under the threat of an eviction in the name of forest, animal conservation, and projects. Collective and individual rights are violated in pri-

vate and public spaces. Sexual violence, trafficking, killing/branding, militarization or state violence in the name of insurgency control, and the impact of development-induced displacement, etc., remain important issues and challenges for indigenous peoples. Since India is a liberal democracy with inclusive character, it must play a leading role in the promotion and protection of rights of tribal people.

## 2. Theoretical Premises of Customary Law and Practices

Administration of tribal justice is the foremost pillar of the government. It is the process by which the legal function of the government is executed, aiming to provide justice for all. In India 705 individual ethnic groups are notified as Scheduled Tribes, 300 of whom inhabit in the Northeast. According to 2011 Census, 10.42 crore (104.2 Million) Indians are notified as “Scheduled Tribes,” accounting for 8.6 percent of the total population.<sup>10</sup> Northeast, a homeland of ethnic tribes, is comprised of eight states: Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura, and Sikkim.

Every Naga village has different practices of customary law as every Naga village is governed independently. Earlier, people were confined within the jurisdiction of a particular village without much interaction with neighbouring villages: in the present day there is more interaction and activities within villages and also within tribes [9]. Therefore, a uniform codified customary law may enable speedy trials and better judgment. However, a certain level of exclusive rights/laws must be under the authority of each village. At a time when there was no unified system of administration, a village chief or elder settles disputes and disagreements of the village [10]. They all were controlled and regulated by their customary laws and the village chief (elderly person of the village) was the main person responsible for the administration in the context of Naga inhabitants in that particular village. Therefore, the customary laws administered and implemented by every village stood for a form of governance and so the administration was totally independent.

In India, the justice system is based on the English common law system. But the justice system in tribal areas, particularly in Northeast region seems to be quite different from rest of the country. In Northeast, before the advent of colonial legal system, the rest of India was administered by the holy norms of Hindus and Muslims; justice was dispensed with mostly by the Kings in person or someone appointed by the Kings [11]. With the advent of British rule India was governed by English civil and criminal laws; however, family issues like marriage,

7 The Rules for the Administration of Justice and Police in Nagaland, 1937.

8 *Ibid.*

9 Naga customary law can be defined as unwritten customs, accepted as oral usages, practices and traditions passed through generations which regulate the day-to-day life of Naga people. Nagas are comprised of different tribes having different cultures, customs, traditions and dialects, and one tribe could not understand another tribe’s dialect. Nagaland recognise three-tier of hierarchy of customary courts, namely, Village Court, Subordinate District Customary Court and District Customary Court. Among all these three courts the Village Court plays a significant role in the preservation and promotion of Naga customary laws and practices.

10 As per the Census Report of 2011, 104.2 million people in India are notified as Scheduled Tribes (STs), of which 10.4 million live in urban areas and the rest in rural areas. Scheduled Tribes represent 8.6 percent of the India’s total population and 11.3 percent of the total rural population. Madhya Pradesh has the highest proportion of Scheduled Tribe residents (14.6 percent)—Meghalaya (as one of the Northeast States) has the lowest (2.5 percent). In Nagaland, the ST population dropped due to migration. (Source: Census Report of India 2011).

divorce and succession, were allowed to be regulated by the personal laws of the concerned parties. In Northeast, the tribal peoples have their own unique traditional customary laws and courts dealing with both the civil and criminal matters and are in practice since the time immemorial. Even though the colonial administration legally annexed the Northeast regions in 1826, they abstained from altering the social structure of tribal societies; however, they categorized crimes into serious and non-serious ones which signify that the Northeast tribes were quite advanced in their justice delivery system. Tribal peoples were allowed to deal with petty and non-serious offences by their customary law.

## 2.1. Colonial and Post-Colonial Policy Towards Customary Law

It was acknowledged as early as the Regulating Act of 1773<sup>11</sup> by the colonial regime that tribal peoples of Northeast should be regulated by their own traditional laws and practices, especially in the areas of marriage, divorce, inheritance and religion.<sup>12</sup> However, non-tribal peoples continued to be regulated by colonial legal system on the basis of common law principles of “justice, equity and good conscience.” English laws, procedural codes and rules of evidence manifested no connection with the traditional laws, and reduced the application of traditional laws and practices through traditional courts. After India became independent in 1947, and with the endorsement of the democratic and secular Constitution in 1950, the tribal areas of the Northeast states were given a special status with some autonomy. These areas were placed under the Sixth Schedule to provide for the local administration of tribal areas by formation of Autonomous Districts/Autonomous Regions and Autonomous District Councils. Some states in Northeast opted out of this. According to the provisions of the Sixth Schedule to the Indian Constitution, village councils or courts formed or recognized by the Autonomous District Councils could try certain categories of criminal offences and civil disputes. During the British period, the tribal areas of Northeast region except those of Manipur and Tripura, formed a part of the province of Assam.<sup>13</sup> Presently, special status under the Sixth Schedule is—applicable to four states of the Northeast: Assam, Meghalaya, Mizoram and Tripura. Most of the tribes of Arunachal Pradesh and Nagaland have been declared as Scheduled Tribes.<sup>14</sup> Nagaland is specifically governed by Article 371-A

of the Indian Constitution, not by the Sixth Schedule. Nagaland enjoy more autonomy in respect of self-governance in comparison to Sixth Schedule states.

## 2.2. Constituent Assembly Debates

The tribal peoples affectionate members of Constituent Assembly, like Shri Gopinath Bordoloi, Rev. J. J. M. Nicholas Roy and Dr. Bhim Rao Ambedkar who understood the tribal customs, culture, traditions and usages—advocated for the incorporation of Naga customary law in the Constitution and thus the Naga Hills were included in the Sixth Schedule to the Constitution of India [12]. Dr. Bhim Rao Ambedkar responding to the opponents of this initiative as follows:

The position of the tribals in Assam stands on a somewhat different footing from the position of the tribals in other parts of India... the tribal peoples in areas other than Assam are more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they live. With regards to the tribal in Assam that is not the case. Their roots are still in their own civilization and their own culture. They have not adopted, mainly or in large part, either the modes or the manners of the Hindus who surround them. Their laws of inheritance, their laws of marriage, customs and so on are quite different from that of the Hindus. In other words, the position of the tribal of Assam, whatever may be the reason for it, is somewhat analogous to the position of the Red Indians in the United States as against the white emigrant there [12].

Dr. Bhim Rao Ambedkar, additionally, whilst persuading the other members of the Constituent Assembly to accept the Sixth Schedule to the Constitution of India said:

Now what did the United States do with the Red Indians? So far as I am aware, what they did was to create what are called Reservations or Boundaries within which the Red Indians lived. They are a Republic by themselves. No doubt, by the law of United States they are citizens of the United States. Factually, they are a separate, independent people. It was felt by the United States that their laws and modes of living, their habits and manners of life were so distinct that it would be dangerous to bring them at one shot, so to say, within the range of the laws made by the white people for the white persons and for the purpose of the white civilization [12].

Nagaland is primarily a tribal state, whose statehood was granted on 1<sup>st</sup> December 1963 on the basis of the Sixteen Point Agreement [13] signed between the Government of India and the Naga People's Convention.<sup>15</sup> Then Prime Minister Pandit Jawaharlal Nehru while promulgating the

11 The Regulating Act of 1773 was the first parliamentary legislation and authorisation by the British Parliament, defining the authority, powers and functions of the East India Company, in respect of its Indian occupation and administration.

12 It is significant to note here that subjects such as the management of natural resources which had already been regulated by the local and tribal community for a long period were not left to them anymore under the Regulating Act, 1773.

13 In 1971, the state of Assam was reorganized under the Northeastern Areas (Reorganization) Act of 1971 and new Union Territories and states were carved out of Assam: Arunachal Pradesh, Manipur, Meghalaya, and Mizoram, and Tripura. Nagaland became a State in 1962 vide the State of Nagaland Act, 1962.

14 In 1949, the sixth schedule was enacted as per Article 244 of the Indian constitution. The sixth schedule was designed to protect the indigenous and tribal

groups by establishing and functioning autonomous district divisions known as the autonomous district councils or ADCs. The Sixth Schedule is not a parliamentary enactment but a part of the original Constitution; therefore, its essence and basic structure cannot be destroyed by a parliamentary amendment. It is a special feature of the federal structure which enriches the beauty of the Constitution and strongly regards the protection of culture as a fundamental right under the Constitution.

15 The chief outcome of this ‘Sixteenth Point Agreement’ was the creation of a separate State of Nagaland by inserting Article 371A by way of the Constitution (Thirteenth Amendment) Act, 1962.



Sixteen Point Agreement and the creation of the State of Nagaland in the Lok Sabha (House of the People) in August 1960 said:

The Nagas are hard-working and disciplined people, and there is much in their way of life from which others can learn with profit. We have had for many years Nagas in the Indian Army and they have proved to be excellent soldiers. Our policy has always been to give the fullest autonomy and opportunity of self-development to the Naga people, without interfering in any way in their internal affairs or way of life [14].

Pandit Nehru concluded his speech in the Lok Sabha by saying,

We have always regarded the territory inhabited by the Nagas as a part of independent India as defined in our Constitution. We look upon all these tribal peoples as citizen of independent India having all the privileges and obligations of such citizenship [14].

### 2.3. Incorporation of Customary Law in the Constitution

The Naga social and cultural practices, including customary law and procedure, were exclusively recognized in the Constitution by this Agreement under Article 371-A.<sup>16</sup> This Article specifically dealing with the State of Nagaland remains crucial for the identity and preservation of Naga culture. It is the source of constitutional recognition of customary law and institutions which provides for parallel system of both customary and formal law in the state. The tribes were in fact self-governing nations and their justice system is one of the most visible manifestations in the exercise of tribal sovereignty. The customary law is one of the most distinctive features of the tribal communities and their justice system is wholly based on customary law.

Tribal customary laws are provided considerable autonomy under various international instruments and within the Indian Constitution through Articles 244, 244-A, 371-A (Nagaland) and 371-G (Mizoram). Because of the special status accorded to the states in Northeast India, a number of new institutions were created<sup>17</sup> in addition to the continued recognition accorded to the existing traditional village and community institutions. This led to a multiplicity of law and justice systems, that continue to operate in some parts of Northeast, especially those forming part of the Sixth Schedule states. In addition, in the Sixth Schedule States that formed the Autonomous District Councils that have been authorized to make laws for the region within their jurisdiction, a third set of laws is applica-

ble.<sup>18</sup> Autonomous District Council laws are in full conformity with indigenous laws and practices of local tribes and are applicable where both the parties to a dispute are tribal and inhabitants of that locality.

It is apparent that the rights of tribal peoples to be governed by their own customary laws leads to the creation of a number of local institutions associated with administration of justice or dispute settlement. On the one hand, the Deputy Commissioner in some parts of the Northeast states administers both institutions, Executive and Judiciary, where they are still not separate. At the same level, for certain other states, there is a state-run judiciary with the High Court Bench as the apex body within the state. Moreover, another body at the intermediary level, found in the Sixth Schedule states is the Autonomous District Councils,<sup>19</sup> which are also vested with judicial powers. The Northeast states which are not part of the Sixth Schedule continue to be governed by the Rules for Administration of Justice<sup>20</sup> framed by the British administration in the late-nineteenth century [15]. This is true for the states of Manipur, Nagaland and Arunachal Pradesh where no Autonomous District Councils exist. The Manipur too had enacted its own special rules for dispensation of justice in the State by the Manipur Hill Areas Village Authorities Act, 1956.

### 2.4. Legal Pluralism as a Feature of Indian Legal System

Under the Indian Constitution, tribal peoples were provided a reasonable autonomy by allowing them to be governed by their own customs and usages, making legal pluralism as a real feature of the legal system in India. In this context, Justice M. B. Lokur in his lecture on Tribal and Customary Laws, opined that:

The system of enforcement of tribal customs is very strong in the Northeast and is constitutionally protected. Conventional courts, as we understand them, are very often out of reach for tribals in the Northeast and that is another reason why the method of dispensing justice in accordance with customary law is so popular among the tribal. It is necessary for all of us to try and strengthen customary courts and enforcement of customary laws amongst the tribal communities

16 Article 371-A was added to the Indian Constitution by 13<sup>th</sup> Amendment Act of 1962, by which the Nagaland was given authority of self-governance in many matters.

17 See the Sixth Schedule of the Indian Constitution for the states of Assam, Meghalaya, Mizoram and Tripura. Autonomous Councils have been created for the administration of justice in these state. In Nagaland, Village Courts, Subordinate District Customary Courts and District Customary Courts have been created for the administration of civil and criminal justice for tribal areas.

18 One of the most significant provisions of Sixth Schedule of the Indian Constitution is the creation of District and Regional Autonomous Councils. They are equipped with certain legislative, executive, financial and judicial powers. The law making powers include forests, land, cultivation, water, village administration, marriage and divorce, inheritance of property, social customs, and so on.

19 The Sixth Schedule gives tribal communities considerable autonomy in legislative, administrative, financial and judicial matters. Currently there are 10 Autonomous District Councils in four Northeast States. These are: Assam, Meghalaya, Mizoram and Tripura. Nagaland, on the other hand, is governed by Article 371-A, which says that "no Act of Parliament shall apply in the State in several areas unless the Nagaland Assembly so decides by a resolution". One of the important provisions of the Sixth Schedule is that the tribal areas have to be administered as Autonomous Districts and Autonomous Regions.

20 Rules of Administration of Justice were promulgated at different times for different areas, superseding the previous ones. The first set of rules was issued in 1872 under the Garo Hills Act of 1869 which was extended to the Naga Hills.

since that system of administration of justice has been accepted and practiced by them for centuries without any dissatisfaction with their justice delivery system [16].

The Parliamentary Standing Committee in its Twenty-sixth Report on Demands for Grants (2008-09) of Ministry of Law and Justice has observed that:

Though, there were no written rules for administration of tribal villages, but the customs and traditions were almost compatible with the modern concepts of jurisprudence. The tribal councils in Northeast States were functioning on the lines of the system evolved for parliamentary democracy, which is in vogue now-a-days. The council derived their authority from the expression of the will and power of the people. They had the support of both social and supernatural. Thus the concept of parliamentary democracy is not new to the tribal society [17].

The National Commission for Women in its Report on Customary Laws in Northeast India: Impact on Women (2007) submitted that:

In the Northeast many tribes continue to regulate themselves according to their own customary laws while most laws of the Middle India tribes fell by the wayside because of the onslaught of the Pan-Indian laws. Among many hill tribes of this region the village chiefs regulate the use of land and water and has administrative and judicial power. The tribes combine kinship based political organization with well-defined laws and procedures for punishment of offenders through traditional courts [18].

The Constitution through several Articles has provided for the socio-economic development and empowerment of Scheduled Tribes. But there has been no national policy, which could have helped translate the constitutional provisions into a reality. Five policies spelled out in 1952, known as Nehruvian Panchasheel [19], have been guiding the administration of tribal affairs. The policies seek to bring Scheduled Tribes into the mainstream of society through a multi-prolonged approach for their all-round development without disturbing their distinct culture. They are:

- 1) Tribals should be allowed to develop according to their own genius.
- 2) Tribals' rights in land and forest should be respected.
- 3) Tribal teams should be trained to undertake administration and development without too many outsiders being inducted.
- 4) Tribal development should be undertaken without disturbing tribal social and cultural institutions.
- 5) The index of tribal development should be the quality of their life and not the money spent.

## 2.5. Condition of Tribal Peoples Human Rights in India

Recently, India appears to have softened its stand against autonomy for tribal people. In September 2007, India voted in favor of the United Nations Declaration on the Rights of

Indigenous Peoples [20] which affirms various rights to autonomy that are inherent in the tribal peoples of the world (e.g., U.N. Declaration, Articles 3-5) The UN Declaration, although not binding, has been variously described as an international norm-building document [21] that reflects the widespread agreement [22] with respect to Indigenous rights among many nations [23], and which, along with other developments, can be seen as giving rise to a body of customary international law on the subject [22]. By supporting the UN Declaration India agreed that nations must respect some form of autonomy for Indigenous peoples, but the vote was conditioned on the fact that the UN Declaration recognizes the right to internal autonomy for tribal people and not the right to impair the territorial integrity of sovereign and independent nations that India has so vigorously opposed.

India's recognition of Indigenous Peoples in international and domestic law, policy, and practice is paradoxical. While India voted in favor of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and signed the ILO Convention 107, the government continues to deny the term and concept of "Indigenous Peoples" claiming that all Indians are indigenous peoples. Although the Government of India officially does not consider any specific section of its population as "indigenous peoples" as generally understood and implied in its usage in the UN Convention, it claims all its peoples as indigenous. However, the "Scheduled Tribes" (STs) of India are considered as indigenous peoples in all operational dealings.

India has constantly insisted that its own indigenous peoples (Scheduled Tribes) cannot claim status or protection under these international laws. The government is particularly hostile to any reference to the rights of indigenous people to autonomy, self-governance or self-determination. Regarding references to the right to self-determination, it was the understanding of Indian government that the right to self-determination applied only to peoples under foreign domination and that the concept did not apply to sovereign independent States or to a section of people or a nation, which was the essence of national integrity. The Declaration clarified that the right to self-determination would be exercised by indigenous peoples in terms of their right to autonomy or self-government in matters relating to their internal and local affairs, as well as means and ways for financing their autonomous functions.

India has an array of laws, policies and constitutional provisions aimed at protecting the rights of tribal communities. Yet, India is also well-known by the extreme reluctance to acknowledge or accept the international framework for such protections, incorporated primarily in International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. The rights of Indigenous Peoples are guaranteed within the Indian Constitutional framework. The Constitution of India provides for special protections for the classified Scheduled Tribes using

paternalistic and discriminatory language: recognizing their social, educational and economic “backwardness,” and the need to “protect” them from social injustice and various forms of exploitation [24]. The Fifth and Sixth Schedules of the Constitution offer special laws on Indigenous Peoples’ land rights and self-governance and are applicable to designated parts of the country with high tribal population including central India and the Northeast states. Article 371-A clearly provides special status to Naga tribes in Nagaland in consonance with the rights guaranteed by the UNDRIP. At operational level, India has adopted reservation and affirmative action policies for the welfare of Scheduled Tribes. Reservation of seats and special quota for Scheduled Tribes in various organizations and institutions is secured by the Constitution. Education has been made accessible by reducing fees and imposing compulsory education. Health, water, road etc. facilities have been initiated under various welfare schemes for Scheduled Tribes.

### 3. Constitutional and Legislative Provisions Regarding Customary Law

In traditional societies almost every law makes concessions in favor of customs prevailing in a particular community or in a particular area. In India, customs are given special recognition both by the Constitution and different laws. Legal recognition of customs has its own history. The customary rights of the tribes were recognized in the Northeast at the earliest in 1872, by enactment of the Indian Evidence Act. Section 13 of the Act makes specific reference to the proof of customary law and practices. Similarly, the Assam Forest Regulation of 1891 recognizes rights to grazing land and jungle (forest) yield at the time of solving rights before a designated zone of forest is categorized as Reserved Forest [25]. Undoubtedly, these rights can be recognized as customary rights in favor of tribal peoples. Post-independence India as a nation made concerted efforts to follow the principle of unity in diversity by accommodating within the framework of the Constitution, due recognition and preservation of minority and tribal culture. Although the Constitution of India makes no specific reference to Naga customary law, it refers to the constitutional recognition of “custom” under Article 13, which is interpreted in such a way as to include customary law and practices. For the exercise of indigenous (customary) law in the administration of justice, custom needs to be recognized as a “law” by the Constitution.

Under the Indian Constitution, “custom” has been clearly recognized as a source of law. All customs and usages having the features of antiquity, reasonableness and continuity are enforceable by law. As clearly stated by Article 13 (3) of the Indian Constitution, the term “law” includes “customs” and “usages” holding the effect of law. Reference can be made to the case of *State of Bihar v. Subodh Gopal Bose* [26], in which the Supreme Court observed:

A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality is entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be valid, a custom must be ancient, certain and reasonable, and not being in derogation of the general rules of law must be construed strictly [26].

The Court is bound to abide by the custom and recognize it as customary law provided it is reasonable and has a long history of usage and that it does not violate the cardinal principles of the Indian Constitution and the constitutional rights of the common citizens. The Court expounded Article 13 (1) in *State of Sikkim v. Surendra Prasad Sharma* [27] saying:

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. The article lays down that any law passed by a legislature or a law already in existence, if inconsistent with the guarantee of fundamental rights will be void [27].

A somewhat similar statement appears in Article 29 (1) of the Indian Constitution, which reads: “Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.” This fundamental right intends to preserve the culture of minority groups in India. Indian society is a composite heterogeneous one and its diversity is one of its strengths. The Constitution guarantees these rights to minorities so that the diversity of this country is preserved and provides avenues for all groups including marginalized ones to protect, preserve, and propagate their culture. In this sense, the tribal communities’ right of access to justice may be considered a subset of the fundamental right to conserve culture under Article 29 (1) of the Indian Constitution.

#### 3.1. Special Constitutional Provisions for Protection of Tribal Rights

Apart from the general protection as provided in Part III and IV of the Constitution, the second type of constitutional protection is provided in the Fifth and Sixth Schedules of the Indian Constitution, which refers to tribal autonomy, in the matter of internal governance and the welfare of tribal peoples (also called the Scheduled Tribes). The Fifth Schedule<sup>21</sup> of the Constitution is more comprehensive and protects the interests of tribal peoples living in Central India aside from the four states of Northeast, namely, Assam, Meghalaya, Tripura and Mizoram. It encompasses systems concerning the man-

21 The Fifth Schedule which has been added to the Constitution of India by the Constitution (Amendment) Act, 1976 (Act No. 101 of 1976). This Schedule contains provisions in respect to control and administration of Scheduled Tribes and Scheduled Areas in any states except Assam, Meghalaya, Mizoram and Tripura.

agement and authority of the Scheduled Areas in the ten states having Scheduled Tribes.<sup>22</sup> Whereas the provisions of the Sixth Schedule,<sup>23</sup> an another unique feature of the Constitution, apply to the governance and control of the tribal regions of the aforesaid four States to protect the interests of the tribal communities in such states. The Sixth Schedule allows the setting of the separate administrative units, namely, the Autonomous District and Regional Councils as having full autonomy with regard to legislative, administrative and most judicial functions. The special provisions are provided in Article 244 (2) and Article 275 (1) of the Constitution deal with the Sixth Schedule. This Schedule is placed on the suggestions of Northeast Frontiers (Assam) Tribal and Excluded Areas Sub-Committee that recommend for the creation of an autonomous body for the control and management of hilly regions grounded on the idea of self-rule in all matters relating to customs, administration of justice, land, water and so on. The policy behind the creation of the Sixth Schedule was to set up a separate administration for the tribes so that maximum autonomy can be provided to the tribal peoples for safeguarding their distinct customs and traditions.

The third form of constitutional statement is one that legitimize customary law by making provisions in Article 371-A, which clearly states that:

- (1) Notwithstanding anything in this Constitution—
- (a) No Act of Parliament in respect of—
  1. Religious or social practices of the Nagas,
  2. Naga customary law and practices,
  3. Administration of civil and criminal justice involving decisions according to Naga customary law, and
  4. Ownership and transfer of land and its resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides [28].

As apparent from Article 371-A of the Constitution, the Act of Parliament does not apply to the State of Nagaland on matters enumerated in the Article 371-A without it being legislated by the State Legislative Assembly. Thus, the constitutional recognition under Article 371-A is a right given to Naga people to be regulated by their own customary laws. The inclusion of customary laws in the Constitution was the outcome of the Naga people's struggle and negotiations with the Union Government and so this governance right entirely endows the Naga communities with the power to resolve all their disputes through customary institutions, like Village Courts, headed by village chief. The idea behind such sanction of power in favor of Naga community is to preserve the customs, usages, cultures, traditions, language and other

rights of the Naga communities. Although, Article 371-A makes a specific reference to the Naga customary law and procedures, the Legislative Assembly of Nagaland is also authorized to make a law contrary to customary laws. However, it is within the domain of State Government to recognize and preserve customs and privileges of the tribal community and sustain the spirit of Article 371-A of the Constitution and not to jeopardize such a noble principle. Although the Naga people have the right to be governed by their own customs and usages on the subjects enumerated in the Article 371-A of the Constitution, there are indications that because of their interface with modernity men interpret it in their own favour [29]. Most tribal traditions are community-based and assigned a relatively high status to women without making them equal to men. On the other side, modern land laws are individual-based and ownership is by and large by men. Our own studies indicate that its result is class formation and a stronger patriarchal ethos [30].

### 3.2. Tribal Autonomy in the Application of Procedural Systems

In addition to the Indian Constitution, Indian procedural law also allows the tribal peoples to enjoy considerable autonomy in the application of their own procedural systems to settle disputes within their community. The Code of Criminal Procedure, 1973 states that the provisions of that law, other than those relating to Chapters VIII (Security for Keeping the Peace and for Good Behavior), X (Maintenance of Public Order and Tranquility) and XI (Preventive Action of the Police) thereof, shall not apply to: (a) the State of Nagaland; or (b) the tribal areas,<sup>24</sup> but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification [31].

Similarly, the Code of Civil Procedure, 1908 affirms that the provisions of that Code shall not apply to the State of Nagaland and the tribal areas. It provides similarly that the concerned State Government may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplement, incidental or consequential modifications as may be specified in the notification [32].

The Village Court while deciding cases shall follow the customary laws and traditions of the village.<sup>25</sup> The Village Court is not required to follow the national general rule of CrPC (in criminal matters) and CPC (in civil matters). The

22 The Fifth Schedule States include Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa, Rajasthan and Telangana. The Fifth Schedule was added for promoting the welfare and advancement of Scheduled Tribes and the control and administration of Scheduled Areas.

23 The Sixth Schedule protects the interests of tribal populations and bestows the freedom of self-rule to the communities through formation of Autonomous Development Councils that can make laws on public health, agriculture, land and others. As noted above, at present, ten autonomous councils exist in Assam, Meghalaya, Mizoram and Tripura.

24 The term 'tribal areas' under the Codes of Criminal and Civil Procedures means the territories which, immediately before the 21<sup>st</sup> January 1972 were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Indian Constitution.

25 Rules for Administration of Justice and Police in Nagaland, 1937, Rule (60 1).



court can give its decision only after hearing the parties and the witnesses.<sup>26</sup> The decision has to be pronounced forthwith after the hearing and the verdicts of the majority members shall be the final verdicts of the Village Court. The notice of the summons can be issued either in written or oral manner as the Village Court deems fit. However, the Rules of 1937 requires that the proceedings of the court in any case shall be recorded in writing.<sup>27</sup> The Village Court is also empowered to give its verdicts in any case *ex parte*, if it is satisfied that the other party has willingly remain absent on the day of hearing of the case.<sup>28</sup>

### 3.3. Special Rules for the Administration of Justice in Nagaland

In 1937, by exercising the powers under Section 6 of the Scheduled Districts Act, 1874, the Governor of Assam passed the “Rules for the Administration of Justice and Police in Naga Hills District, 1937.” This Act provides exceptional autonomy to the people of Naga Hills Districts for the self-rule and control of civil and criminal justice in conformity with the prevailing customs and traditions of the Naga people. The aforesaid Rules, identified Gaon Boras as Rural Police and authorized the Village Council, Chief, Headman and other authorities of village to examine and settle cases, on the basis of tribal customs and usages. Here, it may be noted that every recognized village<sup>29</sup> in Nagaland has a Village Council.<sup>30</sup>

In 1974, by the First Amendment, the title of the 1937 Rules was modified as the “Rules for the Administration of Justice and Police in Nagaland [33].” By way of Second Amendment to the Rules in 1982, the term “Dobashi” was introduced in the Rules and was considered to have been introduced with effect from 1<sup>st</sup> December, 1963 [34]. The second amendment also inserted Rules 15AA and Rules 23A which provided that the Dobashis shall try and decide criminal [35] and civil [36] cases upon referred to them by the Deputy Commissioner, Additional Deputy Commissioner and Assistant to the Deputy Commissioner. The status *quo ante* provided by the second amendment was upheld by the Gauhati High Court in *Atenjenba & Ors. v. The State of Nagaland* [37] where it was argued that the Rules of 1937 nowhere mentioned the Dobashi Court and thus the Dobashi Court

have no jurisdiction to decide the dispute and therefore prayed for a Quo Warranto. The High Court referring to Rules 15AA and 23A inserted by the second amendment in which the word “Dobasis hence forward shall try and decide” appeals in both the provisions, held that the Dobashis Court have the jurisdiction to decide both civil and criminal matters and the question of lack of jurisdiction does not arise.

In 1984, the Third Amendment brought a major reshuffle in the Rules by introducing a different chapter exclusively committed to the customary courts through which the different courts—namely, Village Courts (Village Councils), Subordinate District Customary Courts, and District Customary Courts (Dobashi Customary Courts) have been introduced in the Rules [38]. This amendment also introduced some procedural changes with respect to filing suits and appeals before the Customary Courts [39]. Women are not appointed as Dobashis as per Naga customary law. It is a position to which only men are eligible. There are growing demands in the state of Nagaland by various women’s organizations to reform the custom and appoint women as Dobashis. No lawyers are permitted to appear before the Dobashi Courts and therefore a party has to present his case himself. However, the Rules of 1937 emphasizes that the spirit of national CrPC, 1973 in consistent with the Rules of 1937 so far as possible may be followed in executing sentences and for which the assistance of the regular police should be given by the Superintendent of Police of the district [40].

## 4. Traditional Mode of Settlement of Disputes

The tribal justice system may simply refer to the local approaches that tribal communities used in resolving personal and local disputes in a peaceful manner. A High Powered Group of the Planning Commission, India in 1983 [41] remarked,

The tribal system of justice in the Northeast hilly areas has some inherent features which make for its strength and relevance namely proximity, accessibility, speed and credibility. The system is also most expeditious. Rightly, the question is asked whether the extension of the Anglo-Saxon system of justice is a progressive or retrograde step. Should the existing tribal system be disturbed to meet the challenges of development? The Group answers the question by concluding that the traditional system of justice—civil as well as criminal—and in matter affecting their social and economic life should not unnecessarily be disturbed.

To resolve disputes through traditional mode of settlement there are well-structured customary courts in Nagaland, which function parallel to the formal courts. The “Rules for the Administration of Justice and Police in Nagaland, 1937” (with amendments) is still followed in legal regulation of customary law and practices in Nagaland. The Rules provided for hierarchy of customary court, their powers and functions includ-

<sup>26</sup> *Id.*, Rule 60 (2).

<sup>27</sup> *Id.*, Rule 60 (5).

<sup>28</sup> *Id.*, Rule 60 (4).

<sup>29</sup> Village is defined in Section 3 of the Nagaland Village and Area Councils Act, 1978. According to Explanation of Section 3 of the Act, “An area in order to be a village under this Act shall fulfil the following conditions namely: (a) The land in the area belong to the population of that area or given to them by the Government of Nagaland, if the land in question is a Government land or is given to them by the lawful owner of the land; (b) The village is established according to the usage and customary practice of the population of the area.”

<sup>30</sup> A Village Council consists of members, selected by villagers in consistent with the prevalent customary practices and usages, which has been approved by the State Government by notification. Here, it may be noted that, hereditary village chiefs, Gaon Boras (GBs) and Angamis shall be EX-officio Members of such Council and shall have voting rights in all decisions taken by the Village Council.

ing appointment of customary law personnel in the customary courts. Nagaland has recognized three classes of customary courts for the settlement of disputes. The lowest court of justice in hierarchy under Naga customary law is the Village Court, also known as Gaon Bora,<sup>31</sup> which is prevalent in all the villages of Nagaland, while the highest customary court is the District Customary Court, also known as District *Dobashi* Court,<sup>32</sup> established in all the districts of Nagaland. In between, there is the Subordinate District Customary Court, also known as lower *Dobashi* Court. Criminal justice continues to be governed by the Village Court at village level, on appeals at the Dobashi Court, and thereafter the assistant to Deputy Commissioner and the High Court.

#### 4.1. Village Courts

As noted above, the primary piece of legislation that governs the customary courts in Nagaland is the “Rules for Administration of Justice and Police in Nagaland, 1937” (as amended subsequently from time to time). The Village Court (also known as the Village Council Court), is the lowest court of justice under the customary law.<sup>33</sup> The Village Court is constituted in every village of Nagaland to resolve disputes in accordance with the customary law [42]. Every Village Court consists of members of the Village Council formed under the Nagaland Village and Area Councils Act, 1978. The Village Council also appoints the Chairman of the Council who will be selected from amongst the members of the Council [43]. The Village Court will exercise jurisdiction over civil and criminal matters within its own territorial jurisdiction. However, if any civil or criminal matter warrants, the Village Court can refer the matter to the state machinery. The higher courts may also revert back any appeal or cases of customary nature to Village Council Courts to be looked into by them on

the basis of customary practices, so as to make Naga customary law paramount in the lives of majority tribal peoples in Nagaland.

In civil matters, the Village Court can entertain and resolve a dispute coming within the scope of “customs” and “usages” of the village.<sup>34</sup> Unlike in the national court system, there is no limit to the pecuniary value of the suit. However, the disputed property or issues must be within the territorial jurisdiction of the concerned Village Court. The disputants must be the inhabitants of the village.<sup>35</sup> It is necessary to point out here that the Village Court cannot pass any sentence in criminal cases. However, it can impose a fine for any offence, which may extend to Rs. 500/-. It may also pass any order for payment in compensation and restitution to the victims or aggrieved party. The quantum of compensation can be fixed in conformity with the accepted customs.<sup>36</sup> In civil matters, the Village Court has the capacity to impose costs in favor of those against whom vexatious lawsuits have been filed in the Court.<sup>37</sup> The compensation and fines levied and awarded by the Court under Rule 46 of the Rules 1937 may be executed by attachment of the property of the wrongdoer.<sup>38</sup> A Village Court can issue an order for the appearance of the offender and the witnesses to be examined in any case, whether civil or criminal, and may impose a fine which may extend to Rs.100/- on that person who willfully fails to appear in the Court when so directed.<sup>39</sup>

While deciding cases the Village Court may follow the prevalent customs and usages of the concerned village.<sup>40</sup> Here, it may be noted that each village in Nagaland has its own customs and usages different from the other villages. The Court can give its decision only after following the basic principles of natural justice, as by giving an opportunity of hearing to concerned litigants and the witnesses appeared in the case.<sup>41</sup> The finding has to be declared just after the proceeding is concluded in open court. In each and every case in the Village Court, the majority decision will prevail.<sup>42</sup> In the event of stalemate, the decision of the Chairman shall be final.<sup>43</sup>

#### 4.2. Subordinate District Customary Courts

In between the Village Court and the District Customary Court exists the Subordinate Customary Court, which may be constituted by the State Government. The composition, powers, functions, and procedures of the Court are given in the Rules of 1937. The Court shall consist of a Presiding Officer and some other members, not more than six and not

31 ‘Gaon Bora’, means a village elder. ‘Gaon’ means village and ‘Bora’ means an elder or old man. The words are taken from Assamese and are not indigenous Naga tribal dialect. The British appointed Gaon Boras in every village for their administrative convenience. The Gaon Boras are provided with civil and criminal powers to decide the case at the village level. This means that civil and criminal matters are settled by Gaon Boras at village level without recourse to formal court system.

32 The term “Dobashi” is a derivation of Assamese and Hindi word “Dou-Bashi” that is, one who could speak the two languages of Assamese and Hindi and translate into local dialect. With the Passage of time Dou-Basha changed its form to “Dobashi”. The Dobashi Court was not established by any legislation (Act), but by necessity and by convention. Disputes in the Subordinate and District Customary Courts are decided by the Dobashis designated by the state government who are considered as the custodian of customary law. The tradition of Dobashi institution is rooted in British India. They were in the service of colonial administration as interpreters appointed by them from among the villages. Gradually they started to settle disputes in the villages and later evolved as dispenser of justice according to customary law. The primary qualification to be a Dobashi is that they must be conversant in their own community law.

33 From the very beginning the Nagas have a democratic and republic type of village community, in which the administration and management of village is run by the Village Council that performs both administrative and judicial functions. Any type of dispute (civil or criminal) can be resolved in the village court irrespective of the value of suits. When it is not possible to decide the guilt of the wrongdoer, the village court in such a situation leave the matter to the “divine will” which is revealed through the performance of oath and ordeals. The most common forms of ordeal are traced as dipping the parties involved into water to determine guilt, oaths with water and fire, and consuming iron (metal) powder.

34 Rules for Administration of Justice and Police in Nagaland, 1937, Rule 45.

35 *Ibid.*

36 *Id.*, Rule 46 (1).

37 *Id.*, Rule 46 (2).

38 *Id.*, Rule 46 (3).

39 *Id.*, Rule 47.

40 *Id.*, Rule 60 (1).

41 *Id.*, Rule 60 (2).

42 *Ibid.*

43 *Ibid.*

less than four, who may be selected case-wise by the Presiding Officer from a panel, as prepared, maintained, and duly notified for each Subordinate District Customary Court.<sup>44</sup> The territorial jurisdiction of the Court shall be such as may be determined by the State Government in that case.<sup>45</sup> The Court has jurisdiction to try all civil and criminal cases arising out of its territorial jurisdiction. The cases that cannot be tried by Village Courts or cases concerning disputes between two or more villages coming within the local jurisdiction of the said Court.<sup>46</sup> If the dispute is related with the immovable property then that property must be situated within the territorial jurisdiction of that Court. In criminal matters, the Court can try such offences which are committed within its territorial jurisdiction and are not triable by the Village Court.

The Court may examine the proceedings of the Village Court and if so required the Court may enhance, modify, reduce or even cancel any sentence or finding passed by the Village Court. In civil cases, the procedure of the Court shall be in conformity with the Code of Civil Procedure in spirit, but not strictly in letter of the Code. In civil matters the Court shall adjudicate the case by applying the principles of justice, equity, and good conscience. Similarly, in criminal cases the Court shall decide the matter in the spirit of the Code of Criminal Procedure, 1973.

### 4.3. District Customary Courts

The District Customary Court (popularly known as *Dobashi* Court) is said to be the highest customary appellate court in Nagaland. The Court functions with a Presiding Officer and other members who can be appointed by the state government for a particular case from a list prepared by the government for each district. No one can be appointed as Presiding Officer of the Court unless they have a profound understanding and experience of local customs, usages and traditions prevailing in the area, and the judicial expertise in civil and criminal proceedings, in conformity with laws and rules in force in the State.<sup>47</sup>

The District Customary Courts are vested with appellate as well as original jurisdictions in civil as well as criminal matters. In appellate jurisdiction, the Court hears appeals against the decisions of Subordinate Customary Courts and Village Courts in civil and criminal matters.<sup>48</sup> The Court can also entertain matters actionable by the Subordinate District Customary Courts, as and when occasion arises.<sup>49</sup> Whenever it is made to appear to the District Customary Court, on application made or otherwise, that it is expedient for the ends of justice that any particular suit or case be transferred from one Subordinate District Customary Courts to another Subordinate District Customary Court or Village Court within the

same district or any case pending before any Subordinate Court within the district be transferred to its own Court, the District Customary Court may pass order transferring such cases, recording brief reasons for the order passed.<sup>50</sup> The State Government may direct an appeal to be presented to the District Customary Court against an order of acquittal passed by a Subordinate District Customary Court or Village Court and such an appeal shall be presented within a period of 90 (ninety) days from the order of acquittal excluding the time needed for obtaining a copy of the order appealed against.<sup>51</sup>

However, the District Customary Court (*Dobashi* Court) cannot entertain an appeal unless the same is committed to it by the Deputy Commissioner (DC) or Additional Deputy Commissioner or Assistant to the Deputy Commissioner as the case may be.<sup>52</sup> Here, it may be noted that the proceedings of District Customary Courts are governed by the Criminal Procedure Code, 1973 in criminal cases and the Code of Civil Procedure, 1908 in civil matters. In all civil matters, the District Customary Court shall decide the case by following the principles of justice, equity, and good conscience and the customs and usages applicable.<sup>53</sup> In deciding criminal matters in its original jurisdiction, the Court normally uses all the powers as a First Class Magistrate under the Code of Criminal Procedure, 1973. As noted above, The Court may award payment by way of compensation or restitution to the injured or aggrieved party, and the amount will be determined by the customs of the tribes.<sup>54</sup>

The District Customary Court may permit witnesses to be examined on appeal, or such admit documents or evidence as deemed crucial to secure justice.<sup>55</sup> Any appeal can be filed in the District Customary Court against any decision or order pronounced by the lower courts—that is, Village Court or Subordinate Customary Court—within 90 (ninety) days of the decision/order appealed against.<sup>56</sup> In civil cases the Court shall follow the spirit of Civil Procedure Code of 1908 so far as it is applicable in the formal court system. In execution proceedings, the land may be transferred, sold or attached in satisfaction of decree/order passed, provided the customs and usages as practiced in that locality of the district so permits.<sup>57</sup> Ordinarily, an imprisonment order cannot be passed for satisfaction of debt unless the executing court is certain that the concealment or deceitful transfer of property has already taken place, and in that situation the judgment debtor may be imprisoned for up to three months.<sup>58</sup> Since the execution proceeding is done by the original court, so the decision/order delivered in appeal by the District Customary Court in civil matters shall be sent to the original court for the purpose of

44 *Id.*, Rule 42 (2).

45 *Id.*, Rule 42 (3).

46 *Id.*, Rule 43.

47 *Id.*, Rule 44 (2).

48 *Id.*, Rule 55 (1).

49 *Id.*, Rule 55 (2).

50 *Id.*, Rule 58.

51 *Id.*, Rule 59.

52 *Id.*, Rule 15AA and Rule 23 A.

53 *Id.*, Rule 62 (2).

54 *Id.*, Rule 56.

55 *Id.*, Rule 57 (3).

56 *Id.*, Rule 59.

57 *Id.*, Rule 66 (1).

58 *Id.*, Rule 66 (2).

execution.<sup>59</sup>

## 5. Advantages and Disadvantages of Tribal Justice System

The tribal justice delivery system is quite different in terms of structure and approaches from the national justice system. The advantages and disadvantages of tribal court are as follows.

### 5.1. Advantages of Tribal Justice System

- 1) The tribal court exists at local level in almost all villages. Hence, tribal justice system is accessible and people need not travel a long distance for seeking justice [44].
- 2) Tribal courts apply only customary law. Thus, it is easily understandable by even people without legal expertise or training [44].
- 3) The procedure followed in tribal court is very simple, flexible, and expeditious and puts the parties at ease, which in turn makes them willing to seek a court solution. Procedural informality and simplicity have triumphed over the national judicial system with its procedural complexities.
- 4) Legal practitioners are not permitted in this court. The absence of procedural formality and lawyers in customary courts has secured the ideas of customary laws and practices to endure intrinsically, which in turn motivates popular involvement in the expositions of customary law.
- 5) Tribal courts are cheap to participate in. They levy minimal fees which may be payable in cash or kind [44].
- 6) The tribal court reduces the workload of the formal court by dispensing justice without formality.
- 7) The customary penal laws and modes of punishment are based on the nature of crime and offences one has committed. The village chief and the judges while awarding punishment they make it sure that it is befitting and balance justice. As the punishment is given as per customary laws without any partiality or prejudice the offender readily obey the punishment. It is common practice that the entire citizen obeys the authority of the village chiefs and judges.
- 8) The continuing dissatisfaction and frustration with the role of police, public prosecutors, and judges to deal efficiently with rising civil and criminal cases has given rise to a greater interest in the structure and procedures of dispute resolution machineries that are more traditional and simple in nature.
- 9) Finally, the tribal courts use the local language of the parties with no chance of perversion by way of inter-

pretation [44].

Ruchi Pant explored the advantages of local institutions as:

- 1) The basic advantage is that the traditional institutions are constituted by the local people, which helps in two ways. First, the local people are aware of the social systems within their society and are well versed with the social norms. Second, the members of the institution are a part of the same society and residents of the same locality, and hence would not delay in delivering decisions/resolving disputes. On the other hand, the members of the national institutions are rarely from the same society. They are not familiar to local customs. These officials do not want to get involved in resolving disputes that may have major repercussions. Hence they merely try to postpone the decisions while awaiting their transfer and posting [45].
- 2) The procedure under the formal judicial system is normally complex and time consuming. Justice is delayed, thus depriving the aggrieved party of timely relief. Justice is speedy in local and traditional courts.
- 3) Rules formulated by the society and enforced through the traditional institution elicit better compliance [46].
- 4) In traditional institutions, there is no system of appeal from the decision thereof. The decision is final and acceptable to the community and is binding. Supernatural powers are considered to be the only court of appeal and this is resorted to with the help of oaths and ordeals, which are very severe. In the case of the formal judicial system, there are several appellate levels and the order of any of these levels can be challenged further at the higher level, which prolongs justice or the final decision.
- 5) The members of tribal communities may be unaware of the different avenues (forums) available under the national legal systems for redress of their different problems. Because of poor divulgence the tribal peoples have had to the formal legal system, they choose not to approach the modern courts for relief.
- 6) Justice as provided in the indigenous community by customary law is rests on the idea of restoration and compensation which brings justice to the people, whereas in the national courts the legal process is based on adversarial system of justice and the relief in such system is not guaranteed to the victim. The fate of litigation usually depends on the capacity of the party and the competency of the lawyer. It is uncertain in adversarial systems that justice will be dispensed and the truly aggrieved party may win.
- 7) In tribal justice system, the defendant always stands a respectable member of the community even though he has been penalized and there is no disgrace associated with the punishment. In the adversarial system, the defendants may not be reformed or rehabilitated because of the stigma attached by the society to their crime, even after being released from the jail.

<sup>59</sup> *Id.*, Rule 66 (3).



- 8) In the national justice system, the court expenses are found to be very expensive for the accused. They include the court fee, lawyers fee, work income loss, travelling expenses etc.; the justice under the traditional systems are available at the village level, at a more accessible distance for all litigants and do not include any advocacy or court fee.
- 9) It may be noted that, where an aggrieved party has an option to choose from a number of forums, including a traditional one, for conflict resolution, people in most cases prefer customary institutions for conflict resolution. The punishment in the form of payment is normally awarded in accordance with the paying capacity of the wrongdoer, and the same need not be paid at once; it can be deferred for a future date as per the convenience of the party [45].

## 5.2. Disadvantages of Tribal Justice System

Every legal system has its own merits and demerits. Customary law and institutions are often criticized on several grounds. First of all, legal practitioners are not allowed to participate in legal proceedings before the tribal court. The exclusion of lawyers in tribal court is unjustified and also violates Article 22 (1) of the Indian Constitution, which provides, “every accused person should have a right to consult and to be defended by a legal practitioner of his own choice.” [47]. Second, judicial procedure under customary law is grounded on an inquisitorial system, in which there is no room for the right to remain silent as enshrined under Article 20 (3) of the Indian Constitution. The “right to remain silent” is unknown to Naga customary law [47]. In an inquisitorial system, the village headman and his councilors question a party in court proceeding, presuming the accused to be guilty—and requiring a person to prove their innocence before the court. Third, in traditional customary courts, women are not allowed to preside over or even participate in any way in the proceedings except when women are directly involved in the dispute. This practice is considered to be discriminatory and a violation of gender justice as enshrined in the world’s most secular constitutions. Article 14 of the Indian Constitution clearly grants the right to equality to all citizens. Finally, the quantum of fine and compensation under tribal customary law are very minimal.

As noted above, Naga customary laws are unwritten customs, accepted practices, and traditions for generations which regulate the day to day life. Due to its unwritten feature, misinterpretation from the original intent and the content is possible. The interpreters and members of the customary court are only men and interpretation may be affected by individual views and opinions [48]. As per the Naga customary law, in case of divorce due to the husband’s infidelity, equal distribution of property between the husband and wife takes place. In case the wife wants claim maintenance for her children and her husband abandons her and their children. In

the absence of a written customary laws, what will be the result if the husband refuses to give maintenance to her wife and children? In such a situation, people will generally lose faith in the traditional courts and lean more towards the formal courts. Even the formal courts do not interfere in customary domains of tribal community and this creates dissatisfaction towards customary law. Hence, women are unable to use the penal provision effectively wherein under section 125 of The Code of Criminal Procedure, 1973 provides an effective remedy for neglected persons to seek maintenance [48].

## 6. Major Issues Relating to Tribal Justice System

A careful analysis of the customary law brings out a lot of inconsistencies in the discriminatory use and application of customary law. The conflict between tribal and non-tribal people and many other issues are at point here for discussion. If one tries to understand the culture and ethos of the indigenous people in Northeast India, particularly Naga community one can realise the futility of the customary law. In states like Arunachal Pradesh, Assam, Manipur, Nagaland, and Tripura, where several tribes and sub-tribes reside, the customary laws and social norms differ from tribe to tribe. In such a case, the tribal or village institutions are not in a position to deal with a case [45]. When the dispute is in between tribal and non-tribal peoples (including central or state government department), the village councils often cannot decide matters. There have been some instances in which the village council did adjudicate and the decision was agreeable to both the parties. But such decisions could go in appeal by any one of the parties [45]. The educated and the elite tribal populace (even in rural areas) are also aware that the rules and regulations framed by the community are not enforceable and can be challenged in the formal judicial system [45]. The High Courts and the Supreme Court are given constitutional authority to review any rules and regulations framed by any authority, including customary courts. So, if educated and elite class of tribal community consider any rules and regulations of tribal community to be unjust and unfair, they prefer to challenge them in constitutional courts.

The decision of the village council is not always without prejudice. Persons having larger and stronger clans or those hailing from a well to do or political family could at times be in a better position to influence the decision of the council [45]. The Village Courts do not enjoy any freedom or autonomy as the Supreme Court or the High Courts of India. The decisions of the Village Courts can easily be influenced by the contesting tribes having high social and political status in the community. The efficacy of the customary laws depends upon conscience and reverence. With the spread of education and new ideas, the reverence to the customary laws is declining [45]. Children educated in state-sponsored or modern schooling systems, rather than traditional education in the

customs of their people or culture, are growing up without the same reverence for preserving cultural practices that their ancestors had and practiced. Growing social individualism in the community is a reason for the traditional system being less effective. With the monetization of the economy and the forest resources, greed and the trend for easy money is leading to individualism in society [45]. People want to sidestep the customs and avoid facing the village councils in cases of violations of the customary laws [45]. Village authorities do not keep any written records of the decisions taken. The trend of maintaining records is very recent [45]. The major issue relating to tribal community is that their social and economic conditions have to be ameliorated by social, economic, educational, and political empowerment at such a pace and in such a manner without disturbing their social set-up and way of life.

### 6.1. Customary Law from Human Development Perspective

Customary law tends to be relatively conservative when it comes to administering justice. This is not surprising because they are bound to apply the custom prevailing in the community. Custom does not merely refer to values, beliefs, and practices but also pertains to inalienable human rights. However, in non-tribal societies, human rights are often viewed in an individualistic manner, where the focus is placed on civil and political liberties as opposed to social, economic, and cultural rights. The right to practice customary law falls under social and cultural rights. In many areas customary rights conflict with human rights as guaranteed by the international community. Thus, the emerging human rights movement can be considered to be a serious threat to customary laws.<sup>60</sup> Besides human rights, the concept of modernization is also held responsible for the loss of custom, tradition and cultural identity. Tribal peoples assumed that by adopting many new thoughts and ideas the importance of customary law will decline as it gradually loses its weight due to modernization in tribal perceptions, thoughts, lifestyles, culture, rules and rituals.

Certain tribal communities are perceived as disaffected by the national justice system, due to various reasons. In several jurisdictions judges and other court officers have been found to be biased against tribal or indigenous people, or insensitive to their factual conditions, ensuring inequitable and discriminatory application of the law. Still a concern, therefore, is how customary law compromises or ensures human rights standards [49]. Any legal system—conventional or customary—is open to criticism over its formulation. A legal tradition is a set of deeply rooted historically conditioned attitudes

about the nature of law, about the role of law in society, about the proper organization and operation of a legal system and about the way the law should be made, applied, studied, perfected and taught [50]. Certain religious and ethnic minorities and indigenous group feel alienated from the larger legal system, for a number of reasons. Sometimes the judges and other court officials acquainted with modern legal system have historically been prejudiced against them, or ignorant of their conditions, resulting in the unfair and biased application of the law [50]. The customary legal system has its critics, especially with respect to women, who are not allowed to serve as judges of customary courts or even participate in the proceedings of the courts. There are arguments about how to improve customary law and practices, so as to make it just and equitable to women. Even so there is a disquiet, for that reason, concerning how indigenous law and practices should accommodate human rights standards.

In many countries, including India, indigenous people are almost entirely unrepresented in the government services and the judiciary. The reality of bias and exclusion is exacerbated by the inaccessibility of the legal system to these groups for additional reasons, including geographical distance, financial cost and language or other cultural barrier [50]. Plural legal systems can counter this exclusion. But some critics argue that plural legal systems can legitimize traditional practices that are inconsistent with expansion of freedoms. Many traditional practices reject the equality of women, for example in property rights, inheritance, family law and other realms [51]. But legal pluralism does not require the wholesale adoption of all practices claimed to be “traditional.” The accommodation of customary law cannot be seen as an entitlement to maintain practices that violate human rights, no matter how “traditional” or “authentic” they may claim to be [52]. From human development perspective, all legal systems—whether unitary or plural—must conform to international standard of human rights, including gender equality. Other critics therefore argue that if the legal system of the larger society respects human rights norms, and if indigenous people accept these norms, there is no need to maintain legal pluralism. But even where there is a consensus on human rights norms, there may still be a valuable role for legal pluralism [50].

### 6.2. Limitations on the Application of Customary Law

Although Article 371-A of the Indian Constitution has recognized Naga customary law as a source of law in many areas, it is made clear in that Article that the Legislative Assembly of Nagaland is authorized to make a law contrary to the customary laws. Again, as stated above, the provisions of the Criminal Procedure Code, 1973 [53] and Civil Procedure Code, 1908 [54] shall not apply to the State of Nagaland, unless the State Government may, by notification, in the Official Gazette, apply the provisions of these codes or any part of them to the State. Furthermore, the customary law cannot

<sup>60</sup> The international community treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis, irrespective of caste, class, sex, religion, race, place of birth, etc. Although the tribes are protected under the international human rights law, but the customary law should not be in serious conflict with human right.

claim exemption in respect of crimes which are punishable with death, imprisonment for life, or imprisonment for a term of not less than five years. All these offences have to be dealt with by national law. One another problem with customary law is that in some areas of Nagaland, like Dimapur where the population is mixed, people prefer to approach statutory courts due to the mixed population of various tribes and non-tribes, as the customary laws differ from tribe to tribe, so litigants prefer to national courts and the national courts follow the provisions of statutory laws.

As noted above, Naga customary laws are uncoded customs, accepted as oral norms and usages practiced from one generation to others, which regulate the day to day life of Naga people. Because to its uncoded nature many misinterpretations from the original content and intent is always possible. The customary courts and regular justice system both are under the authority and superintendence of High Court of the concerned State under Article 235 of the Constitution. This article gives power to the High Courts to exercise control over district courts or courts that are inferior to them. In other words, control over all subordinate courts, including customary courts resides in the hands of the High Court of the concerned State. So, if any person who is aggrieved by the decision of customary court has an option to go to High Court for proper relief. The High Court shall decide the case by following the spirit of Criminal Procedure Code, 1973 and Civil Procedure Code, 1908 as the case may be. The Supreme Court of India has also the power to entertain any case either *suo motu* or on appeal against the decision and order of any court or government.

### 6.3. Limited Space for Women Under Naga Customary Law

The situation of women and girls in Naga community remains very worrying, as they are clearly deprived of many of their rights. Naga society is patriarchal and patrilineal, based on traditions of stringent customary practices where a woman occupies a subsidiary socio-political space. Outside Naga traditions, women worldwide are being recognized as partners with their male counterparts in the development of society. Considering this and recognizing the need explained in the Women's Steering Committee (WSC) Report 2007-2017 of devising culturally negotiable approach towards gender equity, the documentation of women's status in Naga customary law is being undertaken. The main objective of the documentation process is to gather sufficient cultural data in order to define, and create necessary instruments (legal, social, and economic) for the empowerment of women to suit contemporary situations and demands. Village Councils often still refuse to admit women as members of the Council despite several attempts made by women's organizations to give them representation. Accordingly, there is an urgent need to make structural changes in traditional institutions.

The concept of marriage, divorce and inheritance of prop-

erty among Naga people and particularly in the Angami tribe of Naga is that when a woman gets married she leaves her natal home and becomes a part of her husband's family. Even with a professional qualification and well-salaried job, she remains in a subordinate place. Even though the Indian Constitution provides women the freedom to participate in politics a woman is rarely appointed as a leader or a decision maker. The influence of customary law is still very strong in this regard and the status of women has not been enhanced. The Angami Customary law along with that of other Naga tribes bars women from inheriting ancestral land and property. In the absence of a male child, ancestral property is handed over to the immediate male relatives [55]. It clearly indicates women have no right of ownership for ancestral property but only the right to use [48].

Naga women are unable to use the penal provision effectively although section 125 of The Code of Criminal Procedure, 1973 provides an effective remedy for neglected persons to seek maintenance under national law [48]. As per the Naga customary laws, after divorce, the father takes the responsibility for the children; if the mother insisted on keeping the children, the sons go to the father and the daughters to their mother. When it comes to guardianship of the children "the best interest of the child" should be taken into account irrespective of the father or the mother [48].

## 7. Should Customary Law Continue

The question that arises now is whether tribal customary law and justice delivery system should continue to exist or not? Some raise questions about its legitimacy and say that it clashes with the modern national legal systems in many ways. Basically, the tribal customary law and justice system is the manifestation of tribal autonomy because of their different life style. It is the right of the tribal peoples to enjoy their traditional customary practices unless it is incompatible with public policy and basic human rights. In tribal society, people are attracted towards tribal justice delivery system and tribal courts because of its accessibility. The procedures followed in tribal courts are very simple, flexible and expeditious. In tribal justice systems the traditional courts are permitted to settle the disputes through compromise, and if required, to award compensation and restitution without following normal complicated procedures. In cases, where no actual economic loss or bodily injury is caused, then an excuse or apology is sufficient [44]. It is said that these redresses should be maintained and suggested in formal court system. Customary law acts as an effective alternative dispute resolution system in tribal society; therefore, the jurisdiction of customary courts should be extended to include more and more subjects to be brought within the purview of the customary courts and justice system.

As noted above, the customary law and disputes settlement mechanism of tribal peoples have been recognized in India from the colonial periods. This structure of justice system is selected because it is prompt, simple, cheap, and speedy. It is

people-friendly, which satisfies the needs of all the parties to a dispute, and thus brings balance in tribal society. The presiding officer and other members of courts are openly selected, representing all kinship groups and factions of society. The tribal justice system thus seems ideal; nonetheless, with the progress of present-day constitutional and legislative laws relating to equality, women's rights, forest and environmental laws, animal rights, protection of traditional knowledge and intellectual property law, the tribal peoples and communities have occasionally clashed with the national law and justice system.

The preservation and protection of indigenous law and traditional institutions are crucial in the case of Naga communities of the Northeast. Tribal customary law is fundamental to tribal governance because it originated from the cultural foundations of tribes. It is not only a matter of justice and equity but also a part of their culture and separate identity. It is an expression of ideas, values and principles which a particular community holds in a pluralistic society. It is, therefore, necessary to study the introduced and adopted laws and compare all these with the traditional laws, as practiced by tribal peoples in the Northeast region [56]. Here it may be noted that a total recognition of customary rules and mechanisms of dispute resolution system is most likely to bring with it uncertainties and distress that reflect the impact of urbanization and new life style on the tribal communities. In *Pannalal Bansilal v. State of A.P* [57], the Supreme Court responded to the matter in question, i.e. whether it is appropriate for the legislative body to issue a uniform law for all religious or charitable endowments and public institutions, and held that:

In a democracy governed by rule of law; gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages [57].

Despite loopholes tribal justice system plays a pivotal role in bringing reconciliation between the parties and restores harmony in the community. At the same time, it also relieves the workload of the formal courts as it is an undeniable truth that one of the greatest challenges faced by the Indian judiciary is to tackle the backlog of cases pending in various courts [44].

### 7.1. Difference is Not a Clash but a Matter of Participation and Recognition

India is a multicultural society. If one community tries to dominate another, then it will generate tension and conflict among different communities and cultures. The societal conflict may be in the name of culture, traditions, language or customary practices. It is therefore in the best interest of all communities to work unitedly to construct a homogeneity in diversity. The presence of two systems of law (formal and

traditional) in India is particularly notable, indicating that diversification is not a menace to communal unity. Instead, it empowers the people to choose their way of life. Here, it may be noted that African countries are often confronted by challenging socio-economic and demographic situations and set apart by the diversity of their social mechanisms [58]. April and Schockley view the role of Africa as one that acknowledges the potential of people, the strength of diversity in their multiculturalism. Diversity has the potential of yielding greater productivity and competitive advantages. Diversity can improve workplace production [59].

Cultural freedom is an essential part of human development, not a source of "clash" nor an obstacle to growth in anyway. Instead, it is a source of empowerment for all people. The state can be more inclusive by accommodating multicultural policies that explicitly recognize cultural diversity. Some critics fear that the recognition of customary law for tribal communities can give rise to political and social disintegration and so forbid the formation of homogenous society with single legal system. These critics consider identity politics to be a severe threat to the harmony and solidarity of nations. The Fifth and Sixth Schedule as well as Article 371-A of the Indian Constitution provides for tribal peoples to enjoy and practice their own traditional system of law and justice, which cannot be abrogated simply by legislative process, unless the Constitution is amended so.

In India, as noted above, the British introduced their own system of laws and procedures along with the system of courts for the dispensation of justice. But for political reasons they continued to retain much indigenous law and several components of the traditional legal system that they considered compatible with their common sense of justice, equity, and ethics. The same policy has been continued by the politicians in independent India. Still the challenge now is to confront, how traditional law ensures or compromises human rights norms. Almost all legal systems are open to questions. Any legal system is a reflection of historically and deeply rooted attitudes of people about the nature and functions of law, about the systematic structuring and working of a legal system, and also about the process through which law should be framed, studied, taught, and be made operational in a society [50].

Some objections to civil society may emerge from a state's factual linkage with religious affiliation or colonial heritage. The appeasement policies in India, which endeavored to categorize people because of their religious affiliation and cultural identities, affix their reciprocal place in the country and in society. The colonial administrators, with their non-interference policy in personal affairs, left the customary and personal matters untouched with implications for consideration of gender equality and other issues.

### 7.2. Recognition of Tribal Customary Law as Reflection of Inclusiveness

The peculiarity of the Indian legal system is its inclusive



character. All ethnic groups and communities are accommodated within the broader structure of the Constitution. The Naga customary laws and practices are given protection by Article 371-A of the Constitution. Although the Naga community is given autonomy in personal affairs, the Legislative Assembly of Nagaland is given the final authority to make laws otherwise in the interest of people. It means that the Naga Legislative Assembly can make law contrary to the provisions of customary law and practices. After coming into force of the Constitution in 1950 many customary laws and practices are in violation of right to equality, fundamental freedoms and women's rights. However, the Indian Constitution is a few among several constitutions in the world having constitutional provisions for the protection of tribal (indigenous) people's customary laws and practices, even though many rules of customary practices are not compatible with the spirit of the Constitution.

In multi-cultural societies plural legal systems provide opportunities to distinct cultural groups to practice and safeguard their traditional way of life. Plural legal systems protect and promote the corresponding operation of more than one legal systems by holding, in the main, presuming each community preserves its own indigenous system in definite domains. There is a need for genuine reform of formal legal system with commitments to acknowledge the customary laws and authority, sustaining gender equality and prejudicial attitudes across all tribal communities. Legislation imposing uniformity will only widen the gap between tribal and non-tribal peoples, which may be detrimental for peace and harmony. The Constitution of India has enough provisions for all classes of people having different language, culture, and practices.

Plural legal systems exist in almost all societies, evolving as local traditions were historically accommodated along with other formal systems of jurisprudence [60]. Customary practices which acquired the force of law over time, coexisted alongside introduced systems of jurisprudence. Such legal pluralism often had roots in the colonial logic of protection of minority rights, which allowed certain customary systems to continue while imposing the colonizer's own laws [50].

## 8. Conclusion

In our multicultural world many countries have some indigenous and tribal groups who are often subject to exclusion and discrimination, including the tribal peoples of Northeast India. Undoubtedly, the Constitution of India protects the interests of tribal peoples of Northeast by giving them autonomy in the matter of administration and settlement of disputes through their customary law and practices. From colonial time, the tribal peoples in Northeast have mobilized, demanding that their customary law and practices be recognized, respected and finally accommodated by larger society in the legal system. It is a basic principle of human rights that people are allowed to choose their way of life. The tribal

society, particularly Naga community, is one of the most traditional societies in the world. Naga culture is associated with the ways of living and therefore it can mean the way they eat, the way they dress, the way they speak or the way they work to earn their livelihoods. It includes the norms, customs, traditions and beliefs [61]. The Nagas have followed their own customary laws on dispute resolution since the pre-colonial era. The tribal peoples living in tribal and scheduled areas enjoy considerable freedom in the application of their own customs and usages to settle their disputes within their community system. With the development of greater interest in restorative justice, the legal systems are much more needed to resolve disputes traditionally with least friction.

Customary law and traditional justice delivery institutions like village courts are indispensable in Nagaland. Despite several changes in national governance over the past century, the practices of customary law and tribal justice system have survived. Any new law or policy can be introduced in the tribal region of Nagaland only if it is done with the negotiation and consultation of tribal peoples of the area concerned. Failing to do so may create acrimony and chaos in the particular society. Though the customary law and practices plays a dominant role in the administration of justice, such concept of application and operation of customary laws in tribal areas are not absolute at all times and places. The most pressing challenge to Naga customary law come from within the community because of impact of education and modernism in new generation people. Most of the elite class students migrate outside Nagaland for getting higher education and when they come back to their own homeland they consider their traditional justice system as outdated. Urbanization also seems to have impact on customary law and weaken it in many ways. However, old generation people still like to preserve their traditional justice system because they consider it to be highly cheap, simple, and accessible to all. At a more practical reason, the recognition of customary law and its traditional institutions could ease the burden of the national courts which are highly overburdened by backlog of cases. The dissatisfaction and weaknesses in state justice systems constitute a means to promote preferences for strengthening informal justice system, which can provide space for Naga customary law.

The Naga women too have been demanding women's equality. Education that has reached them recently and the NGOs have helped both men and women among them to become aware of their rights. As women become aware of their rights, the resistance to their demands is growing at grass root level. The Angami (major Naga ethnic group in Nagaland) customary law that has been recognised already gives women very limited rights of ownership and inheritance. There is a growing demand from all over the state that women should be given representation in traditional institutions. One has to continue this debate among Naga peoples. A positive approach has to be created among all of them in order to encourage them to the challenge of finding an identity in the

customary law. The recognition of gender equality can go together with the updating of their traditions.

For generations, customary laws and practices have regulated human activities and behaviors to be governed by unwritten customs and practices in Naga society. The Naga customary laws and practices may not satisfy the present day legal needs of contemporary technical issues. Naga penal law seems to be cruel as against the basic concept of human rights. The state government should take initiatives to make Naga customary law in conformity with fundamental rights and directive principles enshrined in Part III and IV of the Indian Constitution without abrogating the protections afforded to Naga community under Article 371-A of the Constitution of India.

As of today, the Supreme Court and the High Courts have decided only few cases on the issues of Naga customary laws and practices. In addition, the State Legislative Assembly has not enacted the needed statutory laws despite having power under Article 371-A of the Constitution to make laws contrary to Naga customary laws and practices. The codification of Naga customary laws and practices is difficult because each Naga tribe has its own laws and practices, as there are seventeen Naga tribes living in different parts of Northeast India. So, proper documentation of customary law should be undertaken with the help of local Naga tribes. The documentation of customary law will help the people to understand the customary law and practices in a better manner. The tribal court can function more effectively if this area of law and procedure is to develop in a coherent and principled manner.

## Abbreviations

ACHR	Asian Center for Human Rights
AIJA	Australian Institute of Judicial Administration
AIR	All India Reporter
CrPC	Criminal Procedure Code
IWGIA	International Work Group for Indigenous Affairs
ILO	International Labor Organization
SCC	Supreme Court Cases
UNDP	United Nations Development Program
UNDRIP	UN Declaration on the Rights of Indigenous People

## Author Contributions

Subhash Chandra Singh is the sole author. The author read and approved the final manuscript.

## Conflicts of Interest

The author declares no conflicts of interest.

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