RECOGNITION OF NAGA CUSTOMARY LAW AND PRACTICESIN CRIMINAL SPHERE

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Abstract

In tribal belt, particularly in the Northeast the civil and criminal cases are decided by tribal courts by applying customary laws. The dispute settlement procedures are initiated, processed and decided by traditional institutions without any approach to the formal law enforcement agencies or regular court system, however there may be the cases when people prefer to quasi-formal courts where they are integrated with modern development. There are cases of some tribal communities that derecognise the institutions of police and formal courts. They resolve their disputes through local bodies. But once the criminal case is referred to the police or other law enforcement agencies of formal criminal justice system and the matter is brought within the purview of the national legal system, the relevant criminal law statutes concerning the offences, exceptions, defences and procedures make very few reference to customary law and practices. Within the Northeast region the interface between introduced law and customary law is less visible in the field of criminal law and procedures than in personal affairs and some other areas, such as marriage, divorce, inheritance, land issues, natural resources, *etc.*

I Introduction

THE NORTHEAST India is recognised as one of the most culturally diversified regions in the world. It is a region of inhabitants of more than 300 ethnic groups. Different tribal groups and ethnic communities inhabit in different parts of Northeast India. All the tribes have their own language, culture and traditions. India has claimed to have the second largest tribal population in the world after Africa.[1] The idea of customary law is well-known to people from ancient times. Customary law is a set of social rules, customs, beliefs, and practices that are recognised and approved as binding code of conducts by tribal peoples and local communities as their way of living. What characterises customary law is correctly said that it contains a group of customary practices which are recognised and shared jointly by a tribe, community, ethnic or religious group. This contrasts with the introduced or codified law emanating from a legally established political government.

Traditional and accepted rules of conduct became legal norms on the ground of their long and uninterrupted practice or common rule. In tribal societies which do not have written formal laws the customary laws and practices maintain social order, prescribe rules of social conducts for individuals and control human conduct in such societies. Although most customary laws have undergone modifications in their

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1 *See*, Honoring and Empowering the Adivasis of India, Ministry of Tribal Affairs, Press Information Bureau, Government of India, 2022.

contents, interpretations and implementation, a jurisprudential question still exist, as to whether or not custom should be treated as something distinct from formal law or even public law. The ongoing polarisation of custom (including customary law and practices) and written law is an after effect from the period of colonial regime which is yet to be fully decided by the free India, even in the 21st Century. While the aspirations to develop an integrated legal system has been recognised for most parts of India, the tribal peoples of Northeast continue to maintain their identity through their unique customary law and practices, both in civil and criminal matters.

The areas like substantive and procedural criminal laws have been significantly codified and given a written shape during the colonial and post-colonial periods. A critical study of these legislations shows that mention of customary law and practices rarely occur, and so customary law appears very limited in nature and application. Within many Northeast tribal communities, particularly Nagas, there is clear evidence that tribal peoples who feel that they have been victimised by the act or conduct of someone the aggrieved person can seek the relief through customary courts rather than formal courts. The technical difference between civil and criminal wrong is not very much clear in tribal customary law. The customary procedures are adopted and administered without any approach to the formal police and national justice system. There is also evidence that many tribal communities both in India and abroad refusing to recognise the authority of police, courts and formal justice system. But, as said above, once the criminal case is referred to the police within the domain of formal court system the relevant provisions of introduced law relating to offences, justifications, punishment and bail make very few mentions of customary law.

The United Nations Declaration on the Rights of Indigenous Peoples in 2007 provides a global support for recognising the customary law and practices of indigenous peoples within a majority society or nation-state. Article 34 of the United Nations Declaration clearly states that: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."[2] It is clear from the Declaration that indigenous peoples rights have been recognised as a human right. However, the customary law and practices of indigenous peoples must not infringe international human rights law, such as fair trial, individual rights, and non-discrimination. The greater stress on international human rights law is likely to raise problems in recognising the customary law and practices of a particular indigenous community.[3]

2 See the U. N. Declaration on the Rights of Indigenous Peoples 24 (New York: U.N., 2008).

3 Ragnhild L. Muriaas, "Dilemmas Connected to Recognising Customary Law and Courts in South Africa", 9(1)*Human Rights in Development Online* 205-233 (2003).

II Theoretical foundations of customary law and practice

India, a land of diversity, is home to the large number of tribal groups who are still far away from mainstream of the modern society. In India 705 ethnic individual groups are notified as scheduled tribes, out of which 300 ethnic tribes inhabits in Northeast India alone. The tribal population, according to 2011 Census, is 10.42 crore, accounting for 8.6% of the total Indian population.[4] In Northeast, Nagaland is predominantly controlled by customary law and practices. Every Naga village has differences in the practice of customary law as every Naga village is an independent democratic republic. At a time when there was no unified system of administration, a village elder or Gaonburas[5] settle disputes and disagreements of the village. Traditionally, the Nagas had no kind of internal government and they acknowledge no supreme authority.[6] Thus, Naga Communities do not have an organised system of governance in the past. They all were controlled and regulated by their customary laws and the village chief (elderly person of the community) was the head of the administration in the context of the 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 and indigenous.

In Northeast, the tribal people have their own unique traditional customary law dealing with both the civil and criminal matters and are in practice since the time immemorial. In Northeast region, it is the customary court that dispense justice parallel to the formal law courts. Even though the colonial administration legally annexed the Northeast regions in 1826, they abstained from altering the social structure of tribal societies; however, they categorised crimes into serious and non-serious ones which signify that the Northeast tribes were quite advanced in their justice delivery system and tribal people were allowed to deal petty and non-serious offences by their customary law.

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4 As per the Census Report of India 2011, 10.42 crore of Indians are declared as Scheduled Tribes (STs), of which 1.04 crore tribes live in city/urban areas and the rest in rural or hilly areas. The Schedules Tribes constitute 8.6 percent of the India's total population and 11.3 percent of the total rural population. Madhya Pradesh of India has the highest Scheduled Tribe population (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).

5 Gaonburas are village headmen. Gaonburas are normally entrusted with the duty of maintaining peace and discipline in their locality/villages/clan. They are also the spokespersons of the community they belong. Gaonburas are now an essential part of the legal and governing system of the local areas/villages in Nagaland. They are normally selected by the members of villages/clan and the village council forward the names of selected persons to the government for approval. In legal sense, they are treated as representative of the government.

6 H. Joshi (ed.), *Nagaland: Past and Present* 14-15 (New Delhi: Akansha Publishing House, 2011).

It was acknowledged as early as the Regulating Act, 1773[7] by the colonial regime that tribal people of Northeast should be regulated by their own traditional laws and practices, particularly in the personal matters, such as marriage, divorce, inheritance and religion.[8] However, subjects apart from the above continued to be regulated by formal legal system on the basis of common law traditions, namely, 'justice, equity and good conscience.' This provided a background for extensive introduction of English legal system with English laws, procedural codes and rules of evidence, that manifested no connection with the traditional laws, and reducing 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 region of the Northeast states was given a special status with some autonomy. These areas were placed under the Sixth Schedule thereof to provide for the local administration and management of tribal belts in Northeast India by formation of autonomous districts/autonomous regions and autonomous district councils. Some states in Northeast India opted out of this. As per the provisions of the Sixth Schedule, Village Councils or Village Courts formed or recognised by the Autonomous District Councils can try certain categories of non-serious offences and civil matters. During the British period, the tribal areas of Northeast region except those of Manipur and Tripura, formed a part of the province of Assam.[9] Presently, special status by the Sixth Schedule is applicable to four states of the Northeast, *viz*., Assam, Mizoram, Meghalaya, and Tripura. Most of the tribes of Arunachal Pradesh and Nagaland have been declared as Scheduled Tribes.

The Naga social and cultural practices that includes customary law and procedure were exclusively recognised in the Constitution by the agreement under article 371-A. This article specifically dealing with the State of Nagaland remains crucial for the identity and preservation of Naga culture and 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.

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

8 It is significant to note here that matters such as the management of natural resources which had already been with the local community for long were not left with them anymore by the Regulating Act, 1773

9 In 1971, the State of Assam was reorganised under the North-eastern Areas (Reorganisation) Act, 1971 and new Union Territories and states were carved out of Assam: Meghalaya, Manipur, Mizoram, Arunachal Pradesh and Tripura. Nagaland became a state in 1962 *vide* the State of Nagaland Act, 1962.

Tribal customary laws are provided considerable autonomy under various international instruments and within the Indian Constitution through articles 244, 244A, 371-A (Nagaland) and 371-G (Mizoram). As a result of the particular position provided to the Northeast states, some unique justice dispensing bodies were established apart from the active traditional village courts and village councils. This driven to a multiplicity of law and justice systems, which is being continued in some parts of the Northeast, particularly those making segment of the Sixth Schedule states. From one side there exists the conventional laws and legal institutions which are extended to these tribal regions; apart from, there now are customary laws and practices emanating from inside the tribal community itself, that are recognised by the formal legal systems as well. The Sixth Schedule states created the district and regional autonomous councils, which have been empowered[10] to make rules and regulations for the area within their jurisdiction. The laws framed and applied by the autonomous district councils are in full conformity with indigenous laws and practices of local tribes in nature and are applicable where both the parties to a disputes are tribal and inhabitants of that locality.

It is apparent that the rights of tribal peoples to be regulated by their own customary laws leads to the creation of a number of local institutions associated with administration of justice or dispute settlement in Northeast. On the one hand, there exists a system of administrative body like the deputy commissioner in some parts of the Northeast states, which administers both institutions—Executive and Judiciary, where they are still not separate. At the same level, for certain other states, there is a normal judiciary with the establishment of high court's Bench as the apex body within the state. Moreover, another body at the intermediary level, established in the Sixth Schedule states is the autonomous district councils,[11] that 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[12] framed by the colonial

10 One of the most important provisions of Sixth Schedule is the creation of district and regional autonomous councils. They are endowed with certain legislative, executive, financial and judicial powers. The law making powers include village administration, land, water, forests, cultivation, marriage and divorce, inheritance, social customs, and so on.

11 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, Mizoram, Meghalaya and Tripura. Nagaland, on the other side, is controlled by art. 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 are to be administered as Autonomous Regions and Autonomous Districts.

12 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, 1869 which was further extended to the Naga Hills.

regime in the late 19th Century.[13] This is true for the states of Nagaland, Manipur, and Arunachal Pradesh where no autonomous district councils exist. The Manipur too had enacted its own special rules[14] for dispensation of justice in the State.

Under the Indian Constitution, tribal people are provided considerable autonomy by allowing them to be governed by their own customs and usages, making legal pluralism as a real feature of the tribal legal system in India. In this context, M. B. Lokur J., in his lecture on tribal and customary laws, opined that: [15]

> 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 tribals…. It is necessary for all of us to try and strengthen customary courts and enforcement of customary laws amongst the tribal communities since that system of administration of justice has been accepted and practiced by them for centuries without any dissatisfaction with their justice delivery system.

The Parliamentary Standing Committee in its Twenty-Sixth Report has observed that:[16]

> …. 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

In its Report on Customary Laws in Northeast India: Impact on Women (2007), the National Commission for Women, had submitted that: [17]

> In the Northeast many tribes continue to regulate themselves according to their own customary laws while most laws of the Middle India tribes

13 See generally, J.N. Das, *A Study of Administration of Justice Among the Tribes and Races of North-eastern Region* (Guwahati: The Law Research Institute, Eastern Region, 1987).

14 Manipur Hill Areas Village Authorities Act, 1956.

15 Justice Madan B. Lokur, *Customary Law and Good Governance: Lecture Series on Tribal and Customary Laws* 36 (Central University of Jharkhand, Ranchi, 2013).

16 Report on Demands for Grants (2008-09) of Ministry of Law and Justice, presented to Parliament on April 29, 2008 at 76.

> 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

III Constitutional and legislative protection of tribal customary law

In traditional societies almost every law makes concessions in favour of customs prevailing in a particular area or in a particular community. In India, customs are given special recognition both by the Constitution and different legislations. Legal recognition of customs has its own history. The customary rights and practices of the tribal peoples were recognised in the Northeast as early as in 1872 by enactment of the Indian Evidence Act. Section 13 of the Act which does makes specific reference of the facts pertinent to the mode of proof of customary law and practices. Similarly, the Assam Forest Regulation of 1891 admits rights to grazing land and jungle (forest) yield at the time of solving rights before a designated zone of forest is categorised as Reserved Forest.[18] Undoubtedly, these rights can be recognised as customary rights in favour of tribal people. The post-independence India as a nation made concerted efforts to follow the principle of unity in diversity by accommodating within the structure 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, but instead it refers to the constitutional recognition of 'custom', which should be interpreted in such a way as to include customary law and practices. The application of customary law in dispute resolution lies in recognition of customs and usages practiced in a community by the Constitution. For the application of 'customary law' in the administration of justice, custom is needed to be recognised as a 'law' by the Constitution. Under the Indian Constitution, 'custom' has been clearly recognised as a source of law. All customs and usages having the features of antiquity, reasonableness and continuity are enforceable by law. As clearly stated in 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*,[19] in which the Supreme Court has 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

17 See generally, Walter Fernandes, Melville Pereira and Vizalenu Khatso, Customary Laws of the Northeast: Impact on Women, 24 (National Commission for Women, New Delhi, 2007).

18 See the Assam Forest Regulation 1891, ss. 10-16.

19 AIR 1994 SC 2342.

> 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.[20]

The court is bound to abide by the customs and recognise it as customary law provided it is reasonable and have long usage subject to the situation that it does not violate the cardinal doctrine of the Indian Constitution and the constitutional rights of the common people. The court expounded article 13 (1) in *State of Sikkim* v. *Surendra Prasad Sharma*[21] as: [22]

> 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 inconsistence with the guarantee of fundamental rights will be void

A somewhat similar statement appears in article 29 (1) of the Constitution, which reads as under: "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."

The second type of constitutional protection to customary law is provided in the Fifth and Sixth Schedules of the Indian Constitution, which refers to tribal autonomy, in the matter of internal governance and welfare of tribal peoples. The Fifth Schedule[23] of the Constitution is more comprehensive that protects the interests of tribal peoples living in Central India other than the four states of Northeast, namely—Assam, Mizoram, Meghalaya, and Tripura. It encompasses systems concerning the management and authority of the Scheduled Areas in nine states having Scheduled Areas.[24] Whereas

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20 *Ibid.*

21 2004 Supp (1) SCR 897.

22 *Ibid.*

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

24 The Fifth Schedule states include Andhra Pradesh, Gujarat, Madhya Pradesh, Chhattisgarh, Orissa, Jharkhand, Himachal Pradesh, Rajasthan, Maharashtra and Telangana. The Fifth Schedules was added for promoting the welfare of tribal peoples and advancement of Scheduled Tribes in these states and the administration of Scheduled Areas.

the provisions of the Sixth Schedule,[25] an another unique feature of the Constitution, shall apply to the governance and control of the tribal regions of the aforesaid four states to protect the rights of the tribal communities in these states. 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. This special provision is made in article 244 (2) and article 275(1) of the Constitution that deals with 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 and so on. The policy for the creation of Sixth Schedule was to set up a separate administration for the tribes so that maximum autonomy in self-governance can be provided to the tribal peoples for safeguarding their specific customs and traditions.

The third form of constitutional statement is one that legitimise customary law by making provisions in article 371-A, which clearly states that: (a) No Act of Parliament in respect of—(i) Religious or social practices of the Nagas, (ii) Naga customary law and practices, (iii) Administration of civil and criminal justice involving decisions according to Naga customary law, and (iv) 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.

As it is clear from the above constitutional provision that the Act of Parliament will not apply to the State of Nagaland on matters enumerated in the article 371-A of the Constitution 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 traditional laws. The inclusion of customary laws in the Constitution was the outcome of the Naga peoples struggle and negotiations with the Union Government and so this governance right entirely endows with the Naga communities to resolve their all disputes through customary institutions, like village courts, headed by village chief. The idea behind such sanction of power in favour 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 recognise and preserve such customs and privileges of the tribal community and sustain the soul of article 371-A and not to

25 The Sixth Schedule protects the interests of tribal peoples and provides autonomy in self-governance to the communities by creating Autonomous Development Councils that can frame rules on public health, land, agriculture and others. Presently, 10 autonomous councils exist in for Northeast states, namely: Assam, Mizoram Meghalaya and Tripura.

jeopardize such noble principle. Although the Naga people have the constitutional right to be regulated 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.[26]

Besides Indian Constitution, the Indian procedural law also allowed the tribal people to exercise 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 this, other than those relating to Chapters VIII, X and XI thereof, shall not apply (a) to the State of Nagaland; and (b) to the tribal areas,[27] 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."[28]

In 1937, by using authority under section 6 of the Scheduled District Act, 1874 the Governor of Assam had passed "the Rules for the Administration of Justice and Police in Naga Hills District, 1937" which provided certain privileged status to the Naga Hills District for the administration of civil and criminal justice in conformity with the customs and traditions of the Naga peoples. The above Rules, acknowledged Gaonburas as Rural Police authorised the Village Head, Village Council, Chief and other village authorities to investigate, try and settle cases and disputes in consistence with the Naga customs, usage, and practices. It may be noted that every recognised village[29] in Nagaland has a Village Council.[30] Here, village means and includes the specific area recognised as a village as such by the Government of Nagaland.

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26 Dolly Kikon, "Political Mobilization of Women in Nagaland: A Socioloical Background", in Walter Fernandes and Sanjay Barbora (eds.), *The Socio-Economic Situation of Nagaon District: A Study of its Economy, Demography and Immigration* 176 (Guwahati: Northeastern Social Science Research Centre, 2002).

27 The term 'tribal areas' under the Code of Criminal and Civil Procedures implies the territorial areas which, immediately prior to Jan. 21, 1972 were comprised in the tribal belts of Assam as specified in para 20 of the Sixth Schedule to the Constitution of India.

28 See the Code of Criminal Procedure, 1973, sub-s. (2) of s. 1.

29 Village is defined in s. 3 of the Nagaland Village and Area Councils Act, 1978. According to Explanation of s. 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."

30 The Village Council, constituted under the law inforce, shall comprised of members, selected by villagers in accordance with the prevailing customary law and practice and usages; the same being officially accepted by the state government, provided that hereditary village heads, Gaonburas and Angs shall be the *ex-officio* members of such council and shall have the voting rights.

By the First Amendment to the Rules in 1974, the nomenclature of 1937 Rules was changed as "the Rules for the Administration of Justice and Police in Nagaland".[31] Again, by the Second Amendment to the Rules in 1982 the word "Dobashis" was placed in the 1937 Rules which was treated to have been placed from December 1, 1963.[32] By the Third Amendment to the Rules in 1984 the major changes have been made in the Rules by introducing a separate chapter, committed to customary courts, by which the justice delivery institutions like village courts, subordinate district customary courts and district customary courts have been introduced in the Rules of 1937.[33] This Amendment also incorporated some procedural provisions that must be observed in filing of suits and cases before the Naga Customary Courts.[34]

IV Customary courts in Nagaland and their powers

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 including appointment of customary law personnel in the customary courts. Nagaland has recognised 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 GaonBura, 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,[35] established in all the districts of Nagaland. In between, there is the subordinate district customary court, also known as lower *Dobashi*

31 The Rules for the Administration of Justice and Police in Nagaland (Amendment) Act, 1974 (Act 7 of 1974). Received the assent of the President of India on October 8, 1974.

32 The Rules for the Administration of Justice and Police in Nagaland (Amendment) Act, 1982 (Act 4 of 1982), *vide* Rule 2.

33 The Rules for the Administration of Justice and Police in Nagaland (Amendment) Act, 1984 (Act 1 of 1984), vide Rule 30. Also see, Rule 60-63.

34 Rule 60 (Village Courts); Rule 62 (Subordinate District Customary Court and District Customary Court).

35 The term "Dobashi" is a derivative of Assamese and Hindi world "Dou-Bashi" that is, one who could speak the two languages of Hindi and Assamese and translate the same into local language. With the Passage of time Dou-Basha changed its form to "Dobashi". The Dobashi Court was not created by any legislative law, but by essential requirement and by practice. 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.

Court. The 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.

The customary courts, namely the village courts can try criminal cases in petty matters. Section 45 of the 1937 Rules reads as:[36]

> Criminal cases falling within the purview of tribal laws, customs and offences of theft, pilfering, mischief, trespass, assault, hurt, affray of whatever kind, drunkenness or disorderly brawling, public nuisance and cases of wrongful restraint and such offences occur within the jurisdiction of the Village Court.

While exercising the criminal powers the Village Courts are not competent enough to pass any sentence of imprisonment. Nevertheless, the courts can impose a fine for any offence or order for award payment in compensation or restitution. Section 46 (1) of the Rules of 1937 reads as:

> A village court shall not be competent to pass a sentence of imprisonment in any criminal case. It shall have power to impose a fine for any offence it is competent to try, up to a limit of Rs. 500/- (Rupees five hundred). It may also award payment in restitution or compensation to the aggrieved or injured party in accordance with the customary law.

The village courts in deciding cases and suits shall follow the customs and usages of the Naga village.[37] The Village Court can give its decision only after hearing both the contesting parties and the witnesses.[38] The notice of summons to the parties and witnesses can be issued either in oral or written as the Village Court considers fit in the situations, even so the Rules of 1937 direct that proceedings of the Village Court in any criminal case or civil suit should be recorded in writing.[39]The payments by way of compensation and restitution and fines ordered and imposed under Sub-rules (1) and (2) of the 1937 Rules may be carried out by confiscation of the property of the offender.[40] A village court shall have also the power under the Rules to order for attendance of the offender and the witnesses if any to be examined by the court in the case and to impose a fine not more than Rs. 100/- (Rupees one hundred) on any person intentionally failing to appear before the court when so directed or commit for contempt of such court.[41]

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36 See the Rules for the Administration of Justice and Police in Nagaland, 1937, s. 45 (b).

37 Rule 60 (1).

38 Rule 60 (2).

39 Rule 60 (5).

40 Rule 46 (3) of 1937 Rules.

41 Rule 47 of 1937 Rules.

The district customary court (commonly known as *Dobashi* Court) is said to be the highest customary court in Nagaland. The Dobashi Customary Court (DB Court) acts as an appellate court at the local level, which hears appeals in bothcivil and criminal matters against the verdicts of the Village Courts.[42] Nevertheless, as provided under Rules 23-A and 31 of the Rules of 1937 the Dobashi Court cannot hear an appeal automatically unless the same is referred to it by the Deputy Commissioner (DC) or Additional Deputy Commissioner (ADC) or his Assistants. The Dobashi Court in its appellate jurisdiction has the authority to examine witnesses and even call for evidence or documents for examination.[43] Further, in exercising its appellate power, the orders and judgements of the Dobashi Court should contain the points for resolution and the grounds thereof and the Court must pronounce its judgement in open court.[44] In criminal matters, the procedures of the Dobashi Court shall be in the true spirit of the Criminal Procedure Code, 1973.

The Dobashi 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 as prevalent in the State. The District Customary Court (Dobashi Court) in trying criminal matters as an original court shall use such powers as that of a First Class Magistrate, as defined in the Cr PC, 1973, as may be conferred with by the state government. The district customary court may also award payment in compensation or restitution to the injured or aggrieved parry in accordance with the customary law of the parties.[45]

The (Dobashi Court) in dealing with an appeal may admit such document or evidence to be submitted or witnesses to be examined, as deemed essential for the ends of justice.[46] The state government can also direct an appeal to be presented to the district customary court against an order of acquittal passed by any village court or subordinate district customary court. Such an appeal must be presented within a period of 90 days from the date of acquittal order, excluding the period necessary for obtaining a copy of the acquittal order appealed against.[47]

In between village court and district customary court there is a subordinate district customary court. A subordinate district customary court shall have such powers in

42 Rule 55 (1) of 1937 Rules.

43 Rule 57 (3).

44 Rule 57 (1).

45 Rule 56.

46 Rule 57 (3).

47 Rule 59.

criminal matters, not exceeding the powers of a Second Class Magistrate, as prescribed in the Cr PC, 1973, as may be conferred with by the state government.[48] A subordinate district customary court shall exercise jurisdiction and try such criminal cases, as committed within its jurisdiction, which are not triable by the village court and are indicated in the Schedule-I and cases referred to this court by the village court under Rule 49 of the Rules of 1937.[49]

V Proof of customary law and practices

The proof of custom and usage has been a matter of notable significance in the field of evidence law. Tribal custom must be proved by sufficient evidence by following the rules of evidence. Local and family custom can be proved in the normal way by general evidence as to its prevalence by the members of local tribal community or family, who would have naturally been cognizant of its prevalence for a long time without any controversy. To facilitate the proof of rights and customs, the Indian Evidence Act, 1872 lays down two extensive rules of relevancy of facts:[50]

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence;

(b) Particular instances, in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

The first principle recognises the facts which manifest the creation or origin of the custom or right and its following background. The second proposition recognises evidence of facts showing the practical examples, in which the right through custom was claimed.[51]Proof of custom in any case has been crucial and a matter of considerable importance for tribal people, courts and general public. In India the proof of custom is admitted and supported by the Indian Evidence Act of 1872, prepared and drafted by James Stephen, which is still in operation with minor modifications. This was supposed to be a systematically codified and better expression of the common law system of evidence. Many common law principles have been incorporated in the Act with modifications in the Indian context.

As we know, a custom is a mixed question of fact and law. It can be proved in the same way as other facts. If a right or obligation under custom is claimed by one party and specifically challenged by the other party, the onus to prove the existence of it lies on the party claiming advantage under it. Local custom can be established by

48 Rule 50.

49 Rule 51 (2).

50 See of the Indian Evidence Act, 1872, s. 13.

51 Basant Kumar Singh, "The Sixth Schedule of the Indian Constitution with Special reference to the Dima Hasao Autonomous Council of Assam" 2 *Journal of International Academic Research for Multidisciplinary* (JIARM) 92 (2014).

satisfactory evidence by the person taking the advantage of custom. A tribal or family custom and usage may be established by the common evidence about its prevalence by the members of tribal community or family who would have naturally been cognizant of its prevalence and its practice without controversies'.[52]The effect of section 48 of the Indian Evidence Act, in matters relating to the existence of local custom, is to ignore the necessity in section 45 that 'opinion evidence' be given only by experts, that is, persons having special skill and knowledge in the relevant field of 'science or art'. Opinion evidence about the prevalence of custom and usage can be given by persons of the community group who, although they lack special knowledge or training, 'may be treated to know of its prevalence if it really existed'. However, this does not disregard proof by experts outside of community group as to local custom. Although not categorically stipulated in the Indian Evidence Act, a person specifically skilled through knowledge or training in local custom, may be an expert for the purpose of proving local custom. The study of customs and manners of tribes and castes, the areas occupied by them and other connected matters come within the meaning of 'science or art' for which expert opinion may be called to prove the customs.

To be given legal recognition and admissible in the court of law the evidence of custom must be very clear and not conjectural. According to Batuk Lal, a custom or usage may be established or refuted in any of the ways as given below:

i. By opinions of persons likely to know of its existence of having special means of knowledge thereof.

ii. By statement of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses, provided they were made before any controversy as to such custom arose and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed.

iii. By any transaction by which the custom in question was claimed, modified, recognised, asserted or denied or which was inconsistent with its existence.

iv. By particular instances by which the custom was claimed, recognised or exercised or knowledge of its existence was disputed, asserted or departed from.[53]

The customary laws and practices are considered primarily as if it were a mixed question of law and fact, for the reason of proof. The Privy Council in *Angu* v. *Attah*[54] stated the position in reliable terms: "As is the case with all customary law, it

52 See of the Indian Evidence Act, 1872, s. 48. According to this section, "a tribal or family custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence."

53 Batuk Lal, *The Law of Evidence*, 108 (Allahabad: Central Law Agency, 2000).

54 (1916) PC 2428, 43.

has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the court, become so notorious that the courts will take judicial notice of them."[55] The basic principle is that unwritten customary laws and practices must have to be proved by satisfactory evidence, where the question of punishment is involved. The customary courts and village chiefs are presumed to know their own customary laws and practices.

VI Merits and demerits of tribal justice system

Every legal system has its own merits and demerits. Customary law and institutions are often appreciated and criticised on several grounds. We can point out the advantages of tribal justice system as:

i. The tribal court exists at local level in almost all villages. Hence, tribal justice system is accessible and people need not have to travel a long distance for seeking justice.[56]

ii. Tribal court applies only customary law. Thus it is easily understandable by even people without legal expertise or training[57]

iii. 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 of the tribal court have triumphed over the national judicial system with procedural complexities.

iv. Legal practitioners are not permitted in this court. Thus, the absence of procedural formality and lawyers in customary courts has secured the ideas of customary laws and practices to endure intrinsically and theoretically simple, that in turn motivates common involvement in the expositions of customary law.

v. Tribal courts are cheap in terms of expenses. They levy minimal fees which may be payable in cash or kind.

vi. The tribal court reduced the workload of the formal court by dispensing justice without formality.

vii. The customary laws of crime, penalty and method of punishment is fundamentally based on the nature of criminal acts the person has committed, and the punishment and type of punishment is awarded on the basis of gravity of offences the offender has committed. The village headman, chief, and the presiding officer while awarding sentence they make it certain that it is appropriate in the case.

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55 *Ibid.*

56 Widonlule Newme, *Tribal Court in North-East India: A Critical Study on the System of Administration of Justice under the Autonomous District Council in North-Cachar Hills* 124 (Unpublished Ph.D. Thesis, Assam University, 2019).

57 *Ibid.*

Since the penalty is awarded according to customary laws without any prejudice or partiality, the culprit usually regards the penalty. It is usual practice that the whole tribal peoples obey the authority of the village headman, chiefs and judges who are chosen from the community itself.

viii. Finally, the language used in the tribal court is always be the local language of the parties with no chance of perversion by way of interpretation.[58]

The customary law and tribal justice system holds a number of distinct disadvantages for the criminal justice system, which may be summarised here as:

i. The first and the foremost disadvantage of tribal justice delivery system is that the legal practitioners are not allowed to participate in legal proceedings before the tribal court. 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."[59] 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 enumerated in article 20 (3) of the Indian Constitution. The "right to remain silent" is unknown to Naga customary law. Article 20 (3) of the Constitution provides that "no person accused of any offence shall be compelled to be a witness against himself."[60]

ii. 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.

iii. 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. In this context, Article 14 of the Indian Constitution clearly grants the equality right to all the Indian citizens.

iv. In states like Nagaland 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.[61] When the dispute is in betweentribal and non-tribal peoples (including central or state government

58 *Ibid.*

59 The Constitution of India, article 22 (1).

60 *Id.*, article 20 (3).

61 Ruchi Pant, "Exploring the Role of Community and Customary Law in Natural Resources Management in the Legal Pluralist Societies of Northeast India", Paper prepared for National Biodiversity Strategies and Plans (2003) at 16.

department), the village councils often cannot decide matters. There have been some instances where the village council did adjudicate and the decision was agreeable to both the parties. But such decisions could appealed by any one of the parties.[62] The educated and the elite populace (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.[63] So the tribal justice system is losing its faith among educated people.

v. 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.[64] The efficacy of the customary laws depends upon conscience and reverence.

vi. With the spread of education and new ideas, the reverence to the customary laws is declining.[65] Growing social individualism in the community is a reason for the traditional system being less effective. People want to sidestep the customs and avoid facing the village councils in cases of violations of the customary laws.[66] Village authorities do not keep any written records of the decisions taken. The trend of maintaining records is very recent.[67]

vii. Finally, the quantum of fine and compensation under tribal customary law are very minimal and is outdated in modern context.

VII Conclusion

In sum, the scant provisions of the constitutional and legislative laws can raise complexities and ambiguities when the customary and formal courts in Northeast India seek to give practical effect to them. With the growing interest in restorative justice throughout the world. The debate in this article has been limited to the specific issue of criminal law and procedures, that is, sentencing areas. References to law and procedures of other countries indicate that such issues are not relevant in the Indian context only but also to the Pacific Island region. It has been demonstrated that the customary law in sentencing practices may be relevant if this branch of customary law and procedures is studied in a principled and systematic manner. Continuing dissatisfaction with the administration of formal justice system because of corruption and procedural technicalities to deal effectively with rising crimes, it is more likely to increase interest in traditional justice system.

62 *Ibid.*

63 *Ibid.*

64 *Supra* note 16 at 17.

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

The customary matters that have been highlighted and discussed here are a small part of comprehensive socio-political debates, which are connected with the recognition of customary laws and procedures in the field of criminal law and procedures. The Indian approach very firmly be similar to the current state of affairs in Aboriginal communities of Australia. Restitution and compensation in tribal societies of Northeast region makes the comparison appropriate. The legislative structure for sentencing of tribal culprits and the acknowledgement of tribal customary laws and practices differs between the Nagaland and other states of Northeast region. Amongst the various aspects, one of the crucial issues of giving approval to customary laws and practices in sentencing decisions come from the type of physical punishment that can be used by the community, which in itself constitute a criminal offence. The customary courts regard this fact while determining sentences.

As noted earlier, Naga customary laws are unwritten customs, accepted as oral usages, 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. In the absence of written code of customary laws, people will lose faith in the traditional courts and lean more towards the formal courts. Even the formal courts generally do not interfere in customary domains of tribal community.