

On the Dispensation of Justice by Customary Courts in Nagaland

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ABSTRACT

Customs and usages have been the sole means by which any kind of disputes were adjudicated in the Naga society. It is highly appreciated for it is simple, speedy and does not involve expensive litigation. The British Raj continued this system of settlement of disputes by enacting legislations exempting the application of technical procedural laws enforced in other parts of the country. After the Indian independence, the Constitution of India provided special provisions recognizing the whole realm of Naga customary law. However, with the growth of society, the requirements of the people change and the age old customs may not cater to the current needs in many cases. Similarly, some customs and practices may conflict with the rule of law and other provisions of the Constitution. Thus, in such transitional period, the governmental organs of the state have been casted with a special responsibility. This paper endeavours to study the customary courts and its structure, functioning and authority in settlement of disputes and administration of justice. The paper also endeavours to study the customary courts vis-à-vis the formal laws in contemporary times with help of judicial decisions.

Key words: customary courts, Constitution, Article 371A, Dobhasi, Gaon Bura.

1. INTRODUCTION

The method of adjudication of disputes plays a significant role in management of social harmony and resolution of conflicts. Since time immemorial, the Nagas have been following customs and usages which are simple and just based on good conscience in the

settlement of disputes. These customs and usages have ordered peace and harmony throughout the years in the Naga society. The village council composed of elders representing each clans of the village discharges both administrative and judicial functions. Unlike the present day state, there was no separation of the governmental organ and thus all the powers were centered in a single institution – the village council. The same council make laws, implement it and settle disputes between the members of the village. Thus, it may be described as a Greek city republic.¹ The laws and procedures for adjudication of disputes were based on customary practices handed down orally from generations. The disputes were settled instantly but to the satisfaction of the parties. Despite the headhunting practice, there was no capital punishment and ostracization from the village was the highest form of punishment. Animals like, pig, cow, mithun were imposed as fines on the guilty party. In cases of deadlock, the parties were asked to swear and the verdict is left to providence. In addition to the village council, other customary authorities were created by the British administration to assist them in administration. Post the Indian independence, the legacy of the colonial legal and administrative system was continued and by the insertion of Article 371A to the Constitution of India, the status of customary authorities in the

¹ Ravi Duggal, Raj Verm, *et.*, *Nagaland Issues in Governance*, Economic and Political Weekly, Vol. 34, No. 50 (Dec. 11-17, 1999), pp. 3498-3501.

state has been made stronger. This paper endeavours to study the structure, functioning and the authority of the customary courts vis-à-vis the formal laws in contemporary times with help of judicial decisions. The paper also explores into the legislative history on the evolution of the customary institutions and concludes with judicial rulings and suggestions.

2. Evolution of Customary Courts in the Formal Legal System

Though the entire Naga society was regulated solely by customary authorities, however with the advent of colonial administration, the customary bodies were recognized as a supplementary organ in the governmental machinery. In the initial period of the colonial administration no specific and dedicated nomenclature of legislation designating customary bodies as a supplemental governmental organ was enacted, however with coming into force of the Garo Hills Act, 1869,² whereby the Non-regulated system of administration was repealed and also removed the application both civil and criminal procedure in the tribal hills; the Act empowered the Lieutenant Governor to delegate the powers of administration of justice to officers so appointed by him. In this way, the Headmen and Chiefs of the villages were appointed by the Commissioner and Deputy Commissioner to assist him in the administration. The village Headmen and Chiefs so appointed were known as Gaon Bura (GB)³ who assisted the British

officers⁴ in revenue collection, maintenance of law and order, settlement of both civil and criminal disputes, award of punishments and any other functions the British officer may delegate him to do. In touring the Naga villages, the British officer also appointed tribal men of the local area who knows either English or Assamese to translate the tribal dialect. He was called the Dobhasi (DB)⁵ who translated the tribal dialect and also provided inputs of customs, practices and other information of the village and the tribe. The DB was so essential that he accompanied the British officer in all his trips and also remained in his office. This status of him being with the British officer all time conferred him with a special position in the Naga society and regarded by the people as a learned man.

In the year 1880, the Assam Frontier Tracts Regulation, 1880 was amended to remove the application of Civil Procedure Code (CPC) and Criminal Procedure Code (CrPC) from the Naga Hills.⁶ Later in 1890, by virtue of a Notification⁷ issued under the Government of India Act, 1870 and the

‘old man’. Thus, Gaon Burah means village elder or old man of the village. In essence, it means the wise and knowledgeable old man of the village. *See also*, Moatoshi Ao, *A Treatise on Customary and Fundamental Laws of the Nagas in Nagaland*, (Notion Press, Chennai, 2019) pp. 143-144.

⁴ British officer herein may be the Commissioner or the Deputy Commissioner or a Sub-divisional Officer or a Political Agent.

⁵ Similarly, like the Gaon Burah, the word ‘Dobhasi’ is also not an indigenous tribal dialect of the Naga tribes. The word ‘do’ in Hindi means two and “Basha” means language. Thus, the word ‘dobashi’ means two languages. It means a person who knows two languages, i.e. the tribal dialect and perhaps a little English to translate the tribal dialect to the British officer. *See also*, Moatoshi Ao, *A Treatise on Customary and Fundamental Laws of the Nagas in Nagaland*, (Notion Press, Chennai, 2019) p. 140.

⁶ The amended Assam Frontier Tracts Regulation, 1880 was called by the nomenclature the Assam Frontier Tracts Regulation, 1884 (Regulation 3 of 1884).

⁷ Notification No. 5189 J. Dated the 30th December, 1890.

See, Assam Gazette, 3rd January 1891, Part II, Page 11.

² Section 9 of the Garo Hills Act, 1869 empowered the Lt. Governor to extend the application of the Act to Naga Hills. It was the first enactment exclusively for the tribal hills in the North Eastern region to remove the application of civil and criminal procedure in the administration of justice. For making the administration simple unhampered by the technical procedures of law, the Lt. Governor was authorized to appoint officers to assist him in administration in accordance with the custom and practices of the tribes.

³ The word Gaon Burah is not an indigenous tribal dialect of the Naga tribes. It is a Hindi-Assamese word. The word ‘gaon’ in Hindi means village and the word ‘burah’ in both Assamese and Hindi means

Schedule District Act, 1874⁸ by the Chief Commissioner of Assam with the previous sanction of the Governor General in Council, the Bengal Eastern Frontier Regulation, 1873 was extended and applied in the Mokokchung sub-division.⁹ Thus, the whole territory of the present state of Nagaland came under the Chief Commissioner of Assam and the application of CPC and CrPC were removed and Inner Line regulation was enforced. These legislative enactments were passed to make the statutory laws compatible with customs and practices of the Naga society. Again in 1936, to further tune the statutory laws in consonance with the customary laws, the Naga Hills District was declared as an Excluded Area by virtue of the Government of India (Excluded and Partially Excluded Areas) Order, 1936 passed under Clause (1) of Section 19 of the Government of India Act, 1935. Finally, under Section 6 of the Scheduled District Act, 1874, the Governor of Assam annulled all the previous orders and passed the Rules for Administration of Justice and Police in the Naga Hills District, 1937 (herein after referred to as the Rules of 1937) on 25th March, 1937. This Rules of 1937 recognised the customary authorities like the GB, the Headman and the Chief of the villages as a statutory organ of the government by empowering with a dual power of rural police and a first class judicial magistrate for arrest and trial of offences which are not heinous in nature. Further, post the Indian independence, by the Constitution (Thirteenth Amendment) Act, 1962, the whole realm of Naga customary laws was constitutionally recognized by inserting Article 371A.¹⁰

⁸ By virtue of Section 5 of the Scheduled District Act, 1874.

⁹ During those periods the present state of Nagaland was divided into the Naga Hills District and Mokokchung sub-division under the province of Assam.

¹⁰ Article 371A of the Constitution provides that no Act of the Parliament would apply unless the Legislative Assembly of Nagaland by a resolution decides in respect of Naga customary law and procedures, administration of civil and criminal

3. Dobashi Customary Court

The Rules for the Administration of Justice and Police in the Naga Hills District, 1937 was amended in 1974¹¹ which changed its nomenclature as the “Rules for the Administration of Justice and Police in the Nagaland, 1937” (hereinafter referred to as the Rules of 1937). Further, by its second amendment¹² to recognise the Dobhasis *status quo ante* (with effect from 1st December 1963) and give wider power, the word “Dobhasis” was inserted in Rules 15, 17, 18, 19, 22(c), 22(d), 23, 24, 25, 26, 27, 28, 29, 31, and 38 of the said Rules of 1937.¹³ The second amendment also inserted Rules 15AA and Rules 23A which provided that the Dobhasis shall try and decide civil¹⁴ and criminal¹⁵ 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*¹⁶ where it was argued that the Rules of 1937 nowhere mentioned the DB Court and thus the DB Court have no jurisdiction to decide the dispute and therefore prayed for a Quo Warranto. The High Court referring to Rules 15AA and

justice, ownership and transfer of land and social and religious practices.

¹¹ The 1974 amendment was the first amendment post the Indian independence. It also replaced the nomenclature of Code of Criminal Procedure, 1898 to Code of Criminal Procedure, 1973 and repealed all notifications, Regulations and Orders issued under the Assam Frontier Administration of Justice (Regulation 1 of 1945).

¹² The Rules for the Administration of Justice and Police in the Nagaland (Second Amendment) Act, 1982.

¹³ *Id.* at Sec. 2.

¹⁴ Rule 15AA which provides for the trial of civil cases was inserted by Section 3 of the Rules for the Administration of Justice and Police in the Nagaland (Second Amendment) Act, 1982.

¹⁵ Rule 23A which provides for the trial of criminal cases was inserted by Section 4 of the Rules for the Administration of Justice and Police in the Nagaland (Second Amendment) Act, 1982.

¹⁶ AIR 1985 Gau 1.

23A inserted by the second amendment in which the words “Dobhasis henceforward shall try and decide” appears in both the provisions, held that the DB Court have the jurisdiction to decide both civil and criminal matters and the question of lack of jurisdiction does not arise.

Again, in 1984 the Rules of 1937 was amended¹⁷ and inserted Chapter-IVA which introduced three types of Customary Courts, namely, the District Customary Court (Dobhasi Customary Court), Subordinate District Customary Court¹⁸ and Village Court (Village Council).¹⁹ The said Chapter-IVA broadly described the constitution, powers and procedures of the customary courts in the state. Thus, the Rules of 1937 is a minimal code of procedural guidelines for trial of suits and cases by the Customary Courts in the state. The Rules of 1937 is not a civil or a penal law enactment, it is only a bare guideline of procedures to be followed by the Customary Courts in trial, however, the cases and suits have to be disposed of as per the custom and usages of the parties concerned.

3.1. Jurisdiction and Powers

The District Customary Court, popularly called as the “Dobashi Customary Court (DB Court)” by the local people functions with a Head Dobashi (DB) assisted by other DBs. They are appointed by the state government from amongst persons having profound knowledge of the customs, usages, tradition and culture of the tribe to which he belong.²⁰ In every district

headquarter there is a DB Court. In bigger districts the DB Courts are also constituted in the headquarters of the Sub-division. However, the DB Courts at the Sub-divisions are not subordinate to the one in the district headquarter and therefore an appeal from the Sub-division DB Court would not lie before the DB Court at the district headquarter.²¹ No lawyers are permitted to appear before the DB Courts and therefore a party has to present his case himself. However, the Rules of 1937 emphasizes that the spirit CrPC, 1973 in consistent with the Rules of 1937 far as possible maybe followed in executing sentences and for which the assistance of the regular police should be given by the Superintendent of Police of the district.²² Similarly, civil suits should be decided consistent with the justice, good conscience, equity and customs and usages applicable to the parties and the spirit of the CPC maybe followed in executing decisions.²³ In civil matters the DB Court has unlimited jurisdiction and in criminal cases they have been given the power of a First Class Magistrate as defined in the CrPC.²⁴ Along with penal powers, the DB Court can also award compensation to the aggrieved party in accordance with the customary law of the parties.²⁵ The judgement in both civil and criminal matters are pronounced in open court at once or on a date fixed as soon as possible. This instant and speedy disposal of cases and suits has earned the Customary Courts an honourable position in the society that people prefer the Customary Courts rather than going through lengthy and complicated procedures of litigation in the formal courts. Besides, it involves no expensive counsel fees and ad valorem fee of the court. The ad valorem fee in the DB

¹⁷ The Rules for the Administration of Justice and Police in the Nagaland (Third Amendment) Act, 1984.

¹⁸ Subordinate District Customary Courts have not yet been constituted in the state and hence not discussed in this paper. Thus, only the Village Courts and Dobhasi Customary Courts are functional.

¹⁹ The three types of Customary Courts were inserted by virtue of Rule 39.

²⁰ Women are not appointed as DBs as per Naga customary law. It is a position to which only men are eligible. There are growing demands in the state by various women organization to reform the custom and appoint women as DBs.

²¹ Moatoshi Ao, *A Treatise on Customary and Fundamental Laws of the Nagas in Nagaland* 173-174 (Notion Press, Chennai, 2019)

²² The Rules for the Administration of Justice and Police in Nagaland, 1937, Rules 62(1) & 65.

²³ at Rules 62(2) & 66(1).

²⁴ *Id.* at Rule 56.

²⁵ *Ibid.*

Court is only twenty rupees irrespective of the value or amount of the subject matter of the suit. The DB Court provides speedy and instant justice with no costly litigation and technical hassle. Thus, it has zero pendency of cases.²⁶ The DB Court also has the power to examine witness on oath and warn them of punishments for perjury.²⁷ Rule 62(5) mandates that summons to persons who are not scheduled tribe and persons residing outside the state can be issued through the Deputy Commissioner of the District.

3.2. Procedures in Appeal and Revision

The DB Court also functions as an appellate court and hears appeals of both civil and criminal matters from the Village Courts.²⁸ However as provided under Rules 23A and 31 of the Rules of 1937 the DB Court cannot hear an appeal unless it is referred to it by the Deputy Commissioner or Additional Deputy Commissioner or his assistants. In *Alemtemshi Jamir v. the State of Nagaland*²⁹ in matter of land dispute, an appeal against the order of the Diphupar Village Council was filed before the Extra Assistant Commissioner (EAC), who by an order endorsed the matter to the Dobashi Customary Court for trial. The appellants challenged the said order of the EAC as violative of Rule 23A and 31 of the Rules of 1937. The state argued that under Rule 55(1) of the Rules of 1937 the DB Court shall be the court of appeal against the decision and orders of the Village Court. Also, the EAC is Assistant to the Deputy Commissioner and therefore has the power under Rule 23A to refer the matter to the DB Court. The Kohima Bench of the Gauhati High Court upon examination of Rules 23A, 31 and 55(1) of the Rules of 1937 observed that the legislative intent of

such rules is to enforce the Deputy Commissioner and Additional Deputy Commissioner and his assistants to exercise supervisory authority over the DB's Courts.³⁰ On the second issue, interpreting the word "Assistant to the Deputy Commissioner" appearing in Rule 1(c) of the Rules of 1937, the court observed that "assistant to DC includes any officers appointed as such to exercise powers assigned under these Rules."³¹ The High Court therefore held that, firstly, the Dobhasis cannot be empowered as appellate court by the exercise of powers under Rule 23A and Rule 31 debars the Deputy Commissioner and Additional Deputy Commissioner and his assistants from such authority.³² Secondly, the office of EAC can be empowered as Assistant to DC under 1937 Rule 1(c) provided the government declares so by a notification.³³

An appeal against conviction and sentence passed in any criminal case by the Village Court should be filed within sixty days before the DB Court.³⁴ Similarly, an appeal from the Village Court should be filed within ninety days in civil suits or cases.³⁵ In both cases, the DB Court has the power to condone the delay and the time of obtaining the copy of the order is excluded in the limitation period. Rule 59 of the said Rules of 1937 also provides that in the case of an acquittal order passed by the Village Court, the government may direct an appeal to be presented before the DB Court within ninety days from the date of passing the order. The DB Court in its appellate jurisdiction has the power to examine witness and call for evidence or documents.³⁶ However, in exercising its appellate jurisdiction, it cannot proceed directly unless referred to it by the Deputy Commissioner or the Additional Deputy

²⁶ Yudhajit Shankar Das, *Customary courts in Nagaland have zero pendency*, available at: <https://timesofindia.indiatimes.com/city/kohima/customary-courts-in-nagaland-have-zero-pendency/articleshow/64566870.cms> (last visited on January 4, 2022).

²⁷ *Supra* note 22 at Rule 62(4).

²⁸ *Id.* at Rule 55(1).

²⁹ MANU/GH/0468/2020.

³⁰ *Id.* at Para 19.

³¹ *Id.* at Para 22.

³² *Id.* at Para 23.

³³ *Ibid.*

³⁴ *Supra* note 22 at Rule 64(1).

³⁵ *Id.* at Rule 64(2).

³⁶ *Id.* at Rule 57(3).

Commissioner and his assistants. In *Lanu Jamir & Ors. v. Bendangtoshi*³⁷ the DB Court at Mokokchung issued a summon notice to the Village Council of Unger and Ungma villages to produce the appellants along with three representatives of each of the two appellants before the DB Court at Mokokchung. The summon was issued in money loan case where the loanee whereabouts was unknown. The appellants were the brothers of the said loanee and therefore the DB Court has issued the summon to them through their Village Council. The appellants challenged the said summon notice on the ground that case before the DB Court was never referred to it by any competent authority as per the rules and procedures laid down by the Rules of 1937. The Kohima Bench of the Gauhati High Court on examination of the records found that no case was formally filed before the Deputy Commissioner or the Additional Deputy Commissioner or the Assistant to the Deputy Commissioner as mandated by the Rules of 1937. Also, there was no record about reference of the case to the DB Court by the Deputy Commissioner or the Additional Deputy Commissioner or the Assistant to the Deputy Commissioner. The Court quashing the summon notice issued by the DB Court and allowing the revision petition of the appellants held that the DB Court has no jurisdiction to proceed with the case filed directly before it. Thus, when an appeal is brought from the Village Court, the naïve tribal villagers may not be aware of the procedures provided under the Rules of 1937, therefore it should be the moral duty of the DB Court either refer the case to the Deputy Commissioner or Additional Deputy Commissioner for approval under Rule 23A or guide the parties to place the case before the Deputy Commissioner for approval of trial by the DB Court. Further, in exercising its appellate jurisdiction, the orders and judgements should contain the points for determination and the reasons thereof and must pronounce the judgement

³⁷ 2007(2) GLT 893.

in open court immediately or on a fixed date as soon as possible.³⁸

4. Village Court

The Village Courts (also called Village Council Court) are constituted in every village under Clause (1) of Rule 40 of the Rules of 1937. The composition of the Village Court is provided by the Nagaland Village Council Councils Act, 1978 (hereinafter the VC Act, 1978), however the Rules of 1937 mandate that the GBs and Putu Menden of the Ao tribe shall also constitute the Village Court.³⁹ Rule 40(3) of Rules of 1937 also prescribed a Chairman and a Secretary in each Village Court. Except in the Sema and the Konyak tribes the hereditary Chief shall be the Chairman of the Village Court⁴⁰, while in the other tribes the Chairman is chosen from the Council members.⁴¹ The Secretary is also chosen by the council members. There is no prescribed fixed number of compositions of the Village Court, thus it is left to the customary practices and usages of the village.⁴² The number of council members may therefore vary from village to village, depending on the size or population of the tribe. Generally, the representations from each clan of the village constitute the Village Court. The jurisdiction of the Village Court extends to both civil and criminal cases with the territorial limits of the village, while the quorum of the Village Court shall be majority of the total number of members of the Court.⁴³

4.1. Powers and Jurisdiction

In civil jurisdiction, the Village Court can hear and decide matters falling within the purview of the customs and tribal laws of the village.⁴⁴ There is no pecuniary suit limits, however the disputed property or

³⁸ *Supra* note 22 at Rule 57(1) & (2).

³⁹ *Id.* at Rule 40(2).

⁴⁰ *Id.* at Rule 40(4).

⁴¹ The Nagaland Village Councils Act, 1978, Sec. 7.

⁴² *Id.* at Sec. 4.

⁴³ *Supra* note 22 at Rule 41.

⁴⁴ *Id.* at Rule 45.

any other issue should be within the jurisdiction of the village and the parties should also be residents of the village.⁴⁵ Rule 46 Clauses (2) and (3) provides power to impose costs and award compensation in cases of vexatious suits by distraintment of the offender's property. The Village Court also have been given the power under Rule 47 of the Rules of 1937 to order attendance of witnesses and accused and to impose fine if wilfully absents himself for contempt of the Court. Rule 48 further provides that the Village Court have the power to take such step as it deems fit and proper to realize the fine, if the offender fails to deposit the fine within the time prescribed by the Court under Rule 47 of the Rules of 1937.

The Village Court under its criminal jurisdiction can hear and decide cases relating to theft, mischief, assault, pilfering, hurt, trespass, affray, drunkenness, public nuisance, wrongful restraint, disorderly brawling, and such offences falling with the tribal laws and customs that occur within the jurisdiction of the village.⁴⁶ The Village Court does not have the power to pass a sentence of imprisonment, however, it can impose fine on the offender and award compensation to the victim in accordance with customary law.⁴⁷ In a situation where the Village Court is of the opinion that the sentence it has passed is not sufficient or proportionate to the crime of the offender, it may refer the matter to the competent court of law without any delay.⁴⁸ The Village Court has been given the same powers provided in its civil jurisdiction under Rules 47 and 48 of the Rules of 1937 herein discussed above (in its civil jurisdiction) for the purpose of power to order attendance of witnesses and accused and impose fine for the contempt of the court. By virtue of Rule 27 the Village Court also have been empowered to attached property of the offender.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at Rule 45(b).

⁴⁷ *Id.* at Rule 46(1).

⁴⁸ *Id.* at Rule 49.

4.2. Procedures in Trial

The Village Courts in deciding cases and suits shall follow the customs and usages of the village.⁴⁹ The court can give its verdict only after hearing both the parties and the witnesses.⁵⁰ The decision have to be pronounced forthwith after the hearing and the decision of the majority members shall be the decision of the Village Court.⁵¹ In case of a deadlock, the opinion of the Chairman shall be final.⁵² In exercising its power to attach property under Rule 27 of the Rules of 1937, the property so attached cannot be sold or sent for auction, if the concerned party prefers to file an appeal before the appellate authority under the Rules of 1937.⁵³ The notice of summons can be issued either in written or verbal as the Village Court deems fit, however Rule 60(5) the Rules of 1937 mandate that proceedings of the court in trail of any case or suit should be recorded in writing. The Village Court has been given the power to decide any case or suit ex-party, if it is satisfied that the other party has wilfully remain absent at the day of the trial.⁵⁴

5. Customary Courts: A Supplemental in Administration

The DBs and GBs wears cotton black-red waist coat and a red shawl giving them the identity of a customary authority created not by a legal contract but by virtue of age old practice honoured and respected by the society. They are not only juries to a dispute who pronounce verdict with wisdom, equity, natural justice and good conscience but perform administrative functions for the welfare of the society. Besides, the judicial functions, the DBs and GBs also perform crucial administrative functions, like, the maintenance of law and order and policy making of the village. They thus assist the state authorities in the

⁴⁹ *Id.* at Rule 60(1).

⁵⁰ *Id.* at Rule 60(2).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Id.* at Rule 61.

⁵⁴ *Id.* at Rule 60(4).

execution of policies and also act as a mediator in times of exigencies between the people and the state authorities. Justice R.M. Lodha, Judge, Supreme Court, speaking on the role of the customary institutions in maintaining harmony in the state, said, "it brings happiness and satisfaction. One went out of such courts with happiness and not as enemy but as friend."⁵⁵ Senior Advocate of the Supreme Court of India, Niranjan Bhat,⁵⁶ said, "We have studied your systems (Customary law) and wanted to see as to how you settle dispute and we found that we still have to learn from you."⁵⁷ Thus, these customary authorities are supplemental to the regular police and administrative organ of state in resolving issues of administration and law and order situation with peaceful means, for the society accept their opinion with highest esteem. The VC Act, 1978, therefore has empowered the Village Council as an auxiliary to the administration and given full power in the internal administration of the village in matter of maintenance of law and order, arrest of serious offender, enforcement of orders passed by the authorities, transfer of immovable property, etc.⁵⁸ Similarly, in the urban areas, the Deputy Commissioner may delegate power to the DBs and GBs to accomplish welfare policies and execute orders for maintenance of law and order in the area.

6. Gender Equality and Customary Authorities

The Naga customary law does not allow women to equally participate in the political and socio-economic decision making. Though Article 371A enshrined the people of Nagaland with customary freedom, Articles 14 and 15(3) provides

equality irrespective of gender, caste, etc. and the state to make special provision for women respectively. Article 15(1) further enjoins that the state shall not discriminate only on the ground of sex, caste, etc. Again, Article 13 declares that any law, regulation, custom or usages, etc. inconsistent with the fundamental rights, shall to the extent of such inconsistency be void. Thus, the denial of women participation the customary authority appears to be violative of Articles 13, 14 and 15 of the Constitution of India. Basing on this argument, the state of Nagaland amended⁵⁹ the Nagaland Municipal Act, 2001 and inserted Rule 23A⁶⁰ for reservation of one-third seats for women in the municipal elections as mandated by Article 243T of the Constitution of India. This was vigorously protested by various tribal and voluntary organisations of the state leading to burning of governmental buildings and properties and consequently dead of two persons and many injured,⁶¹ forcing the state to withhold the elections by a cabinet notification⁶² and continue the affairs of the Municipal and Town Councils by an Ad-hoc Advisory Council consisting of only male members. The State Assembly in September 2016 ultimately passed a resolution exempting the operation of women reservation under Part IXA of the Constitution. The result was a Writ Petition by the women group before the Gauhati High Court at Kohima Bench titled *Rosemary Dzuwichu & Ors. v. The State of Nagaland & Ors.*⁶³ The Kohima Bench allowing the petition ordered the state to hold the Municipal and Town Councils elections in accordance with the

⁵⁵ Chizokho Vero, "Justice Lodha praises customary in resolving disputes, delivering justice", The Morung Express, December 19, 2012.

⁵⁶ Niranjan Bhat, Senior Advocate Supreme Court of India, appointed by the Supreme Court to mediate on Assam-Nagaland border dispute.

⁵⁷ Staff Reporter, "Naga customary law impressive: Bhat", Nagaland Post, April 3, 2012.

⁵⁸ *Supra* note 41 at Sec. 15(1).

⁵⁹ The Nagaland Municipal (First Amendment) Act, 2006.

⁶⁰ *Ibid* at Sec. 10. Reservation of Seats in Municipalities.

⁶¹ The Tribune, "Two killed in clashes between Nagaland Police, public", available at: <https://www.tribuneindia.com/news/archive/nation/two-killed-in-clashes-between-nagaland-police-public-358043> (last visited on January 6, 2022).

⁶² Office Memorandum, Cabinet Meeting Dated 16th December 2009.

⁶³ W.P. (C) No. 147 (K) 2011.

reservation of seats for women as provided under Article 243T of the Constitution of India and Section 23A of the Nagaland Municipal Act, 2001 as amended in 2006.⁶⁴ The Bench also ordered to complete the entire process on or before 20th January 2012.⁶⁵ On appeal by the state against the order of the Kohima Bench, the Gauhati High Court reversing the Kohima Bench order held that:

“In contradistinction, the proposition that an Act of Parliament in respect of the themes set out in Article 371A(1)(a) would apply to the State of Nagaland only if the Legislative Assembly of the State by a resolution so decides not only accords with the tenor, temper and sentiment of the architects of this constitutional provision with the singular outlook of ensuring maximum autonomy to the Naga community and the tribal State comprised of it, but also the language applied in harmony with the spirit and psyche thereof. The plea that in this unique contextual premise the framers of the Constitution had visualized the innate obligation of the Legislative Assembly of the State of Nagaland to scrutinize every Act of Parliament bearing on the fields of the legislation envisaged in Article 371A(1)(a) commends for acceptance.... The impugned resolutions of the Nagaland Legislative Assembly to this effect, therefore, in our view, cannot be repudiated to be incompetent and/or constitutionally barred.”⁶⁶

The judgement of the Gauhati High Court was challenged before the Supreme Court and after almost a decade, the Supreme Court in February 2022 in an impleadment application⁶⁷ giving the state government a six weeks time to submit the report of the Committee formed to further

the object of holding elections in terms of the prayer made by the petitioner remarked with a note of regret that gender equality issue is getting postponed which is difficult to accept and if the state fails to do so, it will get it done judicially by the judiciary.⁶⁸ Assuming that the final judgement of the Supreme Court goes in favour of the women reservation and ordering the state to effectively implement the provisions of Article 243T, the issues of gender equality does not rest there. Issues like representation in customary authorities and inheritance of ancestral properties would still conflict with the customary law. The customary freedom under Article 371A could thus be used for the benefit of the women as well as to the disadvantage. Also, the Parliament can amend or repeal the provision of Article 371A to balance the conflicting interests. In the light of this statement, it would be pertinent to study a few important judgements of the Supreme Court. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged as violative of the Fundamental Rights under Articles 14, 15 and 25 of the Constitution in *the State of Bombay v. Narasu Appa Mali*⁶⁹. The Bombay High Court observing that marriage is a social institution in which the state is vitally interested and it is a measure of social reform of the state and therefore the state is empowered to legislate under Article 25 Clause (a) and (b) of the Constitution, held that:

⁶⁸ Abraham Thomas, *Decide or we will': SC's last chance to Nagaland on women quota in local bodies*, available at: <https://www.hindustantimes.com/india-news/decide-or-we-will-sc-s-last-chance-to-nagaland-on-women-quota-in-local-bodies-101645547790332.html> (last visited on February 24, 2022).

Also see, Shruti Kakkar, *Important Aspect Of Gender Equality Getting Postponed' : Supreme Court Asks Nagaland Govt To Implement 33% Women Reservation In Local Bodies*, available at: <https://www.livelaw.in/top-stories/supreme-court-asks-nagaland-govt-to-implement-33-women-reservation-in-local-bodies-192590> (last visited on February 24, 2022).

⁶⁹ AIR 1952 Bom 84.

⁶⁴ *Id.* at Para 35.

⁶⁵ *Id.* at Para 36.

⁶⁶ *State of Nagaland v. Rosemary Dzuwichu & Ors.* GLT 2012(4) 744; MANU/GH/0547/2012 at paras 29 and 30.

⁶⁷ IA No. 5/2017, IA No. 4/2017, IA No. 3/2016 in *Peoples Union for Civil Liberties (PUCL) v. The State of Nagaland*, Civil Appeal No. 3607/2016.

“A question has been raised as to whether it is for the Legislature to decide what constitutes social reform. It must not be forgotten that in democracy the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put up on the statute book in order to advance the welfare of the State.”⁷⁰

The Muslim Personal Law that permit polygamy, the Muslim Women (Protection of Rights on Divorce Act, 1986 and Section 2 of Dissolution of Muslim Marriages Act, 1939 was challenged as infringing Articles 13, 14 and 15 of the Constitution and therefore void in *Ahmedabad Women Action Group v. Union of India*⁷¹. The Hon’ble Supreme Court refusing to take cognizance of the matter held that “the issues raised involve questions of State policy with the court does not ordinarily have any concern. The remedy lies somewhere else (meaning the Legislature) rather than the courts”⁷². Similarly, in *Reynold Raiamani v. Union of India*⁷³ the Supreme Court observed that “the courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there.”⁷⁴

In *Pannalal Bansilal v. State of A.P.*⁷⁵ the Supreme Court answering to the issue of whether it is necessary for the legislature to make a uniform law to all charitable, religious, endowments and public institutions established by people professing all religions, held that:

“In a democracy governed by rule of law; gradual progressive change and order should be brought about. Making law of

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.”⁷⁶

The Chota Nagpur Tenancy Act, 1908 was challenged as discriminatory and *ultra vires* Article 14 of the Constitution in *Madhu Kishwar v. State of Bihar*⁷⁷ on the ground that the Act denied succession of property to women. The Supreme Court observed that though the Act was validly enacted by the Legislature and has the force of law but any customs repugnant or inconsistent with the fundamental rights are no law and therefore void. However, the Supreme Court did not strike down the Act as unconstitutional for it will lead to chaos in the tribal society. The Supreme Court therefore instead of giving an adversarial order, harmonized the conflict by making male succession subject to the right of livelihood of the female dependent. Justice Ramaswami harmonizing the conflict held as follows:

“In this manner alone, and upto this extent can female dependents/descendants be given some succour so that they do not become vagrant and destitute. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependents/descendants under section 7 and 8 of the Act are carved out to this extent, by suspending the exclusive right of the male succession till the female dependent/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose.”

A perusal of the above stated judgements indicates that the judiciary has

⁷⁰ *Id.* at para 7.

⁷¹ AIR 1997 SC 3614.

⁷² M.P. Jain, *Indian Constitutional Law* (Lexis Nexis, 7th Edition, Gurgaon, 2014), p. 868.

⁷³ (1982) 2 SCC 474.

⁷⁴ *Id.* at Para 6.

⁷⁵ (1990) 2 SCC 498.

⁷⁶ *Ibid.*

⁷⁷ 1996 AIR SC 1864.

restraint from interfering in the tribal legislative and policy making process and harmonized the conflict by taking the essence of the state legislation and the customs and thereby restored peace in the society. Thus, as observed by the Supreme Court in *Pannalal Bansilal v. State of A.P.*⁷⁸ in a democracy governed by rule of law, change has to be gradual and application of uniform law may not be possible in all times and cases. Judicial intervention in such grey areas may put the judiciary in a difficult position for giving an adversarial judgement for it may lead to social chaos and frustration of the order. Therefore, the legislative policy has to be applied carefully after studying the fabric of the society.

7. CONCLUSION

The Constitution has enshrined the Naga people with a special status giving customary freedom in the administration of justice. Such constitutional status is not available to everyone in the country. It is an additional privilege conferred by the Constitution. These special status, privilege and rights can be used both for the advantage of the society as well as to the disadvantage of a certain section of the society or the whole of the society. It can also hinder the growth of the society and lead to the backwardness of the state if obsolete and irrational customs are mulishly adhered and followed. The words “unless the Legislative Assembly of Nagaland by a resolution so decides” in Article 371A of the Constitution, therefore has cast a special responsibility upon the legislators of the state in making policy decisions that would not offend the customary rights of the people nor infringe other fundamental provisions of the Constitution. Judiciary has been playing a vital role in engineering the Naga society where conflict has arisen either by appreciating or disapproving the customs where the policy makers and administrators have failed to reconcile the conflict. As for instance, the Supreme Court

in *Tekaba Ao & anr. v. Sakumeren Ao & anr.*⁷⁹ appreciating the simple customary law in settlement of disputes observed that the customary laws have been recognized by framing the Rules of 1937 which provided the Village Court as the primary court and the High Court cannot deprive the primary jurisdiction from the Village Court. Disapproving obsolete and irrational customary practices, the Gauhati High Court in *Vimede Angami v. Ziekrue-O Angami*⁸⁰ where the petitioner was fined by the DB Court for not taking the traditional oath⁸¹ as per the customary practice of the tribe, held that such method of forcing the parties to take oath should be discarded. Similarly, in *Peoples Union for Civil Liberties (PUCL) v. The State of Nagaland*⁸² the Supreme Court has expressed its displeasure on the policy makers and administrators of the state. The customary way of settlement of disputes has been appreciated for it is speedy, simple and non-costly. It is easily accessible to all class of the society and one can comfortably present his case unhampered by the technical procedures of law. However, to combat and prevent the hitches that may lead to backwardness of the state and frustration of the orders of the court, the policy makers and administrators should be copiously vigilant in understanding the fabric of the society in implementation of any law or policy. Similarly, the customary authorities should be updated with contemporary laws and policies in order to render their services to the society at par with the evolving.

Acknowledgement: None

⁷⁹ AIR 2004 SC 3674.

⁸⁰ AIR 1982 Gau 108.

⁸¹ When there is a deadlock or a tie in the settlement of disputes, the customary court would order the party to take oath or swear that if he had lied or given an untrue statement than adversities, misfortune or death would ensue to him or his family members.

⁸² *Supra* note 67 & 68.

⁷⁸ *Supra* note 75.

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