

Customs and Law: Legal and Judicial Challenges in Naga Customary Law

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ABSTRACT

The State of Nagaland, after being carved out of Assam, Article 371A was inserted in the Constitution of India with a unique degree of customary autonomy. Laws, therefore, were enacted to align with the customs and usages of the tribes and administered justice as per customary law. With the progress of society and the influence of universal legal principles, the customary law in many fields has become obsolete and inconsistent with the fundamental laws. Thus, numerous issues require pragmatic judicial and legal examination in the interface of customary law and statutory laws. While Article 371A emerged as a result of a political settlement incorporated within the Constitutional framework through an amendment to the Constitution of India, it does not constitute an entrenched clause. Furthermore, the powers of the state are derived from Article 371A and other constitutional provisions, thereby subjecting state actions to judicial review. This paper explores how judicial intervention has influenced contemporary issues within Naga society in light of modern developments and socio-legal progress.

Keywords: Article 371A, Customary Court, Gender, Regressive Taxation

1. Introduction

The State of Nagaland was born out of Assam as the Sixteenth State of India in 1963 after the 16-Point Memorandum, 1960 of the Naga People's Convention was accepted by the Government of India. The demands set out in the Memorandum were incorporated in the Constitution of India by the Constitution (Thirteenth Amendment) Act, 1962 and Article 371A was consequently inserted in the Constitution of India. A political and cultural demand was thereby constitutionalised within the framework of the Indian Constitution. The State by virtue of Article 371A enjoys a unique degree of autonomy from the rest of her sister States under the Indian Union. No laws enacted by the parliament of India could apply in the State unless the Legislative Assembly of Nagaland adopts by a resolution. This degree of autonomy in self-governance protects the indigenous political institutions, customs, traditions, culture, the land and identity of the people. Article 371A is therefore in addition to the existent Constitutional safeguards augmenting greater political safeguard for the people of Nagaland. Political and cultural autonomy though indisputably is the best arrangement for the governance and administration of the State, the integration of the State into the Union legal framework raises significant judicial challenges in harmonizing the Naga customary law with the statutory laws of the Union and the Constitution. It thus, necessitates a pragmatic socio-legal study to reconcile and harmonize any challenges in upholding the rights and legal principles simultaneously preserving the political autonomy and rich cultural heritage of the State. Nevertheless, the judiciary has no jurisdiction over the political aspect of the Naga autonomy, however the powers of the State is sourced from Article 371A and other provisions of the Constitution; therefore the act of the State is subject to judicial scrutiny. This paper endeavors to examine the judicial intervention in some contemporary issues emanating in the Naga society in the wake of modernity and socio-legal development.

2. Naga Customary Law

Before the advent of administration, customs alone regulated the Naga society in all walks of life. The Village Council was the apex body that exercised the powers of all administrative and judicial functions. Amendments in the customs were adopted by unanimous decision of the Council composed of all the clan representatives of the village. This tradition continued in the present customary institutions. Social transition is adaptive to the Naga customs and thus every village holds annual meetings to adopt the modifications and amendments. Every issue of the village is thoroughly debated in the annual meeting before adoption. The laws that govern the Naga society is thus not from a single authority or a group of elite, but a law from the bottom enacted by involving every adult member of the society. Therefore, disobedience or resistances to such laws are uncommon in the Naga society. The enforcement of the law is not by the might of an authoritative force but by consent and rational reasoning prioritizing in bringing harmony in the society. As for instance, compulsory house tax and compulsory contribution of labour in community works among the Ao tribe can be exempted by providing a reasonable ground before the Village Council. Similarly, offences are mediated by the elders circumventing the nature of the offence to the satisfaction of all the parties. The Naga customary laws are non punitive in nature based on restorative justice in the greater interest of social harmony by adopting non-adversarial adjudication of disputes. The customs are handed down orally and may vary with the transition in the society. The flexibility and reliance on oral traditions may not cater to the statutory laws and formal judiciary in some cases. Resoluteness to obsolete customs in the name of protection of culture and customs may hinder the flourishing of society and deny the principle of equity to the marginalized sections. On the other hand, flexibility utilized positively may bring equilibrium in the society. The flexibility of customs thus can be used a tool of social engineering in the socio-legal development of the society. The Naga customs are older the positive law and the formal judiciary, it is also not a social contract. They are established norms of the society tested by time and accepted unanimously. The flexibility and resilient nature of the Naga customary law has survived through the ages and has balanced the dynamic needs of the society.

3. The Constitution of India and the Naga Customary Law

The Constitution of India has enshrined the State of Nagaland with a special status with autonomy in all realms of customary law including religious and social practices, administration of civil and criminal justice, ownership and transfer of land and customary law and procedures.¹ In those subjects of customary law, the laws enacted by the Parliament of India would not apply unless the Legislative Assembly of Nagaland adopts by passing a resolution.² The State may in whole reject the application of central law, as for instance, the Ban on Cow Slaughter Bill 2019.³ Similarly, whether the Land Acquisition (Amendment) Bill, 2007 and the Rehabilitation and Resettlement Bill, 2007 would apply automatically to the State, the Standing Committee on Rural Development of the Lok Sabha observed that the Land Acquisition laws of the centre would apply “only when decided by a resolution of the Nagaland Legislative Assembly.”⁴ In *Repasosang v. State of Nagaland*⁵ on the argument that by virtue of Section 1(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (RFCTLARR), 2013, the Act would automatically apply in the State of Nagaland, the Gauhati High Court observed that to accept such an argument “would be tenuous and would obliterate the special provision for State of Nagaland under Article 371A (a) which starts with a non-obstante clause.”⁶ The Standing Committee’s report thus corresponds to the Gauhati High Court judgement and therefore *prima facie* unless the State Legislative Assembly adopts by passing a resolution, no law of the Parliament would apply in the State of Nagaland. The State may also adopt the central law with modifications.⁷ The State therefore enjoys great degree of autonomy. Customs and traditions play a significant role in influencing the socio-legal and political development of society. The State legislature being the representative of the people is bound to maintain tranquility in the society by enacting laws and policies. The State legislature has to be cautious in exercising the autonomy

¹ Article 371A (1)(a) of the Constitution of India.

² Ibid.

³ Nagaland Page, Sept. 11, 2024, available at: <https://nagalandpage.com/cow-slaughter-ban-more-orgs-oppose-proposed-gau-dhwaj-yatra-in-nagaland/> (visited on September 15, 2024).

⁴ The observation of the Standing Committee was given clarification given on the basis of the Department of Legal Affairs. Source: Standing Committee on Rural Development (2008-2009) Fourteenth Lok Sabha, Thirty-Ninth Report, Lok Sabha Secretariat New Delhi, p. 22.

⁵ MANU/GH/0995/2023.

⁶ Ibid at Para 56.

⁷ The Special Marriage Act, 1954 was applied in the State by passing the Special Marriage Act, 1954 (Extension to Nagaland) Act, 2001 wherein the whole provisions of the Act were applied except Section 21 where the marriage is solemnized under the Act of any person belonging to a Scheduled Tribe in the State of Nagaland.

enshrined by Article 371A. The failure of the State to implement Article 243T⁸ of the Constitution of India on the ground of Naga customary law⁹ on one hand and the adoption of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 on the other hand despite objections by the society¹⁰ are issues concerning socio-legal debates. Customary laws though followed by the society may be inconsistent or in derogation of the fundamental law. In such complex circumstances, judiciary is the only organ for restoring a just law in the society irrespective any socio-political considerations. The State legislature was compelled to enact the Nagaland Municipal Act, 2023 during the pendency of the litigation consequently rendering the legal appeal against the State before the Supreme Court of India in *Peoples Union for Civil Liberties v. The State of Nagaland*¹¹ as “infructuous” thereby restoring the constitutional rights of the Naga women. On the contrary of the women reservation issue, the State legislature adopted the SARFAESI Act, 2002 despite objections by the legal fraternity and civil organizations. This raised concerns of the protection of tribal land from outsiders, as had been occurred in the neighboring State of Manipur.¹² By virtue of Clause (iv) of Article 371A(1)(a) of the Constitution of India, the State of Nagaland is enshrined with customary freedom in “ownership and transfer of land and its resources”. The intention of the framers of the Constitution regarding this Clause is to safeguard tribal land from outsiders. Consequently, by enacting the SARFAESI Act of 2002, the State legislature has created a pathway that could lead to conflicts between customary law and formal law, ultimately resulting in a loophole that undermines the inviolability of Naga customary law. This gradual shift may erode the legislative intent encapsulated in Article 371A.

It is a settled principle of law that the fundamental law will prevail and the rule of law is a primary and fundamental feature of the Indian Constitution. The Doctrine of Eclipse operates as a feature of the Constitution by virtue of Article 13(1) of the Constitution, therefore any customary law inconsistent with the fundamental rights are void. Similarly, Article 13(2) mandates the State for not making any law which abridges the fundamental rights. Therefore, the customary laws inconsistent or abridges the fundamental rights cannot be sheltered under the umbrella of Article 371A. A study of the provisions and doctrines of the Constitution in the intersection of Naga customary law is to harmonize the conflict appreciating the customs and traditions by providing constitutional safeguards in integrating the customary law with the formal laws.

4. Customary and Judicial Courts: Jurisdictional Conflict

The Customary Courts are constituted under the Rules for Administration of Justice and Police in Nagaland, 1937 and Nagaland Village & Tribal Council Act, 1978. The Village Court and Dobhashi Customary Court (DB Court) are the Customary Courts. The Village Courts are constituted in every government recognized villages composed of the Village Council members, the Gaonburas (village elders) and the village headman or chiefman.¹³ The DB Courts are constituted in the District headquarters and Sub-headquarters. The DB Courts are composed of men having profound knowledge of customs, usages and traditions of the tribe he belongs to. They are appointed by the State Government and functions under the supervision of the Deputy Commissioner of the District or Assistant Deputy Commissioner as the case maybe. The Village Courts are empowered to try criminal cases failing within the purview of tribal customs like theft, assault, hurt, affray, etc. and civil cases with the power to impose fine and compensation.¹⁴ The DB Courts, in criminal cases can exercise the power of a First Class Magistrate.¹⁵ The DB Court will be appellate court of Subordinate

⁸ Article 243T of the Constitution of India provides for reservation of one-third seats for women in municipalities.

⁹ The Naga customary law does not allow women to participate in political and administrative affairs of the society. Naga women are not permitted to hold office, vote and attend meetings in the Village Council or in the Tribal Council.

¹⁰ “SARFAESI Act in State would prove highly disastrous: NBA”, Nagaland Page, 30 Sept. 2021, Available at: <https://nagalandpage.com/sarfaesi-act-in-state-would-prove-highly-disastrous-nba/> (visited on August 26, 2024).

“NBA on application of SARFAESI Act in Nagaland”, Nagaland Post, 29 Sept. 2021, Available at: <https://nagalandpost.com/index.php/2021/09/29/nba-on-application-of-sarfaesi-act-in-nagaland/> (visited on August 28, 2024).

¹¹ By order dated July 23, 2024 in *Peoples Union for Civil Liberties v. The State of Nagaland*, Supreme Court of India, Civil Appeal No.3607 of 2016.

¹² E-Pao, D P Panmei, *Land Rights of Tribal and State Land Laws : Manipur*, available at: https://e-pao.net/epPageExtractor.asp?src=features.Land_Rights_of_Tribal_State_Land_Laws_2.html (visited on September 10, 2024).

¹³ Rule 40 of the Rules for Administration of Justice and Police in Nagaland, 1937. Further, under Rule 2(a) and 7 the Gaonburas are rural police empowered with ordinary duties of police to arrest all criminals and repress all disorders within their respective jurisdiction.

¹⁴ Ibid at Rule 45.

¹⁵ Ibid at Rule 56.

District DB Court.¹⁶ Thus, both the Village Court and DB Court have unlimited jurisdiction in matters of civil disputes. The only limitation imposed on the Customary Court is in criminal cases. The Dobhasis (jury members of DB Court), in addition to their judicial function, also serve as administrative mediators representing the government during times of social disharmony and conflicts, negotiating with civil society.¹⁷ Similarly, the Village Council serves as the primary administrative authority in the village during instances of social conflicts, overseeing the implementation of the laws and policies set forth by the State.¹⁸ The Village Courts and the DB Courts, thus functions both judicial and administrative functions and may therefore be considered as quasi judicial authorities. However, the DB Court is not the superior or an appellate court of the Village Court. Both functions within its territorial jurisdiction, the Village Courts in the Villages and the DB Courts in the district headquarters. Upholding the Village Courts as primary courts, the Supreme Court ruled that the High Court cannot deprive the Village Courts of its original and primary jurisdiction observing that “in adopting a course of remitting the issue of ownership of land in which the water source exists, the High Court has deprived the Village Court as the primary court to make an effort to resolve the dispute between the two clans of the two villages amicably and on consensus.”¹⁹ In this case, on appeal, the High Court remitted the matter to the Deputy Commissioner (DC) Judicial Court for recording evidence. Administratively the Deputy Commissioner enjoys administrative authority over the villages; however, the Village Court is independent in judicial functioning within its jurisdiction. Therefore, the DB Court or the DC Court or the High Court cannot assume the jurisdiction of the Village Court as the primary and original court. In cases involving trial by Customary Courts, there may be instances where the courts may come under the influence of vested interests or the verdict maybe not be guided by rule of law and reason. There also maybe instances where the rational formal laws may be disregarded and adhere to obsolete customs violating the fundamental rights and procedures established by law. Such instances may bring skepticism and obscurity in the customary institutions and customary law. In such circumstances, application of formal laws and trial by judicial courts presided by qualified legal experts appears to be the only institution that can be rational and just. In the Naga society, customs and traditions are sacrosanct in all fields of social and political life. It is the basic foundation upon which the Naga society is built. Thus, integration of the customary law in a gradual process with the formal laws may unfasten the obsolete custom. The sensitivity of the society may not make it feasible to do so by legislative and administrative process. Judicial intervention has proved to be acceptable channel of legal transformation. As for instance, it was only when the Supreme Court observed “we have an impression, more so, considering the past orders that the State Government is trying to play games which is not something we appreciate. At each stage there has been a delay on the part of the State in its endeavour to defeat the rights of the women gender”²⁰ the State government was compelled to pass the new municipal law with provisions reserving seats for women as mandated by Article 243T of the Constitution of India. More complicated issue arises in the intersection of criminal law and customary law. The absence of procedural laws based on evidence of modern science and technology in the customary law may defeat the ends of justice. In *Thringtonla v. the State of Nagaland*²¹ a lady was arrested by the village Mother’s Union on charges of adultery. The lady was tortured by shaving her head, slapped and kept naked in a solitary confinement as per custom of the village. A formal police complaint was filed against thirteen mothers who acted in the scene. Before the Magistrate Court, the accused mothers pleaded they acted upon the order and instructions of the Village Council. The Magistrate Court convicted the mothers for wrongful confinement and assault under Section 342 and 352 Indian Penal Code respectively. On appeal by the mothers, the High Court held that “the element of criminal force is established. The charges of illegal confinement are established. However, the charge of outraging the modesty of woman is not proved. Therefore, the learned Magistrate did not err in convicting the accused.”²² The High Court further observed “this nature of punishment meted out to certain offenders has been often experienced in our society, citizens taking law into their hands. This is not a healthy practice. Citizens must be guided to respect the rule of law.”²³ In this fact of the case and the judgement of the formal court, the lady who committed adultery went unpunished by law owing to no evidence whereas the mothers protecting the society were punished. To a person who is ignorant of the formal laws, the formal court judgement may appear to be unjust and an inequity treatment

¹⁶ Ibid Rule 55(1).

¹⁷ Piketo Sema, “*The Institution Of 'Dobashi System' In Colonial Naga Hills*”, Proceedings of the Indian History Congress, 1985, Vol. 46 (1985), pp. 470-475.

¹⁸ Rules 12 and 14 of the Nagaland Village & Tribal Council Act, 1978.

¹⁹ *Tekaba Ao v. Sakumeren Ao*, AIR 2004 SC 3674.

²⁰ By order dated 14-07-2022 of the Supreme Court in *Peoples Union for Civil Liberties v. The State of Nagaland*. It was this order of the Supreme Court the State Government of Nagaland was compelled to enact the Nagaland Municipal Act, 2023 ensuring one third reservation of women in the municipal bodies as in accordance with Article 243T of the Constitution of India. See also Supra Note 11 on women reservation in municipal bodies.

²¹ The High Court of Gauhati (Kohima Bench) Criminal Revision No. 4/2021; MANU/GH/0305/2021.

²² Ibid.

²³ Ibid.

by the court. Power to try offence of adultery as per customary law is with the District Customary Court *i.e.* DB Court under Rule 51 read with Schedule-I of the Rules for the Administration of Justice and Police in Nagaland, 1937. This is for the reason that the DB Courts functions under the supervision of the DC. The Village Court or the Village Council has no power to pass a sentence or imprisonment in any criminal cases triable by it, except to impose a fine upto a limit of five hundred rupees.²⁴ Moreover, on occurrence of any heinous or serious crime, the customary authorities must report to the DC.²⁵ A reading of the three provisions defining the jurisdiction of the Customary authorities shows that the offences of serious and heinous nature must be reported to the DC by the customary authorities and can be tried only by formal courts. Thus, it is clear that the criminal jurisdiction of the Customary Courts are limited to the extent provided under the Rules for the Administration of Justice and Police in Nagaland, 1937. Therefore, unlike in civil jurisdiction where the Customary Courts can try civil disputes of any nature not restricted by pecuniary limits of jurisdictions, the criminal jurisdiction of the Customary Courts are limited to trifling offences or petty criminal acts falling within the tribal customs the offences which are *de minimis non-curat lex* to the Magistrate Courts.

5. Inheritance and Gender Equality

The Naga custom prohibits women from inheriting ancestral property and participating in customary political institutions. A daughter cannot inherit the clan or community land. She also cannot purchase it, for she has no right of ownership. Similarly, in the village administration, she cannot attend the Village Council meetings or preside over the Village and Customary Courts. However, she takes an equal part in traditional and cultural events and shoulders equal responsibility for family and field cultivation. It thus appears, the Naga women are denied the basic rights enshrined by the Constitution. This custom therefore has to be tested with Clauses (1) and (2) of Article 13 and Part III of the Constitution of India.²⁶ A reading of these provisions of the Constitution may render the Naga custom *ultra vires*. However, Articles 317A and 246 read with the Seventh Schedule of the Constitution, have to be considered while testing the Naga customs with legal provisions to harmoniously construe to achieve the legislative intention of the framers of the Constitution.²⁷ To avoid conflict between two provisions of law, it should be so interpreted that effect can be given to both by taking the essence and a construction which renders either of them inoperative should be resorted to as a last resort.²⁸ The Naga customs on gender equality though apparently is *ultra vires* the Constitution; it cannot be rendered nugatory by reading only Part III and Article 13 of the Constitution. Article 371A has both Constitutional and political significance constituting the contemporary progress of peace and development in the Naga society. Rights over land and land tenures are a State subject under Entry 18 List II of the Seventh Schedule of the Constitution of India. Furthermore, ownership and transfer of land and its resources as per Naga customary law is enshrined by Article 371A (1)(a)(iv). In this regard, a comparison with other States law and judicial pronouncements maybe examined. Sections 7, 8 and 76 of the Chota Nagpur Tenancy Act, 1908 which provide succession to property in male line was challenged as discriminatory against women and therefore *ultra vires* Articles 14 and 21 of the Constitution.²⁹ The Supreme Court of India refused to “strike down the provisions on the touchstone of Article 14 as this would bring about a chaos in the existing state of law.”³⁰ The Court however, observed that right to livelihood is a part of right to life under Article 21. To succour the female descendants from becoming vagrant and destitute, the only way to protect the constitutional right to livelihood of female descendants is “to interject in Sections 6 and 7 of the Act by keeping the provisions in suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue.”³¹ The judicial restraint and minimalism in ruling of the judiciary in matters of cultural and traditional practices of a community leaving it to the legislature and administration may bring desired equilibrium in the society. Thus, the doctrine of “separate but equal”³² as

²⁴ Supra Note 13 at Rule 46(1).

²⁵ Supra Note at Rule 9.

²⁶ Clause (1) of Article 13 declares that all laws enforced in India that are inconsistent with Part III of the Constitution are void. Clause (2) prohibits the State from enacting any law that contradicts Part III of the Constitution. Part III outlines the Fundamental Rights enshrined in the Constitution of India.

²⁷ In *Subramanian Swamy v. Union of India*, AIR 2016 SC 2728, the Supreme Court of India on interpretation of Constitutional provisions observed, “A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve.”

²⁸ Justice A.K. Srivastava, *Interpretation of Statutes*, Judicial Training & Research Institute, UP, July-September, 1995, P. 4.

²⁹ *Madhu Kishwar v. State of Bihar*, 1996 SCC (5) 125.

³⁰ Ibid.

³¹ Ibid.

³² *Plessy v. Ferguson*, 163 U.S. 537(1896).

adopted by the United States Supreme Court, though criticized as inherent equality, undermining justice and violation of equal protection clause, which took six decades to be quashed in *Brown v. Board of Education*³³ perhaps may prevail justice in the blindness of law in the process of social transition.

6. Regressive Taxation and Customary Equality

In social and political life, there is no distinction between rich and poor under the Naga custom, and everyone enjoys equal rights. Both rich and poor pay equal amounts of tax regardless of income and wealth. This equality is also seen in the contribution of services and physical labour to society, such as the contribution of physical labour in community road construction and maintenance, the construction of community halls, water supply channels, and other community-related works. However, wealthy individuals may voluntarily contribute any amount to the extent they can in social projects and work. The Naga custom on taxation is based on equality; therefore, there is no vertical equity in the tax payment, resulting in the absence of a fair tax system. It is based on a poll tax system which may disproportionately affect the lower income sections and may prove disastrous.³⁴ The poll tax system originated in the ancient period and has continued to exist in the present day without any amendments. This has led to income disparities within Naga society, undermining the principle of equality that customary law aimed to uphold. Thus, the custom of equal tax has defeated its principle of equality owing to the rapid growth of economic development in society.

Further, to augment the disproportionality caused by customary taxation, the State has failed to undertake any policy reforms in taxation. The Nagaland Profession, Trade, Callings and Employment Taxation Act, 1968 has laid a tax of Rs. 208 (Rupees Two Hundred and Eight only) per mensem for salary and other earners whose income exceeds Rs. 12,000 (Rupees Twelve Thousand) or more.³⁵ Thus a person whose income per month is a mere Twelve Thousand Rupees would pay the same amount of income tax whose income maybe in Lakhs of Rupees. The banks and companies pay only Rs. 2500 (Rupees Two Thousand Five Hundred Only) per annum,³⁶ a more startling law. Similarly, dealers under the Nagaland Sales Tax Act, Purchase Tax Act, whose annual gross turnover on all sales is One Crore or more, pay only Rs. 2500 (Rupees Two Thousand Five Hundred Only) per annum.³⁷ Under the said laws, no individual or company pays more than Rs. 2500 (Rupees Two Thousand Five Hundred Only) per annum. Thus, the maximum tax payable is only Rs. 2500 (Rupees Two Thousand Five Hundred Only), irrespective of the income of an individual or a company. The Naga customary law professes laissez-faire, and thus, there is minimal interference by the customary authorities in the commerce and economic activities of the people. Every individual is free to cultivate crops, exploit resources found in his land and sell as he wishes, free from any tax imposed by any authority. Thus, even under statutory law, the concept of equal tax is influenced by poll tax customs. However, with the growth of the economy in the State, a few have monopolized the market. In the absence of a progressive taxation law based on vertical equity, the disparity between the rich and poor is alarming, creating a stratified capitalist society and a plutocracy. The customary and the statutory taxation laws in the state are regressive, which requires urgent amendment based on vertical and progressive taxation laws.

7. Judicial Harmonization

Customary law that does not evolve in response to the changing dynamics of society risks becoming irrelevant and obsolete. It is essential for customary law to adapt alongside societal shifts in order to retain its significance and efficacy. However, there are instances where modifying these customs may be challenging due to various societal and political constraints. Amidst the ongoing discussions regarding the jurisdictional overlap between customary and judicial courts, it is crucial to recognize that judicial courts hold the ultimate authority in determining the constitutional and legal validity of a custom. Their decisions are binding and final. Consequently, the role of judicial courts is vital in resolving disputes, ensuring that they interpret contemporary law while preserving the integrity and sanctity of valued customs and traditions. This approach can strike a harmonious balance between tradition and progress, safeguarding the sacrosanctity of customs and traditions. The Supreme Court of India harmonizing the issue of application of Civil Procedure Code in adjudication of civil disputes over land held that "such disputes can never be satisfied by mere formal decision of such disputes in favour of one or the other party."³⁸ Thus, the Supreme Court of India has emphasized that the resolution of civil disputes related to land cannot be reduced to a mere formal adjudication in favor of one party. In the villages, in the absence of documented land boundaries and

³³ 347 U.S. 483 (1954).

³⁴ Peter Smith, "Lessons From The British Poll Tax Disaster", National Tax Journal, December, 1991, Vol. 44, No. 4, Part 2, pp. 421-436.

³⁵ Section 4 read with the Schedule of the Nagaland Profession, Trade, Callings and Employment Taxation Act, 1968 (Amendment) Act, 1999.

³⁶ Ibid at Sl. No. 6, 7 and 8 of the Schedule.

³⁷ Ibid at Sl. No. 3 of the Schedule.

³⁸ Supra Note 19.

titleship, these issues are governed by longstanding customary laws rooted in oral traditions. While the Civil Procedure Code is applied in spirit within the State, attempting to resolve disputes steeped in custom through statutory procedural law risks undermining justice and the true essence of the matter which may frustrate the order of the Court. Thus, it is essential to recognize that disputes arising from customary practices should be addressed solely through customary law, except in cases where there is a clear violation of the rule of law or natural justice. This approach not only respects the local traditions but also ensures a fair and satisfying resolution for all parties involved.

In a notable ruling regarding women's voting rights in the elections for the Chairman and Secretary of the Village Council, a division of the Gauhati High Court confirmed that the right to vote and stand for election is restricted to individuals specified in Sections 4, 7, and 8 of the Nagaland Village Council Act of 1978, alongside hereditary Village Chiefs, GBs, and Angs.³⁹ The Court further observed that legislative amendments in accordance with due process of Article 371A of the Constitution is required for the women folks to vote and stand for the election of Chairman and Secretary of the Village Council.⁴⁰ A careful examination of the *Seyievinyu Medom Case*⁴¹ and the *Peoples Union for Civil Liberties Case*⁴² reflects the endeavour and zeal of the judiciary to bring a balance between the customary law and the statutory law, protecting the customary and cultural traditions while simultaneously enforcing the rights of the citizens granted by the Constitution. Furthermore, this effort protects the essence of customary autonomy as outlined in Article 371A of the Constitution, ensuring that cultural heritage is honored without infringing upon individual rights.

8. Procedural Law and Customary Law

During the colonial period, the application of the Civil Procedure Code and the Criminal Procedure Code was effectively supplanted by the Garo Hills Act of 1869,⁴³ which established customary law as the governing framework for the administration of justice. The Privy Council affirmed the legality of the laws enacted by the Lieutenant Governor under this Act in the case of *Empress v. Burah & Book Singh*,⁴⁴ stating, "the Indian Legislature has defined powers set by the Act of the Imperial Parliament, which it cannot exceed. However, within these limits, it operates independently and holds legislative powers similar to those of the Parliament itself."⁴⁵ This arrangement persisted until the Governor of Assam introduced the Rules for the Administration of Justice and Police in the Naga Hills District in 1937. Following India's independence and the formal recognition of Nagaland as a state, these rules were revised to "the Rules for the Administration of Justice and Police in Nagaland, 1937."⁴⁶ Subsequent amendments mandated that Customary Courts "shall follow in matters of procedure the spirit of the Civil Procedure Code and the Criminal Procedure Code in matters not covered by customs and usages."⁴⁷ This decisive action by the legislature illustrates a strong commitment to integrating customary laws with statutory laws in a cohesive manner. Aligning with the legislative intention, the High Court observed "the Limitation Act, 1963 even though in respect of administration of civil justice did not involve decision according to Naga customary law, and as such, in my opinion, the provisions of Article 371A of the Constitution were not attracted."⁴⁸

As to whether the principle of *res judicata* under Section 11 and the framing of issues under Order XIV of the Code of Civil Procedure, 1908 would apply in a proceeding before the District Customary Court, the High Court firmly established that "such legal principles are essentially necessary in Nagaland as the principles governing the rules are of universal application."⁴⁹ As a result, civil litigations within Nagaland are distinctly governed by the Code of Civil Procedure in matters that fall under the purview of the Administration of Justice and Police in Nagaland, 1937. In a similar case, the trial court issued an order without adequately considering the evidence on its merits. The High Court subsequently quashed this order, stating that "the principle of natural justice requires that the matter be decided in all perspectives and by affording the opportunity to the Appellant village to be heard for the ends of justice."⁵⁰ This clearly affirms that customary law cannot take precedence over the principle of natural justice. An examination of the Rules of 1937

³⁹ *Seyievinyu Medom v. Sabeituo Mechulho*, W.P. No. 24 (K) of 2011, Decided On: 09.01.2013, MANU/GH/0165/2013

⁴⁰ *Ibid.*

⁴¹ *Supra* Note 39.

⁴² *Supra* Note 11.

⁴³ By virtue of Sections 4 and 9 of the Garo Hills Act, 1869 and Calcutta Gazette Notification Dated 14th October, 1871

⁴⁴ ILR (1878) 3 Cal 64.

⁴⁵ *Ibid.*

⁴⁶ By the Rules for the Administration of Justice and Police in Nagaland (Amendment Act) 1974

⁴⁷ Rule 62 and 65 of the Rules for the Administration of Justice and Police in Nagaland (Second Amendment Act) 1982.

⁴⁸ *Temjenkaba v. Temjenwati*, AIR 1992 Gau 8.

⁴⁹ *Vimede Angami v. Ziekrue-o Angami*, AIR 1982 Gau 108

⁵⁰ *Diezephe Village v. Tsithrongse Village*, 2002(3) GLT 642.

alongside judicial interpretations firmly reinforces the integration of statutory laws and legal principles. It is imperative to uphold universal legal principles within customary courts. This legal trajectory clearly demonstrates a strong commitment to harmonizing indigenous traditions with universal legal standards, thereby ensuring fairness and due process throughout the state's judicial system.

9. Conclusion

The Naga customary law is commendable for its inherent justice and efficiency. It is based on justice, equity, and good conscience. Its simplicity and capacity for speedy justice are highly regarded. Customary law alone regulated society before the advent of modern administration, making it older than the government and the courts. Institutions like village and tribal councils serve as vital supplements to the government in administering justice. The Dobbasis (jury members of District Customary Court) and District Customary Courts, established during the colonial era, continue to play a significant role in maintaining tranquility in urban areas, especially during times of social tension when governmental agencies struggle to manage the situation. These customary institutions are deeply respected and rooted in the origins of Naga society. Adherence to customary law stems not from fear of an elite or powerful ruler, but from each individual's sense of commonness, identity, values, and the legitimacy of customs and beliefs. Customs and traditions are the centre of all social and political fabric of Naga society. Article 371A of the Indian Constitution is the foundation of all Naga legal and judicial frameworks. However, exercising customary autonomy without weighing it with the statutory laws and universal legal principles would result in depression and societal challenges. Article 371A is sacrosanct to the Nagas but it is not immune to legislative reforms and judicial scrutiny and therefore not an 'entrenched clause' of the Constitution of India. Thus, any custom inconsistent with the fundamental laws of the Constitution and other statute of national importance enacted by the union government can be declared *ultra vires*.

Adapting and evolving is crucial for progress. Customs are norms of society that change with societal ends. Change in norms may be through government interventions and actions of private parties.⁵¹ There is a tendency of not accepting the government interventions by certain sections of the society owing to fear of manipulations. Private actions on the other hand may not be suitable for all occasions for it may not adequately address the interest of all sections of the society. In such situations, the judiciary stands out as the most effective institution, as it maintains impartiality and independence from both state mechanisms and civil society influences. However, legal reform by judiciary is a gradual process, and excessive judicial scrutiny may lead to judicial overreach and bureaucratic paralysis, which may result in erosion of judicial legitimacy. Justice K. Ramaswamy observed, "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."⁵² In a culturally diverse society, imposing uniformity in laws and legal processes will inevitably breed confusion, diminishing both the efficacy and efficiency of our legal system. However, it is imperative to uphold uniformity in matters concerning national integrity, security, and the protection of fundamental and human rights for all citizens. A thoughtful approach fostering adaptations, promoting mutual respect, and committing to genuine inclusivity may gradually engineer the society and an acceptable legal system. Therefore, the evolution of both customary law and statutory legal frameworks must harmonize with the constitutional and social fabric, while steadfastly preserving the rich cultural heritage and tribal autonomy of the Nagas.

⁵¹ Dorothea Kübler, On the Regulation of Social Norms, Journal of Law, Economics, & Organization, Oct., 2001, Vol. 17, No. 2 (Oct., 2001), pp. 449-476.

⁵² 1996 AIR 1023; 1996 (2) SCC 498.