

Relevance of Customary Law with Reference to Nagaland: The Question of Exclusion of Women

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Abstract

The paper is an attempt to understand, whether customary law still stands relevant in this fast moving paced? Do customs, practices, and beliefs that are made mandatory serve as a code of conduct for both men and women? If so, why is exclusive rigidity imposed on women while men are subject to flexible selective appropriation? In general, modernity encompasses women rights and interests, however men haven't always embraced this. The paper addresses the fact that women are not permitted to participate in the Dohashi and Gaonbura customary courts due to superstition, myths, ignorance, etc.

Key words: Naga society, customary law, exclusion of women, dohashi. gaonbura.

Introduction

The privileges that women do not have in our society are due to the existence of customary law, which has a strong male dominance. Of course, customary law has its advantages, but when it comes to women and our social rights, it acts as a barrier to our political freedom or as a source of leverage. Since the early days, women were never allowed to be a part of the decision making body, they were never allowed to even enter the morung¹. So letting women to be a part of the village council is against the customary law?

(A, F, 50, Vice President, Lotha, Women Organisation², Lotha tribe)

The iron rod will never be carried away by a strong wind, no matter how much it may blow and even topple a large tree. The customary law symbol is this rod. Our customary law resembles that iron rod exactly. The arrival of Christianity had no negative effects on our customs.

(B, M, 90, Gaonbora, Yimchunger tribe).

The Question of Customary Law and its Relevance in Contemporary Naga Society

In the postcolonial era, the Indian nation-state generally have endorsed the legacy of “indirect rule” of the past and continued with a decentralized format of tribal governance by safeguarding the customary laws. The need for decentralization and devolution of power led to introducing of self-governing autonomous institutions, such as Autonomous Councils under the Sixth Schedule, Panchayati Raj institutions (Assam-Arunachal Pradesh), and safeguarding the customary laws and “tribal institutions” through Article 371A (Nagaland), Article 371G (Mizoram) and Article 371 C (Manipur). Two main founding features of the “indirect rule” of the colonial regime in Nagaland were Gaonbura (village elder) and Dobashi (interpreter) who were institutionalized under the

¹ Most of the studies defined Morung as a ‘bachelor hall’ or ‘dormitory’ or similar institution but it is not just dormitory or bachelor hall rather it’s an institution of ‘socialising place’ (inculcate masculinity).

² The interview took place between May 2021 and January 2022. Dobashi's and Gaonbura's, as well as civil organization leaders from several tribes, including both elderly men and women, are among the respondents. It was critical to include all of these respondents because customary law varies by tribe. As a result, the study includes gender, tribe, age, and various civil society organizations.

postcolonial setup. Dobhashi's functioned in district offices as the official adjudicators. The court is now called Dobhashi courts (Das, 1993: 98).

Nagaland comes under the Sixth Schedule where indigenous cultural practices are predominant like any other tribal states in India. World Intellectual Property Organisation (WIPO) defines customary law as, "a community's customs, practices, and beliefs are accepted as obligatory rules of conduct under customary law. Customary law is an integral part of indigenous peoples' and local communities' social and economic systems, as well as their way of life"³. Article 371A-Constitution of India 1949 states the special provision with respect to the State of Nagaland.

- (1) Notwithstanding anything in this Constitution,
 - (a) no Act of Parliament in respect of
 - (i) religious or social practices of the Nagas,
 - (ii) Naga customary law and procedure,
 - (iii) administration of civil and criminal justice involving decisions according to Naga customary law,
 - (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 decides⁴.

The question remains, are all these provisions still intact in present day Nagaland? So going by this, whatever provisions which has been made, it should be the same today in terms of practices. However, that is not the case. The menfolk follow the provisions as per their aspirations and change or improvise it whenever the demand for it arises. For instance, the mass religion of Nagaland is a borrowed institution that i.e., *Christianity*. This was done through conversion. The traditional ritual and worship has been completely oriented towards the principles and teachings of Christianity and not indigenous ones. This also reflects in the other social practices and Naga customary law, where the modern legal system has also penetrated in the Nagas way of life. The customary courts are empowered to adjudicate the civil or criminal cases (depends on the nature of the crime). Although the modern law has not empowered the villages, even in the case of criminal offences, villages are employing customary law in exercising the judgement. There are instances where women have been put to jail

³https://www.wipo.int/tk/en/indigenous/customary_law/index.html#:~:text=Customary%20law%20is%20the%20set,indigenous%20peoples%20and%20local%20communities.

⁴ <https://indiankanoon.org/doc/371998/>.

by the court of judicial magistrate for misusing the customary law.⁵ We no longer follow customary law in the traditional sense as it is enshrined details on movable and immovable properties, ownership and transfer of land and its resources. Naga society is known by patriarchy and patrilineal system. There are parents who understood the importance of gender equality; they have begun to give acquired land to sons and daughters. Whereas, according to the customary law, daughters were not entitled even to inherit the acquired land. In addition, women are purchasing lands and becoming more socially and economically empowered. It is also mentioned (as held by the customary law) that land cannot be sold to non-locals, but this is hardly imbibed or regulated in Nagaland, the practise of such still exist through various modes. Alongside, at present, women too can own a land which was unthinkable ages ago. Even the appointments of Dobashi has changed, no longer following the rules laid by the district administration. The eligible qualification, under age, no knowledge about the customs, practices and beliefs. From the interview⁶⁷, C shared his opinion,

Some of the laws that were in effect during our forefathers' time are simply ignored or are no longer in effect. For example, jungle meat is very tasty, and women were previously forbidden from eating jungle meat under customary law, but now women have the freedom to eat whatever they want, demonstrating how customs are changing. Land is also given to daughters, though men continue to hold the lion's share. Parents give land or property to their daughters. Women are being encouraged to participate even at the village level, and we now have female VDB representatives (C, F, 80, Angami tribe).

This provision served as a shield for men to misinterpret the Naga customary law. The selective interpretation was made in order to protect their current male-dominated public sphere. To put it another way, Naga Customary Law is biased as it only recognizes what is consistent with men's

⁵ A court in Nagaland has sentenced eight women to one year in jail for humiliating a woman after a judgment against her was passed by a kangaroo court in 2018. The Court of Judicial Magistrate, First Class, Tuensang also ordered a fine of Rs 3,000 against the eight, under various Sections of the Indian Penal Code. The victim was punished by a kangaroo court over violation of customary laws relating to extra-marital affairs. <https://www.newindianexpress.com/nation/2021/may/01/one-year-jail-for-eight-naga-women-overhumiliating-kangaroo-court-convict-2297110.html>

⁶ To prevent identification, all names used here are fictitious; however, the names of the tribe, gender, profession, age, and organization are used sequentially throughout all of the interviews. The narratives from a chosen few tribes are used here.

⁷ This study has looked into ensuring that men's and women's perspectives and opinions are given equal importance. Gender discourse is often understood to focus exclusively on women's rights in research, but we also need to give equal weight to having comprehensive worldviews that encompass both genders.

pre-existing values and beliefs. When society is evolving, is it possible to still retain the customs, practices, and beliefs and make it obligatory? However, in the context of Nagaland, this may not be true. Some contemporary scholars like Shimray (2002; 2004), Wouters (2017), and Kamei (2011) have contradicted this idea. The existing literature suggests that unwritten customary laws which were governed by the tribal communities in Nagaland were being recognized with mixed code and conduct of aboriginal practice with Christianity. Wouters thus remarked,

Naga customary law is not an ancient fossil or commandments hewn in stone. Customary law permits a certain drift in form, content, and emphasis, and when moral values, religious beliefs, ideas of justice, and the political context changed, Naga customary law usually followed suit. Notwithstanding the regular rhetorical invocation of “since time immemorial” to explain and justify the status quo, a closer look reveals that much of what is now considered traditional Naga customary law and procedures has its genesis in Nagas’ modern history, a history strongly shaped by colonialism, massive conversions to Christianity, and enclosure into the Indian nation-state” (2017: 22).

However, among the male respondents, the views differs. The respondent D said,

The world is changing at a fast pace. Customary law is our Naga identity but if needed, some practices should be discarded and some be developed so they could be balanced well with the present context. Equal participation in decision-making, property inheritance, and women’s involvement in village matters should be taken into consideration. In the village council body, educated men and women should be inducted because old members may know the history of the village but without education and awareness the old traditional system will be used which will never bring a solution, especially with regard to gender equality. Some traditional practices may work but some may not be applicable in our context now. So far I see no changes in our customary laws. It is still the same practice we have been following. In VDB women have been inducted lately but it is just for the sake of showing it and not practically practiced (D, M, 57, President of ENPO, Sangtam tribe).

Customary laws need to be changed to respond to emerging problems in modern times and to balance the gender exclusion in the customary laws of tribal societies in Northeast India with inclusive policies under modernity (Ray, 2017: 52). Therefore, it has to be understood as a common practice but not obstruct gender equality. For instance, the most worshipped platform ‘*Dobashi court*’ was not a part of Naga tradition but was created by the British government. Unfortunately, this has become a part of the platform to resolve disputes if any. Kamei argues, “Customary laws are not a relic of a pristine past

which is fixed and uniform as thought by the colonial rulers. Customary law is a product of the interaction between the colonial power and the native elites” (Kamei, 2011:56). Though they have not agreed upon, it is not an aged old practice, but they did not suggest what should be ‘the customary laws’ and ignored important aspects of social institutions like family, marriage, kinship -clan system, etc.

Establishment and Relevance of Customary Court

“Customary Courts” includes Village Courts, Subordinate District Customary Courts and District Customary Courts constituted under Chapter IVA of these Rules⁸. Besides the establishment of administrative structures and offices, the colonial administration established two categories, at the village level or local representatives to control their village, called Gaonbura, where women were excluded. The Dobhashi (interpreter), literally meaning "men of two tongues," served as a go-between for colonial officers and village Gaonburas because most of them could not speak Assamese, which was the language of communication at the time. The word Gaonbura has an Assamese and Hindi word, ‘Gaon’ means village and ‘bura’ means elder, hence it means ‘Village Elder’. The Gaonbura and Dobhashi were both directly accountable to a colonial officer in the district and sub-district.

A native scholar writes,

The origin of Dobashi dates back to when Kohima was occupied and headquarters of the British administration was established in 1878. They were initially appointed as interpreter which later statutorily led to the establishment of customary court, also known as Dobashi court...who could speak the language of the British to interpret the local dialects...used them for collection of taxes and information and interpretation between the rulers and the subjects and also between two villages or persons in dispute to adjudicate in harmony with customary law. The Dobashi thus established in Naga Hills. It is also known as District Customary Court was formally established as early as 1914 (Ao, 2009: 144).

Further, he maintains that, “the powers and procedures of village council, Gaonbura, and headmen were left untouched by the British since their advent in the Naga areas. This status was recognized by the Scheduled District Act, 1874 by giving statutory recognition” (Ibid: 141). The Dobhashi court used oral or viva voice plea and defence, as well as the same judgments and orders.

⁸ The Rules for Administration of justice and police in Nagaland (Third Amendment) Act, 1984. (Nagaland Act No. 1 of 1987).

https://www.indiacode.nic.in/bitstream/123456789/11689/1/the_rules_for_administration_of_justice_and_police_in_nagaland_third_amendment_act_1984.pdf

The institution exist today is with mere relevance and importance. The need for the interpreter is no longer in demand. The district commissioners are mostly locals. The language required to collect the information for the administration is in local dialect or lingua franca-Nagamese and English. Not denying the important role offered by the customary court but this institution has become a job oriented. The appointments of the members are based on nepotism, family dynasty, under age members, members with no knowledge of customary law. In fact, both the Gaonbura and the Dobashi have members with questionable morals. There is absence of having sound knowledge of customs, practices and beliefs of their tribes. A few highlights from the interviews on how, simply because they are women, they are not allowed to participate and thus are excluded.

Under the district administration, which is presided over by the District Commissioner and other officials, the processes and selections are handled by the officials. Age and ability are taken into consideration when choosing members. There are currently 20 Dobashi—all of them male—under the customary court. The minimum age should be 25 years old. The only people allowed to join the customary court are the Dobashi member. Some will make statements, and through time, it will become clear who is guilty. In cases of serious misconduct, we allow the offender to take an oath; if that doesn't resolve the matter, we allow both parties to take an oath, and if necessary, we personally visit the scene to gather additional evidence (E, M, 49, Dobashi, Angami tribe).

In Selvaraj's studies, the reported crime in North East India is looked at from the *Gender-Based Violence Index* (GBVI) covering 2004-2013. It includes violence index: rape, sexual harassment, dowry, molestation, and cruelty. For instance, *rape, sexual harassment, and gender-based violence index Nagaland* stood at sixth rank (third-lowest). In the *dowry, molestation, and cruelty index*, Nagaland ranked last (the least). But in the *Murder of Women Index*, it is ranked third highest (cited in Melvil Pereira, 2017, 94-95). This could be stronger the customary laws are, the lower the GBVI reported. This in a way also conveys that many tribes are reasserting their identity through a return to their customary laws (Fernandes, Pereira and Khatso, 2008, 2).

The Nagas have only ever used the customary courts, which are made up of the village council at the top and clan committees at the bottom, to settle disputes. However, following the British invasion and occupation of the Naga Hills, the system of dispute settlement underwent structural modifications.

Exclusion of Women in the History Making

Women are not represented in the creation of Naga history because of the way that men and women are portrayed and differentiated in their 'experiences.' Kikon writes, "Naga customary practices is not the sole domain for asserting our rights, practices and recognizes that we are interdependent beings" (Kikon, 2018: 57). Claiming or making a space exclusively for one gender while ignoring the other has been the norm in Naga society. It is crucial to consider how tradition and modernity are expressions of social order while identifying the structures of Naga society. 'Modernity' is connected to India's colonial era. India saw a return to the traditional burden during the colonial era, along with a plethora of ideological and cultural influences from the contemporary West. Women's current unequal social position, as well as historically unequal social formations and institutions can be understood through the lens of modernity and tradition. Both define women's socio-political position in today's world. Nagaland is no exception. Women are often portrayed as cultural icons representing both tradition and modernity.

Only the male perspective sets the hierarchal social order like thinking, understanding, perceiving social reality, etc. Some of the narratives from both men and women are as follows:

In Village Development Board women are also elected but just for the sake of showing to the officials the records are maintained else most of the works are done by men. And especially during such meetings women are working in the kitchen making and serving teas and snacks instead of participating equally.

(F, M, 57, President of ENPO, Sangtam tribe).

In the village, we don't allow boys to work so much, the girls they do all the household chores but in the field even boys help. The mindset is such that women should take care of the kitchen and boys to do other tough chores. Some men, they help at home but in Angami tribe the practice is still followed even now. The responsibility of women is to look after the family and take care of almost everything. It is endless and it will only keep on pouring.

(G, F, 80, Member, Angami Women Organization, Angami tribe).

Maiki leader hua bi tiktar ase

(To be a women leader is a burden).

Men have this perception about women, in order to prove their perception wrong I put in all the efforts to prove male counterparts that women are equally capable of taking up positions in a

society and if only given a chance they can contribute intensively and extensively to uplifting the society.

(H, F, 62, Council Chairman, Sema tribe).

Our tradition does not allow women to be a part of the customary court.

(I, M, 52, Lotha tribe).

Because, since, the morung days, woman were not a part of the decision making body. Women cannot become GB and DB's. It's against the customary law. Women have no role under the customary law.

(J, M, 79, former, Head Dobashi, Konyak tribe).

Women can be anything outside but within the Naga society, they do not have the authority of giving a judgement...our tradition does not allow. And also women carry the baskets and heavy stuff while returning from the field and the men folk carry just the dao and spear because it's our tradition. Even though head hunting is not in practice anymore.

(K, M, 69 Head GB, Konyak tribe).

See, custom is older than us. Custom does not allow women to take part in decision making. Now, we all are Christians, earlier our forefathers held many festivals and they did not have any idea about clothes, even without clothes they played various games like wrestling, they don't allow women to come near them. Another thing is women tend to speak a lot. In many social gatherings if men held meetings some of the points are not even allowed to share to their wife's such was the practices then. So like this, women are not treated differently, however, only in decision making they should not interfere.

(L, M, 61, Gaonbura, Zeliang tribe).

In the customary court, for example there is a land dispute, we have to go and verify the land even in the middle of the night and take an oath. The oaths are very effective, our tradition does not allow women to take oaths. We, Dobashi's have to go to the jungle with army/police to settle disputes even at night and we cannot risk women's life for such works. *It is not suitable for women to be doing such works.* During the earlier days, Dobashi's were also questioned at gun point if the army suspects anything. *It's not discrimination, it is out of*

love. Women can do many things but when it comes to physical strength, we men are much stronger. As a Dobashi, we have to travel a lot, carry dead bodies and guns at times.

(M, M, 54, Dobashi, Lotha tribe).

Conclusion

The paper tried to unravel the exclusion of women in the decision making process in the Naga society. During the course of field work, it has come across opinions, debates and discussions which highlighted the historical narrative nurtured by the socio-political environment that encouraged the belief of such exclusion to sustain, making it a complex issue entangling alongside responsibilities and identities. The spaces for men and women should be given equal treatment respecting the differences. The same disinterest should be shown to men and women if certain sections of the customary law is no longer relevant. The present day customary law is not orient with the customs and practices that forefathers or the narratives of the indigenous. Customary law is rather a conglomeration of the teachings of Christianity, colonial ideology and a touch of the modern values, which in a way have come together to adapt and reinvent the customary law. Therefore, selective appropriation only perpetuates further discrimination and exclusion of women in the history.

Declaration of conflicting interests

There is no potential conflict of interests.

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