

**AN ANALYTICAL STUDY ON THE CUSTOMARY LAWS OF  
CHAKHESANG NAGA TRIBE OF NAGALAND**



Dissertation submitted to National Law University and Judicial Academy, Assam  
in partial fulfillment for award of the degree of  
**MASTER OF LAWS**

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## **DECLARATION**

I, Nichinka Upadhyaya, pursuing LL.M. from National Law University and Judicial Academy, Assam, hereby declares that at present dissertation titled AN ANALYTICAL STUDY ON THE CUSTOMARY LAW OF THE CHAKHESANG NAGA TRIBE OF NAGALAND, is an original work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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## **PREFACE**

The state of Nagaland depicts its story through processes of colonial and Constitutional past. The colonial era resulted the untouched Nagaland to be a part of Greater Assam. It was through the 13<sup>th</sup> Constitutional Amendment Act, it attained it Statehood. The Constitution of India, cherishes the beautiful culture of Nagaland and protected it by giving it's a special status under Article 371(A). Thus any laws in order to be applicable in Nagaland has to been passed in Naga Legislative Assembly. This research is mainly based on a tribe of Naga ie. Chakhesang Naga in Nagaland and their various customary laws and its relationships with other relevant provisions of India. This study will portray the simple nature of Chakhesang Naga Society where women although, not an oppressed class, but is legally segregated and discriminated. The administration of justice system will also be dealt in detail depicting the nature of crime and people's understanding of crime. The Naga society is changing in fast pace, with static customary law, which in a way is unable to resort justice in Society. Thus this research paper will basically highlight the changes in the society of Chakhesang Naga and how the static customary laws is unable to cope up with the changes in present generation.

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- 1966- The *International Covenant on Civil and Political Rights*
- 1989 -The Indigenous and Tribal Peoples Convention.
- 1996- Panchayat (Extension to Scheduled Areas) Act
- 2006-The Scheduled Tribes and Other Traditional Forest Dwellers  
(Recognition of Forest Rights) Act.
- 2007-United Nations Declaration on the Rights of Indigenous Peoples

## **LIST OF ABBREVIATIONS**

Art – Article

CONST- Constitution of India.

Cr.P.C- Criminal Procedure Code

H.M.A-Hindu Marriage Act

H.M.G.A- Hindu Minority and Guardianship Act.

I.C.C.P.R- International covenant on civil and political right.

I.E.A- Indian Evidence Act

I.P.C- Indian Penal Code

I.L.O- International labour Organisation

N.M.A-Naga Mothers' Association.

N.S.C.N-Nationalist Socialist Council of Nagaland

F.R.A-Forest Right Act

P.E.S.A.- Panchayat (Extension to Scheduled Areas) Act

U.N –United nation

U.D.H.R- Universal Declaration of Human Right

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## CHAPTER1-INTRODUCTION

Every country in the world has some peculiar characteristic which differ them from the rest. Their language, cultures, history depict its past struggle which helped them to redefine their present. History is always regarded as the interpretation of Minds. Going back to the social contract theory as explained differently, by Thomas Hobbes, John Locke and Jean Jacques Rousseau. The only common point among all is “Conflict” which arises among people and Society. This resulted in the formation of state. Hence Conflict does not always denote a Negative force, but many a time act as a weapon for social Change.

India as a whole has a great history which is admired by the rest of world. North-eastern States, of India have different culture, features, than that of the mainland India. But it is an integral part of India. The story of northeast, especially the incredible Nagaland, has its own sweet and better experiences in the past. The untouched region of Nagaland within the undivided Assam, marks its historic day on 1<sup>st</sup> December 1963. The word Naga and Nagaland are two distinct terminologies. One connotes the indigenous Naga tribe who belongs to the Mongoloid race, while the other denotes geographical area which was carved out of Assam. Naga tribe are those who mainly resides in Nagaland and are also present in the states of Manipur, Arunachal Pradesh, Assam and parts of Myanmar that share the border with Northeast India. Many researcher even the tribal inhabitant of Nagaland itself believe that it is the Christianity that have completely changed the believe of these tribal inhabitant of northeast. As stated by Shikhu and Inato “Crucial to the integrity of its communitarian structure, the early Naga religion that of animism was centered on earth and creations and not a founder or a great historical person”<sup>1</sup>. Moreover the author further added that “Before Christianity was ushered in by the European Missionaries, the tribes falling under the umbrella identity of the Nagas gave immense premium to spirits, lycanthropy and witchcraft. The encounter with Christianity enabled them to alter their whole outlook and way of life completely, never to be same again..... the advent of Christianity brought the message of forgiveness and stability leading to its

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<sup>1</sup> Shikhu & Inato Yekhetu, A Re-Discovery And Re-Building Of Naga Cultural Values-An Analytical Approach With Special References To Maori As A Colonized And Minority Group Of People In New Zealand 202-03 ( 2007).

rapid acceptance among the Naga people”<sup>2</sup>. This research paper is a brief sketch of how Nagaland as a separate entity came into existence? What are the various customary laws of Chakhesang Nagas? And its interference with the Constitution of India and other laws of India.

The 13<sup>th</sup> Constitution Amendment Act, 1962, added Article 371A<sup>3</sup> to the Constitution of India. This ensured the creation of the Nagaland state and made certain special provisions for the protection of the customary laws and religious beliefs of the Naga

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<sup>2</sup> *Id.* at 1.

<sup>3</sup> INDIAN CONST.art 371A, cl.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 decides;

(b) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken: Provided that if any question arises whether any matter is or is not a matter as respects which the Governor is under this sub clause required to act in the exercise of his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment: Provided further that if the President on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

(c) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;

(d) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional council for the Tuensang district consisting of thirty five members and the Governor shall in his discretion make rules providing for

(i) the composition of the regional council and the manner in which the members of the regional council shall be chosen: Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman ex officio of the regional council and the Vice Chairman of the regional council shall be elected by the members thereof from amongst themselves;

(ii) the qualifications for being chosen as, and for being, members of the regional council;

(iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council;

(iv) the procedure and conduct of business of the regional council;

(v) the appointment of officers and staff of the regional council and their conditions of services; and

(vi) any other matter in respect of which it is necessary to make rules for the Constitution and proper functioning of the regional council

people. The social fabric of the Naga is unique in itself. “Nagaland is the 16<sup>th</sup> state of India, which has Myanmar ie. Burma on the east, Arunachal Pradesh and even a part of Assam on the North, Assam in the West, while Manipur in its south. Kohima is the state capital of Nagaland, with Dimapur as its largest district. As per as the census of 2011, Nagaland has an area of 16,579 square kilometres, with a population of 1,980,602”<sup>4</sup>. This makes Nagaland the smallest state of India. Nagaland boasts of 16 major tribes. Such as

1. Angami,
2. Ao,
3. Chakhesang,
4. Chang,
5. Kachari,
6. Khamniungan,
7. Konyak,
8. Kuki,
9. Lotha,
10. Phom,
11. Pochury,
12. Rengma,
13. Sangtam,
14. Sumi,
15. Yimchunger, and Zeme-Liangmai (Zeliang).

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<sup>4</sup>District Census Hand book, Phek , Village and Town Director, Government of India, Series 14, Part XII,2011.

[http://www.censusindia.gov.in/2011census/dchb/DCHB\\_A/13/1306\\_PART\\_A\\_DCHB\\_PHEK.- pdf](http://www.censusindia.gov.in/2011census/dchb/DCHB_A/13/1306_PART_A_DCHB_PHEK.- pdf) accessed on 28th May 2018.

These tribes consist of sub- tribes and they again fragmented into number of clans. Each have their own customary law with unique culture, and language, colourful customs, heritage, traditional jewellery/beads and is thus distinguished by other. Although fragmented but they stand united through Nagamese language. In town they normally communicate with each other through Nagamese language as each tribe have their own distinct language. It is a land of folklore, customs and traditions passed down to generations through the word of mouth<sup>5</sup>. There are more than 1000 villages in Nagaland. The real political unit of the tribe is the village. Each village have their own Gaon- buras that is the village chief. These village head receives red woollen blanker every two years from government for the service rendered by them toward the society. These Gaon-buras form the village council with the head Gaon buras as Chairman. “In Naga villages, there are different systems of governing. There is Monarchical system of governing the village in some tribes. (Konyaks (lower), Semas, Maos, Poumai, Tangkhuls, Zeliangrong etc). The Republican type of government was found among the Aos, Lothas, Sangtams etc. In few cases, the post of gaon- buras among few tribes are hereditary and in others it is being appointed by the deputy commissioner.

### 1.1 The Naga Homeland

“The term Naga applies to all the people living in compact area between the Brahmaputra river and the Chindwin river (and beyond), i.e., in between the Longitude 93 0 - 970 East between the Latitude 23.5 (topic of cancer) and 28 degrees North that is in between China, India and Burma (Myanmar)”<sup>6</sup>. “At present the Naga’s live in the State of Nagaland, in the Naga Hills of Manipur, in North Cachar and Mikir Hills, Lakhimpur, Sibsagar, Nowgong in Assam, in the North-East of Arunachal pradesh, in the Somra tract and across the border in Burma (Myanmar). The Nagas who live in Burma (Myanmar) occupy an area from the Patkai range in the North to the Thaungthut State in the South, and from the Nagaland State border in the West to the Chindwin river (and Beyond), in the East.”<sup>7</sup> “Thus an international frontier arbitrarily divides the Nagas even though the Nationalist Nagas recognise

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<sup>5</sup>Nikita Kanam P. Engheepi, *Inheritance & Property Rights of Women as per the Sumi Naga Customary Law*, T.I.S.S.,2016, at 5,6.

<sup>6</sup> Atai Shimrayi, *Naga nationalism and National Socialist Council of Nagaland*, N.EHU, 1996, at 35-36. <http://hdl.handle.net/10603/60915> accessed on 26th may 2018.

<sup>7</sup> *Id.*at7.

neither India nor Burma's (Myanmar) sovereignty over their land. It must be understood that the nationalist Nagas are fighting for the liberation of all compact area inhabited by the Nagas”<sup>8</sup>. The Chakhesang Nagas is one the recognised major tribes of Nagaland in the North-East India belonging to Mongoloid race. The Chakhesang Nagass inhabit Phek District. “The name Chakhesang is an acronym of three sub-tribes, namely; Chokri denoted by Cha; Kheza denoted by Khe and Sangtam denoted by Sang (presently called Pochury). In Khuzami (Kheza) dialect Ku means strong or victory, Za (Zha) stands for order, protector and controller and Mi means people. Thus Khuzami means tough people who protect, give order and control the people”<sup>9</sup>. “The Chokri and Kheza form the main ethnic segment within the Chakhesang and are closely related to the Angami’s in terms of culture, festivals, language and customs. Till 1946, under the British Government the Chakhesang tribe was grouped under Angami tribe and were known as “Eastern Angamis” Majority of the Khezhas are located in Nagaland while a few of them settled in Manipur. Villages like Khezhakeno, Leshemi, Lasumi, Zapami, Kami, Lekromi, Pfutseromi, Chizami, Thetsumi, Enhulumi, Mesulumi, Losami and Sumi falls under the jurisdiction of Nagaland state. Jesami and Krowemi are the two Khezha villages which are placed under Manipur state. The Chokris are confined to Phek and Chozouba areas of Nagaland”<sup>10</sup>

My area of research focuses only on customary law of Nagaland, especially Chakhseng Naga but in order to understand holistically it is very important to understand the political, social and cultural aspect of whole Nagaland.

#### 1.1.1 Land and the people of Nagaland especially the Chakhesang Nagas.

##### 1.1.1.1 Location of Nagaland

“The state of Nagaland is located between parallels of 93° and 96° east longitude and the meridian of 25° and 27' north latitude. It is located in the northeastern region of India, having a total area of about 16,527 sq. km. The

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<sup>8</sup> *Id.at7.*

<sup>9</sup> *Id.at7.*

<sup>10</sup> *Id.at7.*

altitude ranges between 194 and 3,048 metres.”<sup>11</sup> “At present Chakhesang Naga mainly inhabits in Phek District. It was established by Nagaland state notification no. APA.15/12/71 dated 19 December 1973. In the Phek District, 85% of the population lives in rural areas of the district. The district is the home of the Chakhesang and Pochury tribes of Nagaland”<sup>12</sup>.

#### 1.1.1.2 Territory and topography of Nagaland, especially the Phek District.

The state of Nagaland was a district of Assam for nearly ninety years and was known as 'Naga Hills District of Assam'.<sup>13</sup> In December 1957, it became a separate administrative unit and was renamed as 'Naga Hills Tuensang Area', on 1<sup>st</sup> December 1963, it became a full-fledged state and came to be known as 'Nagaland'.<sup>14</sup> It is the sixteenth state of the Indian Union. Nagaland has eight districts, namely, Kohima, Phek, Wokha, Zunheboto, Mokokchung, Tuensang, Monisum and Dimapur with Kohima as the capital of the state.<sup>15</sup> Each district has its own distinctive cultural features and is occupied by different tribal groups. The different tribal groups are distinctly different from each other in terms of dress, language and customs.”<sup>16</sup> The topography of Nagaland is very severe. It is full of hill ranges which break into a number of spurs and ridges. The land is evergreen with thick forests, mountainous horizons, and perennial streams. The highest mountain in Nagaland is the Saramati with a height of 3,841 metres above sea level and the second highest mountain is the Japfii with a height of 3,048 metres above sea level<sup>17</sup>. Nagaland forms a meeting ground for the sub-Himalayan, Indian, Chinese and Burmese types of fauna. A great deal of it however has become extinct owing to the indiscriminate hunting. Among the Nagas, the game is valued not only for its meat but also for hide and skin, skulls, tusks and feathers which the people have a great liking for as part of their ornamentation and decoration”<sup>18</sup>. Chakhesang Nagas mainly resides in the Phek District of Nagaland. “Phek district is a mountainous region, of which 70% is

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<sup>11</sup> Vitso, Adino, *Customary law and women among the Chakhesang Nagass*, N.E.H.U., 2001 ,38-39. <http://hdl.handle.net/10603/65762>- accessed on 26th may 2018.

<sup>12</sup> District Census Hand book, Phek , *Village and Town Director, Government of India*, Series 14, Part XII-B,(2011).[http://censusindia.gov.in/2011census/dchb/1306\\_PART\\_B\\_DCHB\\_PHEK.pdf](http://censusindia.gov.in/2011census/dchb/1306_PART_B_DCHB_PHEK.pdf), accessed on 26<sup>th</sup> May 2018.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* at 13

<sup>17</sup> *Id.* at 13

<sup>18</sup> *Id.* at 13

evergreen forest. The highest mountain is Zanibu, whose summit is over 2,400 m (7,900 ft) above mean sea level (AMSL). The district HQ town of Phek lies at the lowest altitude of the district at 1,524m above sea level, with the village of Pfutsero at the highest point 2,136m above”<sup>19</sup>. “The largest rivers of the district are the Tizu, Lanyi, Arachu, and three most important lakes are the Shilloi, Chida and Dzudu”<sup>20</sup>. “As of 2002, of its 89 recognized villages, twelve were not accessible by road at all, and of the rest only 24 were accessible by "all-weather roads". Only 9 of the 89 villages were still to be connected to the water supply”<sup>21</sup>. Avakhung International Border Checkpost, also known as Avankhu in Phek district of Nagaland, is an International Border Checkpost on India–Myanmar barrier and a highway is being developed as part of the Bharatmala project<sup>22</sup>.

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<sup>19</sup> District Census Hand book, Phek , Village and Town Director, Government of India, Series 14, Part XII,2011.

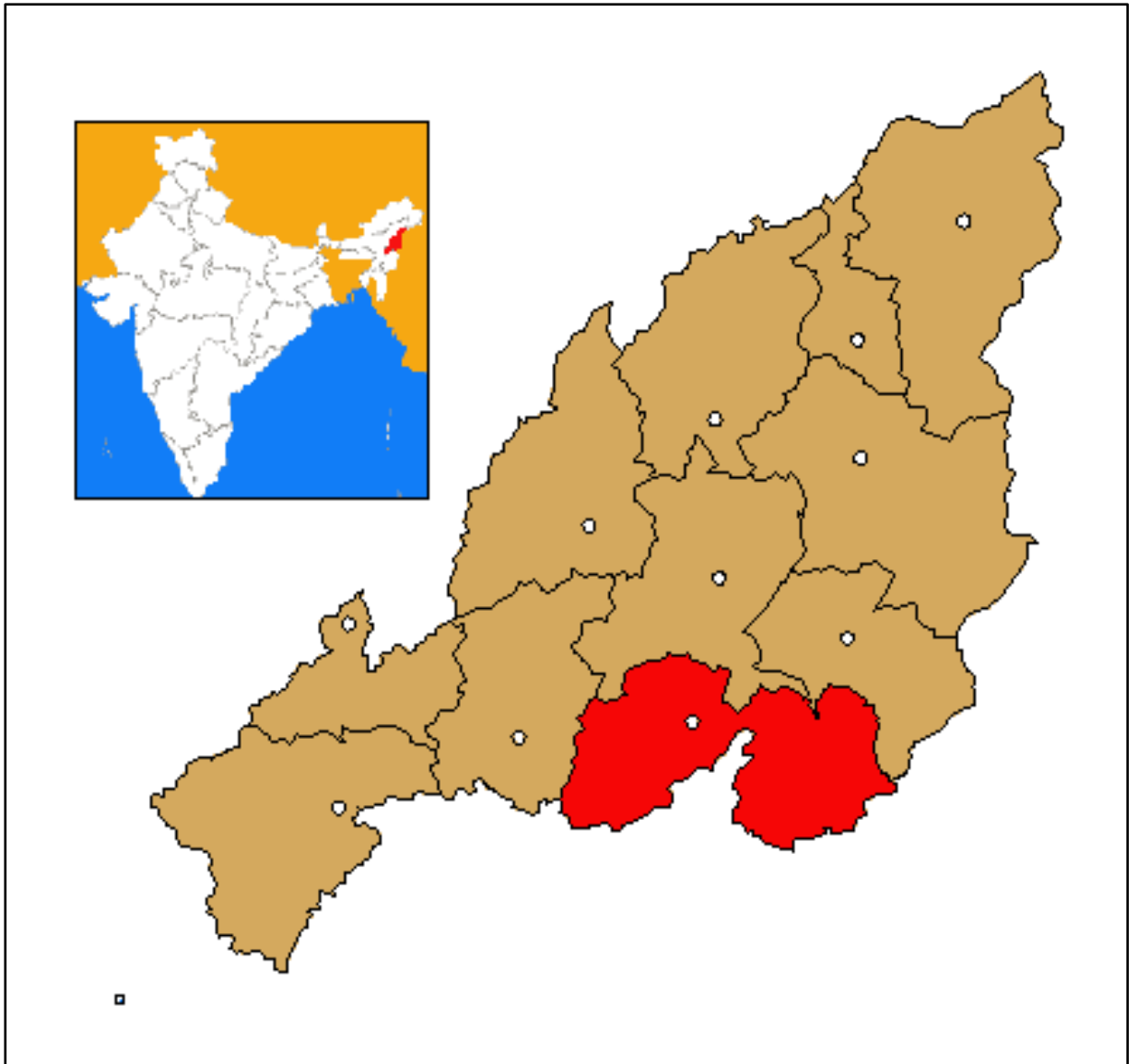
[http://www.censusindia.gov.in/2011census/dchb/DCHB\\_A/13/1306\\_PART\\_A\\_DCHB\\_PHEK.pdf](http://www.censusindia.gov.in/2011census/dchb/DCHB_A/13/1306_PART_A_DCHB_PHEK.pdf)  
accessed on 28th May 2018.

<sup>20</sup> *Id.* at17

<sup>21</sup> *Id.* at17

<sup>22</sup> H. Chish, *Connectivity boost to Indo-Myanmar ties* T.T, June 15 2015, at A 6.  
[https://www.telegraphindia.com/1150614/jsp/northeast/story\\_25597.jsp](https://www.telegraphindia.com/1150614/jsp/northeast/story_25597.jsp)





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The red colour denotes District Phek of Nagaland, where Chakhesang Nagas mainly resides.

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<sup>23</sup> <https://commons.wikimedia.org/wiki/File:Nagalandmap.png>- accessed on 28<sup>th</sup> May2018.

### 1.1.2 Political history of Nagaland

The ancient history and document available about Naga tribe is very sketchy, even the origin of the word “*Naga*” is quite disputable. Different authors have different perspective about the origin it. The only concrete and the definite things appear in the history is that even before the advent of Ahom king, Sukhapa in around 1228, Naga people were already settled there. A long period of “blow hot and cold” Ahom- Naga relationship was followed.

The next significance period was the treaty of Yandaboo in 1826. Although Naga people were not directly affected by it, but after the battle, the first encounter took place between Britisher and Naga tribe. After the Yandaboo treaty Manipur, Assam and Jayantia hills came under the British rule and Captain Jenkins and Pamberton marched across the Naga Hills in their attempt to find a route from Manipur to Assam. When the British came to the Naga Hills, Naga tribes resisted it and the British party were brutally attacked all the way to Dimapur. Britisher then changed their policy toward Naga tribes they even followed the principle of non- interference for many years.

As history is basically interpretation of mind, many author interpreted that, the Nagas continued to raid the British many times. For almost 11 years, Angamis raids, and killed almost more than two hundred British.<sup>24</sup> Ironically this instigates Britisher to get control of Naga tribes. Then the British established the Naga Hills District in 1866 with Samaguting (Chumukedima) as the Deputy Commissioner’s headquarter, which was shifted to Wokha in 1875 and later shifted to Kohima in 1878, the present capital of Nagaland state<sup>25</sup>. According to Mackenzie, the British rule in Naga Hills was “not of coercion and contemptuous devastation, but a firm and kindly policy of Defence and conciliation.”<sup>26</sup> However there are many Naga tribes who never came under the purview of British rule, such as Mon-Tuensary longleng and kiphire district. They were regarded as “free Nagas, of the un- administered area”

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<sup>24</sup> R.B. Thohe Pou, *Nagas Political History* 16 University of Pune Inter-Disciplinary Discussion Group. 35-36(2005).<https://www.facebook.com/notes/the-nagas-world/nagas-political-history/236475786384586>

<sup>25</sup> *Id.* at24.

<sup>26</sup> *Id.* at24.

The next significant event was the introduction of the Inner Line Regulation in 1873. It was applied to the tribal and the plain peoples of the Northeast frontiers of British India. Moreover another important event that marks the colonial history of Nagaland was the formation of Naga club. During the World War II more than 5000 Naga from different tribes went to France, they form allied- labour corps. On their return they organised themselves into a club who mains aim was to protect Naga tribe from Britisher's encroachment. When Simmon commission reached India they submitted their two point:

- 1) To keep Naga people, outside British policy as well as British regime
- 2) If that is not possible to be fulfilled, leave Naga people, as they were before the advent of British<sup>27</sup>

However there claims were rejected. The government of India Act of 1919 , declared Naga Hills District was declared as a Backward Tract and it was made clear in the above Act that no Acts passed by the Indian Legislature were to apply to this Backward Tract and thereby, the occupied Naga territory was treated as a separate entity from the British India Empire<sup>28</sup>. However it was in 1<sup>st</sup> April 1937, that the Naga Hills district along with the North-east Frontier Tract, the Lushai and North Cachar hills were declared 'Excluded Areas' of the province of Assam and were directly placed under the rule of crown as per as the Government of India Act of 1935<sup>29</sup>. With this Naga National Council was formed out of the earlier Naga – Hill district tribal council in 1945 and on 14<sup>th</sup> August they declared themselves independence.

Apart from various historical Struggles for independence movement, a few prominent can be regarded as on "1<sup>st</sup> December 1957, a separate administrative unit know as Naga Hills-Tuesang Area was created". The second Naga people's convention was held at Mokochung in 1958, it was in this convention Naga people expressed their will to established a new territory and even a committee to find the various solution to Naga problem. After that came the third and the last Naga people's Convention which was held at Mokochung in 1959. The drafting committee formulated the sixteen point

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<sup>27</sup> *Id.* at14

<sup>28</sup> *Id.* at 24.

<sup>29</sup> Vitso, Adino, *Customary law and women among the Chakhesang Nagass*, N.E.H.U., 2001 ,38-39.

which were submitted to the Jawaharlal Nehru. It was Mr. P.Shilu Ao who was the first chief Executive Council or in the interim government of Nagaland . It was during the era of President Dr. Sarvapalli Radha Krishnan, 1<sup>st</sup> December 1963, Nagaland land achieved its statehood. Indeed the situation of Nagaland is quite different from other part of India as people of Nagaland had great believe and confidence in Jawaharlal Nehru and thus Nagaland became the preserve of Ministry of External Affairs, instead of Ministry of Home Affairs, as Ministry of External Affairs was directly under his supervision.<sup>30</sup> But soon the situation changed when Dr. Imkongliba Ao, who was the elected chairman of preliminary de facto legislative body of Nagaland, was murdered in the broad day light. Center failed to appease the Naga National Council who then remained hidden or aloof. The establishment of Nagaland, with special status under Article 371A<sup>31</sup> went to vain; when still there is no successful peace accord between the NSCN and government till date.

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<sup>30</sup> S.C Dev & Gouri Dev, Nagaland The Untold Story 22-2,(1988).

<sup>31</sup> INDIA CONST.art. 371, cl.(a)

## 1.2. Research background.

Northeast is a home to many tribal people of India. Before the concept of State i.e India came into being, they were living a simple and segregated life. Even after the formation of the Indian State their society and particularly the customary laws have not changed. It was being said that the 6<sup>th</sup> schedule of Constitution was incorporated to suppress the secessionist movement in Nagaland but the state itself did not come under the purview of it. It was by the virtue of 13<sup>th</sup> Constitutional Amendment that Nagaland became a separate entity. But the demand for Greater Nagaland still/has persisted over the years. The constant secessionist movement accompanied by counter insurgency operations has meant that the region for long has been embroiled in a state of violence.

There is not much research or literature oriented towards understanding Crime and Society with respect to customary laws. In Nagaland there are sixteen recognised Naga tribes and the Chakhesang Nagass are one among them. The Chakesang Nagas are mainly inhabited in the Present Phek District of Nagaland, which is adjacent to Manipur. Till 1946, the Chakhesang tribe was grouped under Angami tribe and were known as “Eastern Angamis”. It was only after 1947 they were recognised as a separate tribe. Many Chakhaseng Nagas still reside in the state of Manipur. The Formation of Nagaland in 1963 created a political boundary among these sisters tribes. The researcher here has tried to understand the customary laws of Chakhesang Nagas in conjunction with the political and economic aspects of Nagaland. Very few research works have been conducted relating to political, social and cultural aspect of Nagaland. When it comes to the sphere of customary law, especially from the legal and Constitutional perspective, there is a distinct unavailability of literature. The attempt of the researcher here is to do a Comparative analysis of Statutory and Constitutional law of India and the customary laws of Naga tribes. Thus the researcher has chosen to study the Chakhesang Nagas customary law from legal point of view hoping to make as little a contribution possible in understanding the subject and adding to the scanty literature.

### 1.3. Statement of Problem.

The 13<sup>th</sup> Constitutional Amendment Act created Nagaland as a separate entity. Although it is a part of India, no laws are applicable to Nagaland until it is passed by its state legislature. Nagaland is a home to 16 recognised Naga tribes, with their own unique way of life and unique Customary laws which differ among one another.

The Research problem of this dissertation is to understand the customary laws among the Chakhesang Nagass who mainly resides in the Phek District of Nagaland. Earlier Chakhesang Nagass were regarded as East- Angamis and later they were designated as a separate and recognised tribe of Nagaland. Chakhesang Nagas has a unique set of customary laws relating to criminal or civil offence. This paper will highlight all the necessary customary practice in the Chakhesang Nagas Society. It will in detail analyse the administration of justice system in the light of a fast changing society. Moreover the interface of Constitutional law and the customary laws of Chakhesang Nagas will be dealt holistically.

1.4. Aims and Objectives are enumerated below:

- 1) To study and to analyse customary law from Jurisprudential, international and from legal perspective.
- 2) To study the Chakhesang Nagas customary laws dealing with civil and criminal laws in details.
- 3) To study the role of the Village Council in the implementation of customary law.
- 4) To critically analyse the Constitutional validity of customary law of Chakhseng Naga.
- 5) To study the changing relations of dependence between formal and informal justice systems from the people's point of view.

### 1.5. Scope and Limitation

The main theme of this dissertation is to understand the customary law prevalent among the Chakhesang Nagass. They mainly reside in the Phek district of Nagaland. To understand their customary laws, selectively four villages have been considered i.e. Khezhakeno and Sohomi, Thenyizumi, Kikruma Villaga of Nagaland. Moreover this research is also based on surveys, books, papers, articles already written on this topic. Moreover Dr. Jeuti Barooah book on *Customary Laws of the Chakhesang Nagass of Nagaland, With Special Reference to Their Land Holding* was a great source of literature and knowledge. The Scope of this dissertation is to understand the present situation of Chakhesang Nagas Society and to study and analyse Customary law from international and Constitutional law perspective. This dissertation also takes into consideration Chakhesang Nagas customary laws in relation to crime and punishment systems in the village community and to study the changing relations of dependence between formal and informal justice systems from the people's point of view. The Scope is further increased by including a Comparative analysis and validity of Customary laws among Chakhesang Nagas Tribes and Indian Statutory laws and Constitutional law.

#### Limitation

Due to shortage of time, this dissertation is focused only among the Customary laws of Chakhesang Nagas. Within the phek district only four villages are consider ie. Khezhakeno , Sohomi, Thenyizumi, and Kikruma . As the researcher does not belong to Nagaland and due to the barrier of language, there was a difficulty in communication. This also meant that there was a chance of losing out on some finer details and the researcher acknowledges this problem.



## 1.6. Review of the existing literature.

- 1) Kukhrolo Lasuh, Customary laws in dealing with crime and punishment, A Case Study of Chakhesang Nagas Tribe, Tata Institute of Social Sciences Mumbai, 2014.

In this article author mainly focussed on the Customary laws of the Thesumi village of Nagaland .He mainly highlighted the traditional practise prevalent in the society of Chakhesang Nagas. Thesumi village of Phek District council consist of Nine village council members and twelve Gaon Buras who work together in managing the day to day administration of the village as well as settling disputes. As the author himself belongs to the Chakesang tribe of Nagaland, so he could understand and analyse the customary law prevalent there in much wider ambit. Author opined that the villages have their own self-governing system since time immemorial. In the context of Khuzami, the traditional village administration under the Mewu, who had the role of a priest and the chief, performed religious ceremonies as well as enforced law and order in the village. The chief as well as priest was assisted by a council of elders representing different clans called Chisemi. Both Mewu and Chisemi were hereditary in positions. Administering justice and taking decisions with regard to the village were important function of the priest and clan representative. The way of functioning of the administration of justice by the Mewu and Chisemi had effect on the peace, harmony and solidarity among the people. With the advent of Britisher, the Dobashi (DB) Court as an institution was set up in Nagaland. In Dobashi Court, customary law is applied in both civil and criminal cases. It is placed under the district administration. Till date, there is the presence of customary courts in every office of the Deputy Commissioner, Additional Deputy Commissioner and Sub-Divisional Officer. As the political structures of the Naga society was based on kinship, the British set up Gaon Buras (GB) as clan representatives. Later the judicial powers of the Mewu and Chisemi were transferred to Gaon Bura. The power of both Mewu and Chisemi are now only limited to religious and rituals only. The Gaon Buras (GB) enjoyed sole power in the political and judicial administration before the formation of local Village Councils. By introducing democracy, people now directly elect members of the Village Council among themselves to execute

judicial and executive functions of the village. At present in the kheza Village, the Village Council is the highest authority. The traditional system of Mewu and Chisemi, has been substituted by modern political structures. With the advent of British administration, one could take the case beyond village jurisdiction for seeking justice. More over the village has its own rule and regulations. There simple and unique law, which should be better tagged as regulations.

- 2) Nikita Kanam P. Engheepi, *Inheritance & Property Rights of Women as per the Sumi Naga Customary Law*, School of Law Rights and Constitutional Governance, Tata Institute of Social Sciences, 2018.

A custom in order to be binding, must fulfil basic requirement as that of under the Constitution of India, “Articles 244, 244-A, 371-A, and the Fifth and Sixth Schedules it protects the tribal indigenous communities and their customary practices”<sup>32</sup> Article 371(A) of Indian Constitution, provide special status for the people of Nagaland. Their customary practices are also protected by virtue of this Article. With the enactment of the Panchayat (Extension to Scheduled Areas) Act, 1996, tribal communities have been granted a limited level of local governance at the village level and hence, certain political, administrative, political and fiscal powers have been given to the village panchayat. Nagaland thus practices its customary law under the rights given by Article 371 (a) of the Indian Constitution. Nagaland has been provided special Status under Article 371(a) of the Constitution. In simplest sense it mean that “No act of parliament shall apply to the state of Nagaland in the respect of

- a) Regiligious or social practices of Nagas
- b) Naga customary law and procedure,
- c) Administration of Civil and criminal justice involving decision according to Naga Customary law.
- d) Ownership and transfer of land and its resources, unless the Legislative Assembly of Nagaland by resolution so decides. This makes it clear that code of civil procedure and criminal procedure is applicable only in words and not

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<sup>32</sup> INDIA CONST. art.244, INDIA CONST. art.244 cl a, INDIA CONST. art.371 cl a,  
<sup>32</sup> INDIA CONST. schedule 5. <sup>32</sup> INDIA CONST. schedule 6.

in spirit. However judiciary is silent in these aspect, in one arena it respect the customary law which is practiced from time immemorial and at the same time it directly declares those customary law as void which are, opposed to public policy at large.

When the Constitution was brought in, all the laws that were made prior to it which were in conflicting nature with the Indian Constitution were considered to be null and void. Article 13(1) of Indian Constitution Specially states that laws, that are inconsistent with or in derogation of the fundamental rights are void ab- initio.<sup>33</sup>

But however the customary laws prevalent in the Naga society where, women are not entitled the right of succession is explicitly violation of Article 14 of Indian Constitution. Thus this clearly indicates the loop holes of the provision of law.

- 3) T. Hravahlou , “Indigenous Methods of Conflict Resolution in Phuba Khuman village of the Poumai Naga tribe in Senapati district, Manipur” Tata Institute of Social Science 2018.

In human societies, conflict and cooperation are the two forces of progress. Cooperation is often the goal, and has to be actively pursued in order to avoid getting stuck in the rote of conflict. To that end, conflict resolution assumes an unquestionable position of importance for societies to sustain and move forward. Tribes are a distinct social category, tied together by the subscription to their shared culture and unique ways of life that set them apart from others. In India, tribes are recognized under specific legal criteria, and thereby accorded differential treatment from the rest of the population. Article 366 (25)<sup>34</sup> of the Constitution of India defines Scheduled Tribes as such tribes or tribal communities or parts of, or groups within such tribes, or tribal communities as are deemed under Article 342 <sup>35</sup>to be Scheduled Tribes for the purposes of this Constitution.

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<sup>33</sup> INDIA CONST. art.13 cl 2

<sup>34</sup> INDIA CONST. art.366 cl 25.

<sup>35</sup> INDIA CONST. art.342.

The Constitution of India since its inception is based on the principle of equality .By virtue of Article 14, equality clause is practically implemented. However at the same time principle of Equity is also practised in India. Affirmative actions for upliftment of Schedule tribe and caste took birth from the Constitution of India itself. The Naga tribes are within the ambit of scheduled tribes, defined under Article 366(25) of Indian Constitution. Hence they are entitled to the positive discrimination under the Constitution of India. They acquire the status of schedule tribe by virtue of their birth status. During the colonial era they were under the status of excluded area and they attain much sovereignty.

Jawaharlal Nehru, a decisive force in determining the outlook of independent India and the first “Prime Minister of the country formulated the following five principles for the policy to be pursued vis-a-vis the ‘tribals’:

1. People should develop along the lines of their own genius, and the imposition of alien values should be avoided.
2. Tribal rights in land and forest should be respected.
3. Teams of tribals should be trained in the work of administration and development.
4. Tribal areas should not be over-administered or overwhelmed with a multiplicity of schemes.
5. Results should be judged not by statistics or the amount of money spent, but by the human character that is evolved.

Once the Constitution of India came into existence they were accorded a special status respectively. Apart from this the reservation has also been introduced for their upliftment in the society. There are also various provision such as Article 46 of the Constitution provides that “the State shall promote with special care the educational and economic interests of the weaker sections of the society and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice

and all forms of exploitation”<sup>36</sup>.Article 330<sup>37</sup> and Article 332<sup>38</sup>, which deal with proportionate representation in Parliament and state legislatures Article 243D1(b) is about reservation of seats in Panchayats<sup>39</sup> and 243(T)(1) reservation of seats in municipalities.<sup>40</sup> Along with Article 15(4)<sup>41</sup>, Article 16(4)<sup>42</sup> and 16(4B) deals with reservation in case of public service.

- 4) Ningshen, Vareso, The tangkhul naga customary laws a critical legal study, Guwahati University,2008.pp

In this article Author analysed the customary laws of Hindu society. The Practices and customs among the Hindus are based on caste. Respective caste customs binds their caste members. However, it varies from locality to locality even among the members of the same caste. Caste customs are agreeable among the different castes on general matters. For instance, the practice of expelling a member from the caste community in case he/she violates caste rules or commits offences against the caste is found among all castes. The guru or the panchayat or a majority of caste-men sit and judge over a delinquent caste-man, and the verdicts are absolute and assertive. Even in the courts of justice, the condemned person has no cure until the decisions were shown In Ganapati Bhatta v. Bharati Swami, the plaintiff was issued provisional order of excommunication for committing three caste offences by the heador ecclesiastical chief. The plaintiff sued the unjust and invalid order passed against him. The court held that according to recognised caste customs and considering the provisional nature of the orders, the guru had jurisdiction and had exercised it genuinely, and hence the civil court could not interfere in the matter. In Krishnasami Chetti v. Virasami Chetti, it was held that to determine whether or not the alleged expulsion from caste is valid was open to the court, if the violation had not been committed. However, if the expelled persons was expelled under a mistaken belief of caste offence committed, then the expulsion was illegal. Kernon J. on the same case held that a custom or usage of a caste to expel a member was not a valid custom if it was in

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<sup>36</sup> INDIA CONST. art.46.

<sup>37</sup> INDIA CONST. art.330.

<sup>38</sup> INDIA CONST. art.332

<sup>39</sup> INDIA CONST. art 243D cl 1.b

<sup>40</sup> INDIA CONST. art.243 cl T 1

<sup>41</sup> INDIA CONST. art.15 cl 4

<sup>42</sup> INDIA CONST. art.16 cl 4

his absence without any notice or opportunity for explanations offered. His Lordship was of opinion that the maxim of *audi alterem partem* (hear the other side too) could not be superseded by even an immemorial custom. Thus it is quite clear that every society evolve with time and the changes are although slow but constant.

- 5) James Anaya, *Indigenous people in International law*, Oxford University Press 2004.

James Anaya in his book explores on the evolution of International law with respect to Indigenous people. Historically, International laws were tools used for the purpose of empire building, conquest and exploitation. But we witness a gradual shift in the orientation of these *laws* which has resulted in a better understanding of Indigenous people, and addressing if not all, then atleast some of their problems.

The book starts with a historical account of the threads that had/has shaped the course of International law. Anaya argues that whatever little sympathy observed towards the indigenous population by the natural law philosophers of the Renaissance period was usurped with the advent of state-centred systems. Even during the late fifteenth and early sixteenth century, people like Francisco De Vitoria, were critical in understanding and analysing European conquest over the Western Hemisphere. Vitoria although acknowledged some form of autonomy for the indigenous people but at the same time allowed for the conquest of their land and labour. These early prescriptions set forth the ground for a system of principles and rules to be applied during future encounters with indigenous people around the world. Conceptualising war as *just* became the European benign style of conquest.

With the treaty of Westphalia in 1648 and the “Law of Nations”, due recognition was given to the concept of nation-state. But it led to some foundational problems for *indigenous* people in terms of asserting their rights. As the vey orientation of the concept was *Westernly* driven, its reflection was obviously not to be observed in the indigenous world with a different set of social and political set up. The indigenous assertions to “state”, which would have meant entitlements and rights under International laws were neglected. This was concretised by not recognising the indigenous communities as political units and hence under the international law there was no any significance of a particular treaty made with the community. Thus

international law remained more of a force helpful to the colonisers rather than invoking freedom for the indigenous people. To conclude the indigenous population were left out to conquer on the very unjust understanding of a civilized western culture.

Towards the later part of the twentieth century, after the end of the Second World War a scheme of recognising and addressing the problems of indigenous people was taken into consideration. The ILO convention 107(developed within the International Human Rights frame in 1957), aimed at enhancing the economic condition of the Indigenous population, but the idea of assimilating them into the larger social and cultural fabric was a precept to such a development. This marked a major shift in the orientation of International Law. It seemed that the legal International discourse although still very state centric accommodated concerns of individuals and groups. However, the very pull towards assimilating indigenous people into the larger social fabric meant intrinsic biases towards the dominant ways of life. When the ILO convention 169 was adopted in the year 1989, the loopholes of the previous convention were addressed and the impetus was given on the self determination of indigenous people. Although controversy over the uses of specific terms like peoples and self determination continues, the author argues, and I agree that the new and emergent International law of indigenous peoples “is a dramatic manifestation of the mobilization of social forces through the Human Rights frame of the contemporary international system”.

The last section of the book looks into the process of implementing international norms in order to safeguard the rights of the indigenous people. This includes remedial and affirmative measures that may involve redress for historical land claims, development of social welfare programmes and to secure cultural integrity and self government for the indigenous people. This in praxis can be achieved when the ethos of justice and addressing inequities seeps through the organs of the government- legislative, executive and the judiciary. The author has given references to benchmark judgement and important legislative actions aligned towards achieving international norms for the indigenous population. Anaya analyses the concept of self-determination, and minutely observes its elements such as access to land and natural resources, right to develop and preserve their cultures etc. These constitute the very

heart of self-determination, which is more than just ‘decolonisation’ and ‘secessionism’.

To conclude, it can be stated that indigenous people have been victims of widespread patterns of officially sanctioned oppressive action and neglect which has led to their special recognition by the International community. As put by James Anaya, even in countries where concrete action are taken towards compliance with International norms and standard, Indigenous population at large still represent vulnerable communities.

### 1.7. Research Question

To fulfil the above mentioned objectives, the following research questions were framed to collect data

1. What is the importance of customary laws among the Chakhesang Nagas tribes of Nagaland?
2. What are the notions of crime as perceived by the village society?
3. Who plays an important role in the implementation of customary laws?
4. What are the proceedings in cases, especially in regard to women, involved with crime as per customary practices?
5. What is the emerging relationship between the people, the village council members and the formal system officials?
6. Which justice system is more preferred for cases of crime and why?
7. Does the provisions of the customary law, and the justice system among the Chakhesang Nagas, fulfil mandates of the Constitution of India?
8. Does State formation in Nagaland, resulted in weakening their indigenous customary law?



## 1.8. Research Methodology.

The research work started after identifying the research problem. Nagaland have plethora of problem be it geographical or political. As the society is changing in a fast pace but still the uncodified customary law of Nagas are static. Although not many F.I.R's are lodges every year, still crime rate is increasing in Naga society.

Researcher's being an outsider; it was very difficult at the beginning to understand the cultural, societal aspect of Nagaland. Thus after identifying the research problem, the 2<sup>nd</sup> step was to read the available literature, relevant to the topic. Books such as Nagaland, *the Untold Story*, by S.C.Dev and I. Y.Shikhu on "A *Rediscovery and Rebuilding of Naga Cultural Values*" was a great source of Knowledge, which helped to understand Naga society in a better way. Other literature such as Papers, Article, and Thesis available on this topic was also taken into account. After understand Naga Society and visiting the Phek District researcher started collecting Data through the interview method and even questionnaires were circulated among college students. A book by Dr. Jeuti Barooah on Customary laws of the Chakhesang Nagass of Nagaland, helped to understand the indigenous conflict resolution system among them. After a detail analysis of the customary Laws of Chakhesang Nagas tribes in the four villages of Phek, a comparative case study is conducted to understand the interface among Customary laws of Chakhesang Nagass and the Statutory and Constitutional law of India.

Thus researcher have used both the Doctrinal as well as the empirical method to collect Data. In the doctrinal methods books and articles are read to understand the basis component if the society of Nagaland. After reviewing the existing literature, the next step was to conduct empirical research and the best research method, available was the Qualitative method.

As stated by Nouria Bricki, and Judith Green, "Understand the perspectives of participants; or explore the meaning they give to phenomena; or observe a process in depth... .. if the answer is yes, then qualitative methodology is appropriate."<sup>43</sup> Thus the best method that suited was qualitative research Methodology.

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<sup>43</sup> Nouria Bricki And Judith Green, A Guide To Using Qualitative Research Methodology 35 (2007); <http://hdl.handle.net/10144/84230>- accessed on 28th May 2018.

### 1.9. Research Design

The researcher has used the exploratory research design and the qualitative methodology using the case study approach as there is very little knowledge available on customary law with regard to crime and justice, especially in the Indian and tribal context. In applying explorative research it provides the researcher with deeper understanding of the participants about the customs and its usage in dealing. The participants chosen for the study were random villager of the Phek District of Nagaland. The area chosen for the study is the Phek District of Nagaland especially a few villages within the Phek District Khezhakeno , Sohomi, Thenyizumi, Kikruma ,Thetsümi where the Chakhesang Naga tribes of Nagaland resides. A group of law student from Nagaland University were also interviewed by the researcher.

The method used to collect data was Sampling. The sampling method used was purposive sampling as the knowledge available on the area of study on customary law with regard to crime and justice is not as much compared to other thematic areas of customary law. Researcher mainly relied on conducting *unstructured interviews* with her respondent.

For better scope of listening and observation, researcher had to resort to electronically recording the interviews conducted with respondents. Researcher explained her reason for doing so and took their permission explicitly before switching on the recorder. Researcher also took care to explain the nature of her research to respondent

## CHAPTER 2- CUSTOMARY LAWS IN INDIA: CONCEPTUAL AND JURISPRUDENTIAL ANALYSIS.

Although this chapter is not much, linked with the main theme of the dissertation. But in order to develop a holistic idea of customary law and its validity, it is important to analyse it from Jurisprudence point of View. Thus this chapter briefly take into account the various schools of Jurisprudence, who defines custom in its unique way.

### 2.1. Meaning and definition

A Custom in its simplest meaning can be defined as established mode of social behaviour within the community<sup>44</sup>. Custom is considered as one of the mechanisms of social control and an appropriate direction for humans to live in the community and to allow the society to perpetuate<sup>45</sup>. Black law dictionary defines Custom as, a usage or practice of the people, which, by common adoption and acquiescence and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates<sup>46</sup>. Many a time Custom and customary law is used interchangeably but however there is a difference between the both. Custom is a usage and a practice, which may or may not have social recognition, and whose violation may or may not result in any sanction. On the other hand, customary law is a usage and a practice which is socially recognized, and the breach of this will result in some penal action. When a custom is practiced over a period of time and found to be useful in maintaining harmony in a society, it becomes established as customary law<sup>47</sup>.

Custom in Chamber's 20th Century Dictionary means, 'What one is wont to do: what is usually done by others: any of the distinctive practices and conventions of a people or locality, esp., those, of a primitive tribe'.<sup>48</sup> Custom is one of the important sources

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<sup>44</sup> P. H Pendharkar, *Customary personal law of adivasis in Nandurbar district A critical analysis, Customary personal law of adivasis in Nandurbar district A critical analysis*, N.M.U.235-36 (2012) <http://hdl.handle.net/10603/74298>- accessed on 28th May 2018.

<sup>45</sup> *Id* at. 44

<sup>46</sup> *Id* at. 44.

<sup>47</sup> Pereira, Victor, *Customary law and stats for mation in NorthEast India: a comparative study of the angami of Nagaland and the garo of Meghalaya*, J. N. U.25-26 (2009). <http://hdl.handle.net/10603/14823>. Accessed on 28<sup>th</sup> May 2018.

<sup>48</sup> Subham Sharma, *Customary personal law of Chakma's; A critical analysis*, N.M.U.21-22 (2014)

of law desirable for the formation of the legal validity of the actions of a particular society. The definitions pertaining to custom as given by Salmond signifies it as the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility; whereas, according to Keeton customary law may be defined as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as sources of law because they are generally followed by the political society as a whole or by some part of it; Carter also opined on this that it is the uniformity of conduct of all persons under like circumstances.<sup>49</sup>

As defined by Sapir, Custom is used to apply to the totality of behaviour patterns which are carried by tradition and lodged in the group, as contrasted with mere random personal activities of the individual.<sup>50</sup> Radin states that customs are regarded as habitual ways of conduct among social groups.<sup>51</sup> While Carter maintains that, custom is the uniformity of conduct of all persons under like circumstances.<sup>52</sup> According to Holland, “custom is a generally observed course of conduct.” While, Holland quoted “custom is a generally observed course of conduct”<sup>53</sup>.

## 2.2. Transformation of Custom in Customary Law

Customs have been interpreted by various school of jurisprudence in different perspective. Mainly the advocate of natural, analytical, historical and sociological school differ in a few perspectives while defining customs but with regard to when custom actually transforms into law there are two perspective mainly historical and analytical theories of law and can also broadly divide into five heading.

### 2.2.1. Idealistic Definition

(a) Salmond defines “law as the body of principles recognized and applied by the state in the administration of justice. In other words, the law consists of rules recognised and acted on by the court of justice.”<sup>54</sup>

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<sup>49</sup> Mahajan, *Jurisprudence And Legal Theory* 225-26 (2007),

<sup>50</sup> pendharka, *supra* note 43, at 225.

<sup>51</sup> *Id. at* 49.

<sup>52</sup> *Id. at* 49.

<sup>53</sup> *Id. at* 49.

<sup>54</sup> Ningshen, Varese, *The tangkhul naga customary laws a critical legal study*, G.U 45-46 (2018)

(b) According to Gray, the law of the state or of any organised body of men is composed of the rules which the court, that is, the judicial organ of the body lays down for the determination of legal rights and duties.<sup>55</sup>

### 2.2.2. Sociological Definition

Duguit defines law as essentially and exclusively as social fact. It is in no sense a body of rules laying down rights. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. Therefore, the most important fact of social life is the interdependence of man (which Duguit calls as social solidarity). The aim of the social institution is to safeguard and further it. Only those rules can be called law which further this end. The basis of the validity of law is the popular acceptance and not the will of sovereign. The sovereign is not above the law but is bound by it. The law should be based on social realities. Ihering defines law as the form of the guarantee of the conditions of life of society, assured by state's power of constrain.<sup>56</sup>

Ehrlich, another great sociological Jurist includes in his definition "all the norms which govern social life within a given society"<sup>57</sup>. Roscoe Pound defines law as "a social institution to satisfy social wants"<sup>58</sup>. This approach is very valuable. It is directed towards new fields of study and lays down a constructive scheme for the study of law in the context of social problem. According to Pound "law is the body of principles recognised or enforced by public and regular tribunals in the administration of justice"<sup>59</sup>

### 2.2.3. Historical school

Edmund Burke, who is regarded as the father of historical school, who laid down the foundation of the historical school pointed out that habit, history and religion as the true guides to social action. Friedrich Carl Von Savigny and George Friedrich Puchta are always remembered the main exponents of the historical school of law who believed that, "custom carries its own justification in itself, because it would not exist

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<sup>55</sup> *Id. at 53.*

<sup>56</sup> *Id. at 53.*

<sup>57</sup> *Id. at 53.*

<sup>58</sup> *Id. at 53.*

<sup>59</sup> *Id. at 53.*

at all unless some deep-seated needs of the people or some native quality of temperament give rise to it. The growth of law does not depend upon the arbitrary will of any individual. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people”<sup>60</sup>. Savigny calls it Volkgeist. According to Savigny, Law was not something that should be made arbitrarily and deliberately by a lawmaker. It was a product of internal, silently-operating forces. It was deeply rooted in the past of a nation, and its true sources were popular faith, custom and the common consciousness of the people. Like language, the Constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its national spirit<sup>61</sup>. To him “law like language stands in organic connection with nature or character of the people and evolves with the people.”<sup>62</sup>Therefore, according to Savigny, the main basis of positive law is its “existence, its reality, in the common consciousness of the people”<sup>63</sup>. Custom hence can be regarded as badge, rather than the ground of origin of positive law. Puchta agreed with Savigny and carried the theory even further. To him, custom was not only self-sufficient and independent of legislative authority, but was a condition precedent of all sound legislation. He founded the basis of customary law in the collective purpose of the nation, and express legislation could be useful only in so far as it embodied this purpose as already manifested in custom.<sup>64</sup>The Historical theory of law has been criticized by many scholars and jurists. Without disrespect to the scholarly genius of Savigny and his followers, Allen criticizes their view as many customs which have taken deep root in society do not appear to be based on any general conviction of their rightness or necessity, or upon any real or voluntary consensus utentium.<sup>65</sup> “Many customs, again, says Allen, are so essentially local in origin that they cannot be said to arise from any widespread conviction.... The reason and utility on which (such) customs rest often arise from purely local conditions, and not from any widespread Geist. In cosmopolitanism of commercial customs and many other customs the Volkgeist loses much of its meaning”<sup>66</sup>. According to Sir Henry Maine,

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<sup>60</sup> Pendharka, *supra* note 47, at 25

<sup>61</sup> *Id.* at 53..

<sup>62</sup> Mahajan. Jurisprudence And Legal Theory 226-27 (2007)

<sup>63</sup> *Id.* at 61.

<sup>64</sup> Pendharka, *supra* note 47, at 25

<sup>65</sup> Pendharka, *supra* note 47, at 25

<sup>66</sup> Pendharka, *supra* note 47, at 25

Custom is conception posterior to that of Themistes or judgments. Themistes were judicial awards which were dictated to the King by the Greek goddess of justice. He explained, Themistes, Themises, the plural of Themis, are the awards themselves, Divinely dictated to the judges.<sup>67</sup>

#### 2.2.4. Analytical School

The main advocates of analytical school are Austin, Gray, Holand. Austin, one of the main priests of the Analytical school, denies customs the force of law until they have been expressly recognized by the sovereign. This is consistent with his general doctrine of sovereignty, for, without the cachet of supreme authority, custom cannot be conceived as a command. To him a customary practice is to be regarded as a rule of positive morality unless and until the legislature or a judge has given it the force of law.<sup>68</sup> A custom can only be regarded as law, only when the sovereign designates it to be so. Custom is a neither a source of law nor law in itself. According to Austin, “A customary law may take the quality of legal rule in two ways: It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode (statute law) or it may be taken as a ground of judicial decision, which afterwards obtains as a precedent and in this case it is converted into a law after judicial fashion.”<sup>69</sup> In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign.”<sup>70</sup> Analytical theory has also been criticized by many scholars and jurists. According to Allen, “custom grows up by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law or by any other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted by a supreme arbiter, nor from any claim of meum against tuum, but from practices prompted by the convenience of society and of the individual, so far as they are prompted by any conscious purpose at all”<sup>71</sup>. Austin moreover “stated that, the starting-point of all custom is convention rather than conflict, just as the starting-point of all society is

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<sup>67</sup> Mahajan. Jurisprudence And Legal Theory 230-31(2007)

<sup>68</sup> pendharka, *supra* note 43, at 225

<sup>69</sup> pendharka, *supra* note 43, at 225

<sup>70</sup> MAHAJAN, *supra* note 47, at 231

<sup>71</sup> MAHAJAN *supra* note 47, at 25

cooperation rather than dissension”<sup>72</sup>. Vinogradoff also states that, “It is not conflicts that initiate rules of legal observance, but the practices of every day directed by the give-and-take considerations of reasonable intercourse and social co-operation. Neither succession, nor property, nor possession, nor contract started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager, property began with occupation, possession is reducible to de facto detention, the origin of contract goes back to the customs of barter. Disputes as to rights in primitive society are pre-eminently disputes as to the application of non-litigious customs”<sup>73</sup>.

Thus if we analyse both the theories we can conclude stating that, both the theories although contain some elements of truth, but that cannot be regarded as the whole truth. As Austin altogether denies customs, as the source of law. He designates it a ‘positive morality’. But, according to Allen, Austin “failed to explain satisfactorily why the body of rules which he classified as ‘positive morality’... lacked the true characteristic of law.”<sup>74</sup> This is true, especially when customs grow up by conduct and are derived from the common consciousness of the people. Therefore, it is a mistake to measure its validity solely by the elements of express sanction accorded by courts of law or by any other determinate authority. But it is also true that many customs do not appear to be based on general conviction of their rightness or necessity, or upon any real or voluntary consensus *utentium*.<sup>75</sup> It also appears that the historical school has undermined the creative role of the judges in molding and shaping the customs. In India, especially, in order that a custom may have the force of law, it is necessary that it should satisfy all the essentials or requirements of a valid custom<sup>76</sup>.

#### 2.2.5. Realist Definition

Realist movement, which is considered to be a part of the sociological approach defines law in terms of judicial process. Justice Holmes, the realist considered the law to be an art of the judicial process. “He said that; the prophecies of what the courts

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<sup>72</sup> pendharka, *supra* note 43, at 225

<sup>73</sup> MAHAJAN, *supra* note 47, at 231

<sup>74</sup> pendharka, *supra* note 43, at 225

<sup>75</sup> pendharka, *supra* note 43, at 225

<sup>76</sup> pendharka, *supra* note 43, at 225



will do, in fact, and nothing more pretensions, are what I mean by law.”<sup>77</sup> According to Realists, the formal law is simply a guess as to what the courts would decide and the law is that what the court actually decides. They consider law as a social institution.”

### 2.3. Essential Requisite for Valid Custom

From the Indian Constitutional law point of view, Custom and customary law has been given much importance. The Constitution of India also defines law under Article 13(a) of India Constitution as “Law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law”<sup>78</sup>. Thus law in itself includes custom in it. However in India, any Custom in order to have force of law, it must fulfil few requirements. Judiciary had waded large number of cases and established very criteria for declaring any custom as valid.

#### 2.3.1. Essentials of valid custom:

- a) Custom must be Ancient: In order to constitute Ancient it required to be followed since antiquity or time Immemorial. “According to Blackstone, “a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary”<sup>79</sup>. In India no such time has been fixed to define antiquity of Custom. In *Jai Sukh v. Manohar Das*,<sup>80</sup> it was held that Antiquity of any custom will depend upon cases and it will vary according to circumstances. Moreover in the cases of *Ramalakshmi v. Sivnantha*<sup>81</sup> it was held that the courts have expressed an opinion that if a custom is established to be 100 years old it is sufficient antiquity to be called ancient. Even in the case of *Kunwar Basant Singh v. Kunwar Brijraj Singh*<sup>82</sup>, “If a custom is found to have existed at a particular date within living memory, it must be taken to have the ordinary attribute of a custom that it is ancient, and may assume to have existed prior to that date”. Hence there is no proper yardstick to measure or define what constitute time immemorial or antiquity. It varies case to case basis.

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<sup>77</sup> Ningshen *supra* note 53, at 22

<sup>78</sup> INDIA CONST. art. 13, cl.a.

<sup>79</sup> Pereira, *supra* note 46, at 25

<sup>80</sup> *Jai Sukh v. Manohar Das*, (1967)AIR 1967 HP123 (India)

<sup>81</sup> *Ramalakshmi v. Sivnantha* (1872) 14 MIA 570(India)

<sup>82</sup> *Kunwar Basant Singh v. Kunwar Brijraj Singh*, (1935) AIR PC 132

b) Custom must be Uniform and Continuous

One of the essential elements of a valid custom, as has already been discussed above, is that, it must be ancient. From the fact that the custom is ancient, it follows that it must be uniform (and not variable), definite and continuous, for these are the elements to establish its immemorial use. If there is discontinuance, such discontinuance destroys its stability<sup>83</sup> It is being presumed that if a custom which is not followed uninterruptedly and continuously, it never existed at all.

c) Custom must be Certain

In order to be valid, custom must be certain and definite. In the case of *Broadbent v. Wilkes*, Willes C.J observed that, “a custom must be certain ‘because, if it be not certain, it cannot be proved to have been time out of mind, for how can anything be said to have been time out of mind when it is not certain what it is?’”<sup>84</sup>.

d) Custom must be Reasonable,

It should not be Opposed to Morality, Public Policy or an Express Enactment- Thus one of the another important requirement is that custom should be reasonable and it should not be opposed of not be Opposed to Morality, Public Policy or an Express Enactment. In India, Supreme Court recently declared Triple talaq as illegal<sup>85</sup>. Although it is a customary law of Muslim people but however it was not reasonable and was opposed to Morality, Public Policy or an Express Enactment. Another aspect in this approach is that what constitutes reasonable or unreasonable is depend upon the values each society adheres to. It may thus differ from place to place and time to time. In India Marital rape is not a crime but in others countries it is denoted as an offence. Therefore, reasonable and unreasonableness is determined using the yardstick of the contemporary values of every society.

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<sup>83</sup> Pereira, *supra* note 46, at 25

<sup>84</sup> *Broadbent Land Co v. Manila*, 842 U.S.54, 55 (1992).

<sup>85</sup> *Shayara Bano vs Union of India And Ors.*(2016)WP(C) NO.118(India)

#### 2.4. Customary Law From International Law Perspective.

In order to understand customary law from international law point of view we need a different set of chapter as the ambit of International customary law is quite large but however a brief analysis is done to analyse the overall concept of international customary law . As stated by “Fenwick that Customary International Law as established usages which have come to be regarded as having an obligatory character of law”<sup>86</sup> Schwarzenberger also defines Customary International Law “as the rules followed by states in their actions when they admit a legal obligation to act in such a manner”.<sup>87</sup> Openheim opines it as a “custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are according to international law, obligator or right.” Manley O. Hudson in a study of Article 24 of the statute of International Law Commission<sup>88</sup> writes that “the emergence of principle or rule of Customary International Law would seem to require the presence of the following elements.

- a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- b) Continuation or repetition of the practice over a considerable period of time;
- c) Conception that the practice is required by or consistent with, prevailing international law;
- d) General acquiescence in the practice by other state. ”<sup>89</sup>

Moreover Article 38(b) of the statute of International Court of Justice (ICJ) requires for the formation of customary law not only as a “general practice but also that it must be accepted as law.”<sup>90</sup> According to Michael Akehurst Customary International Law is created by state practice. State practice means any act or statement by a state from which views about customary law can be inferred; it includes physical acts, claims, declaration in abstract (such as General Assembly Resolution), national laws, national

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<sup>86</sup> Friedrich Joseph Berber, Rivers In International Stevens & Sons Law 41 (1959)

<sup>87</sup> Ningshen, *supra* note 53, at 25

<sup>88</sup> Statute of the International Law Commission 1947, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

<sup>89</sup> Ningshen, *supra* note 53, at 25

<sup>90</sup> United Nations, Statute of the International Court of Justice, 18 April 1946

judgement and omissions. Law also be created by the practice of international organization and (in theory at least) by practice of individuals<sup>91</sup>

From international law point of views in numerous number, custom and customary law been dealt with be it the landmark judgement of Asylum Case where it was held that “Customary law must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial state...”<sup>92</sup> Even in the case of North sea continental shelf it was held that, “not only must the acts concerned amount to a settle practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (...) The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”<sup>93</sup>

One of the important ingredient of customary law from International point of view is “the state practices” which is also regarded as ‘opinio juris. In the Gulf of Maine case it was held that “custom is the ideal right size for the general principles and always on ground to fill the vacuum any time obligation and law of treaties are not gaining global acceptance”<sup>94</sup>.

In Asylum case (Colombia v Peru), to form customary law, it must be ‘in accordance with a constant and uniform usage practised by states in question’<sup>95</sup>. This was stated in Fisheries case, it was held that ‘uniformity’ and ‘consistency’ test is ‘general practice’ and not a ‘universal practice’ and ‘practice of most influential and powerful states would carry the greatest weight’, deducing from the above, it doesn’t mean all states participation in the practice<sup>96</sup>. ‘Once a practice is established as forming part of customary International law’, all states are bound including states and the new states that failed to contribute to the practice initially’<sup>97</sup>. Again for the alteration of an existing custom, consistency of state practice as another element. In Lotus case, “the

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<sup>91</sup> Ningshen, *supra* note 53, at 25

<sup>92</sup> Colombia v. Peru I.C.J. (1950)

<sup>93</sup> North Sea Continental Shelf, Germany v Denmark, Merits, Judgment, ICJ Rep 3(1969)

<sup>94</sup> Canada v United States, Merits, Judgment ICJ Rep 246(1984)

<sup>95</sup> Colombia v. Peru I.C.J. (1950)

<sup>96</sup> Fisheries, United Kingdom v Norway, Merits, Judgment, ICJ Rep 116(1951)

<sup>97</sup> *Id.* at 96.

court said customs must be constant and uniform. It must not be totally uniform and constant it must at least be significantly constant state practice to become customary international law”<sup>98</sup>. Also, “it is well stated in Anglo-Norwegian Fisheries case that the consistency required may vary in degree based on circumstance.”<sup>99</sup>

Thus, for the above discussion it is cleared that a custom to be binding, it must fulfil these basic requirement. “Under the Constitution of India, Articles 244<sup>100</sup>, 244-A<sup>101</sup>, 371-A<sup>102</sup>, and the Fifth<sup>103</sup> and Sixth Schedules<sup>104</sup> it protects the tribal indigenous communities and their customary practices. Article 371(A)<sup>105</sup> of Indian Constitution it provide special status for the people of Nagaland and their customary practice are also protected through this article. The Panchayat (Extension to Scheduled Areas) Act, 1996<sup>106</sup>, have provided tribal community sovereign autonomy. Nagaland thus practices its customary law under the rights given by Article 371 (a) of the Indian Constitution, which protect their identity .This aim of this dissertation is to highlight the various facet of Cutomary laws of Chakhesang tribes of Nagaland. A visit to phek Districy in Nagaland would automatically, reveal the simplicity of the Chakhesang Nagass. Nagaland has been provided with special Status under Article 371 A<sup>107</sup> of the Constitution. In simplest sense it mean that “ No act of parliament shall apply to the state of Nagaland in the respect of

- e) Regiligious or social practices of Nagas
- f) Naga customary law and procedure,
- g) Administration of Civil and criminal justice involving decision according to Naga Customary law.
- h) Ownership and transfer of land and its resources, unless the Legislative Assembly of Nagaland by resolution so decides.<sup>108</sup>

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<sup>98</sup> France v. Turkey P.C.I.J(1927)

<sup>99</sup> U.K. v. Norway, I.C.J. 117(1951)

<sup>100</sup> INDIA CONST. art. 244

<sup>101</sup> INDIA CONST. art. 244, cl.2.

<sup>102</sup> INDIA CONST. art. 371, cl.a.

<sup>103</sup> INDIA CONST. schd.5

<sup>104</sup> INDIA CONST. schd.6

<sup>105</sup> INDIA CONST. art. 371, cl.a

<sup>106</sup> Panchayat (Extension to Scheduled Areas) Act, 1996, No. 40,Acts of Parliament, 1996 (India)

<sup>107</sup> INDIA CONST. art. 371, cl.A.

<sup>108</sup> INDIA CONST. art. 371, cl.a

This makes it clear that code of civil procedure and criminal procedure is applicable only in words and not in spirit. When the Constitution was brought about, all the laws that were made prior to this and were conflicting in nature with the Indian Constitution were considered to be null and void.<sup>109</sup> .Thus there is a conflicting among these two provision, in one arena it respect and gave protection to the customary laws of Nagas which are practiced from time immemorial which although might be in violation of Fundamental right and at the same time it directly declares those customary law as void which are, opposed to public policy at large.

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<sup>109</sup> INDIA CONST. art. 13, cl. 2

### CHAPTER 3- CUSTOMARY LAW PREVELANT AMONG CHAKSENG NAGA.

The Chakhesang Nagas is one of the recognised tribes of Nagaland. It belongs to Mongoloid race. The Chakhesang Nagas mainly inhabit in the Phek District of Nagaland. Chakhesang Nagas is an acronym of “three sub-tribes, namely; Chokri denoted by Cha; Kheza denoted by Khe and Sangtam denoted by Sang (presently called Pochury). In Khuzami (Kheza) dialect “Ku” means strong or victory, “Za” (Zha) stands for order, protector and controller and “Mi” means people. Thus Khuzami means tough people who protect, give order and control the people”<sup>110</sup>. Out of the three sub tribes which as a whole constitute Chakhesang Nagas, the two sub tribe he Chokri and Kheza forms the main ethnic segment within the Chakhesang. They are very closely associated with the Angami’s in terms of festivals, culture, language and customary practices. Untill 1946, the Chakhesang tribe was grouped under Angami tribe and were known as “Eastern Angamis”<sup>111</sup>. The map of Phek district indicates that Chakhesang Nagas tribe of Manipur and Nagaland are just separated by a political boundary. Majority of the Khezha tribes settled in Nagaland while a few of them in Manipur. Villages like Khezhakeno, Leshemi, Lasumi, Zapami, Kami, Lekromi, Pfutseromi, Chizami, Thetsumi, Enhulumi, Mesulumi, Losami and Sumi falls under the jurisdiction of Nagaland state<sup>112</sup>. Jesami and Krowemi are the two Khezha villages which are placed under Manipur state. The Chokris are confined to Phek and Chozouba areas of Nagaland”<sup>113</sup>

The society of Chakhesang Nagas is quite versatile and it is characterised by Khel and clan system. A clan basically consist of many families in the villages, which in turn form khel .A village is a result of the combination of two or more different khel. The chakhseng Nagas, like other tribes of Naga are better united at the clan level. It is the clan, which provide then unique indentity and they stand united within and among their own village. A member is easily identified by his clan name rather than his village.

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<sup>110</sup> Ningshen, Vareso, *The tangkhul naga customary laws a critical legal study*, G.U 45-46 (2018)

<sup>111</sup> *Id.* at 99

<sup>112</sup> *Id.* at 99

<sup>113</sup> *Id.* at 99

The Chakhesangs are well known for their distinct culture. Like many other Nagas the chakhsengs were animists<sup>114</sup> in their past. Among the various festival, the most important is the Siikriinye. The Chakhesangs are not only famous for their song and dance but for their favourite sport of wrestling. At the time of the establishment of new village, prudence, reasonable person who is respected by all are chosen as the leaders of the community. There are various rules or norms are followed while selecting the village head and the village priest. A few are enumerated below

- 1) “A person ( thevo/ Kemovo/ Mawo) was selected to become the village priest.
- 2) The most elderly man would be appointed as the person to pass over necessary information of the village. He is popularly known as Naseo/ Phiiseo.
- 3) Person with knowledge of the traditions and custom was appointed as Mesomia. His rules are
  - a) He will be the first person to sow seeds after performing rituals.
  - b) She will be the first women to taste crops harvesting after performing rituals.
- 4) Brave warriors ( Rikhumi) were appointed to safeguard the village.
- 5) People possessing good reputation and without a deceased family member are appointed to dig spring water.”<sup>115</sup>

The customary law of Chakhesang Nagas passed through various phases. This chapter would contain various provisions of the customary law of Chakhesang Nagas tribe of Nagaland in the present contemporary time. Various topic such as Criminal and civil offences as well as Divorce, family, adoption, mode of inheritance, custody of children, sales and transfer of property and many others are dealt in details.

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<sup>114</sup> *Id.* at 99

<sup>115</sup> Jeuti Barooah Customary laws of the Chakhesang Nagass of Nagaland, with special reference to their land Holding system.8-9 (2011)



### 3.1. Laws Relating to divorce, inheritance and maintenance among the Chakhesang Nagas tribe of Nagaland.

The Chakhesang Nagas's society is well-knitted and unified, it is basically nuclear family. It is basically a patriarchal society with father as the head of family. The head represents the family before the Village council authority and represents and speak on behalf of their family. The Chakhesang Nagas practice monogamy and polygamy is considered to be improper in the family. Marriage between the same clan is prohibited. They prefer marriage between different tribe Naga tribe. Marriage with non-Naga tribe is generally not favoured. "According to customary norms of pre Christian time, the requirement for engagement was exchange of beer rice between families. In ancient days according to custom, four hundred pieces of meat were given to the bridegroom's as bride price. This meat was forbidden to be consumed by the bride and the bridegroom"<sup>116</sup>. Child marriage is prohibited, but there is no definite age for marriage. A marriage is solemnised by the final act of priest and registration in the church.

#### 3.1.1. Divorce

Divorce is generally forbidden in the society of Chakhesang Nagas. However Husband and wife both can seek for divorce on grounds such as adultery, theft, misbehaviour towards wife and children. There is no prescribed standard ground to seek divorce. Divorce can also be initiated by mutual consent, provided necessary consent of the party is taken along with the consent of the parent. "According to Chakhesang Customary law, when a divorce take place two-third of self-acquired properties during the tenure of marriage goes to husband and remainder is divided in between them. If wife divorces her husband, then she is required to present one shawl and one male apron known as (THEPUNE) to husband"<sup>117</sup> If the wife is pregnant during the divorce period then husband is required to meet all the nourishment expenses of the child for the period of three years after which the child's custody goes to husband. But if it is a girl child and wife wishes to take her custody, then with

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<sup>116</sup> *Id.* at 112.

<sup>117</sup> Kukhrolo Lasuh, *Customary Laws In Dealing With Crime And Punishment, (A Case Study of Chakhesang Nagas Tribe)* T.I.S. S 25-28 (2014).

reasonable promise and opportunity she can retain her custody, using the name of her ex-husband.

Although there is no codified law, among the Chakhesang Nagas but the customary law states that if any member by force harass or attempt to commit rape. He is required to pay 1 Chuvera (the best shawl), 71 basket of rice barn and 1 matured Ox. If a man adulterates with another man's wife with mutual understanding then fine is 1 matured Ox and 1 Chuvera (the best shawl) to the husband and the wife has to take with her only the clothes she is wearing and the remaining clothes will be kept by the husband. Only paddy field given by her father will be hers.<sup>118</sup> If a man and woman agrees to marry and after a child is born, if the man refuses to marry her then he has to pay 51 baskets of rice barn. If he refuses to take the child also then his property will be divided into 3 parts and 1 part will be meant for his child.<sup>119</sup>

Case 1: Mr Metokoyi Mesiih's wife Mrs Vevotula, filled a complaint against her husband at the village court of Thenyizumi village on 29<sup>th</sup> November 2001. Her accusation was that her Mr Metokoyi Mesiih abandoned Mrs Vevotula. He no longer participated in any of the household activity and did not maintain his family, so she filled a petition to seek divorce, for the dissolution of her Marriage. While Mr Metokoyi Mesiih argued that he never abandoned them rather Mrs Vevotula, treat her with cruelty and he too seek for the dissolution of Marriage. The council after conducting investigation found that Mrs Vevotula, treated her husband with gross cruelty as she showed her naked body to her Husband, which is treated as a sign of disrespect.

The chairman then when asked her whether she would like to stay with her, her reply was rude and was negative. She was although not permitted by the customary law to get any share in her husband property, however the council, with due permission of the husband awarded her half of his property. Their children were free to decide on their own, to choose either of the parent. "Village council settled the case with a awarding a nominal penalty of rupees 1000, to each. Moreover the village council

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<sup>118</sup> *Id.* at 114.

<sup>119</sup> *Id.* at 115.

decided that the male child remain in the custody of father and while the female can opt to live with either”<sup>120</sup>

### 3.1.2. Custody and adoption:

The society of Chakhesang Nagas is quite simple and people are guided by customary Norms itself. The rate of domestic violence, rape in Nagaland as a whole is quite less than that of other part of India. However it is a myth that women’s status in society is equal to that of man. Women are deprived of property right. Neither they can inherit their husband’s property, nor they can of their father or grandfather’s.

As stated by a Visto “If the daughter is unmarried then she retains the properties of her parents but then she does not have the right to sell off the properties as and when she wishes or likes. Once the daughter gets married then she loses the right to her parental properties, which she had when she was unmarried..... At the time of marriage, women can be given landed properties such as field, plots of forest land and can even be given house but not ancestral properties. The giving of such properties to women depends on the economic status of the family whether they can afford to give or not. According to tradition the eldest daughter usually inherits the properties of her mother called tabu”<sup>121</sup>

Among the Chakhesang Nagas, father is the head of the family and is the absolute natural guardian of their child. Even after the death of the head of the family, it is his younger brother who becomes the next head of the family. At the time of divorce, father is entitled to keep the custody of the male child and in case of daughter can choose any one of them. Adoption is permissible and practised. A childless couple, a bachelor or widow can also adopt any child. Couples can also adopt more than one child, even if they have their own biological child. During past era, Adoption is accompanied with a religious ceremony ie. Siikrii. After the religious ceremony, the adoptee is presented with gifts and the child from that day becomes the member of that family. His relation with his earlier family is legally terminated. The adopted child is treated equally and he enjoys all the right including succession. However in case of male child, he cannot enjoy the position of the eldest son, despite being older

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<sup>120</sup> Jeuti, *supra* note 112, at 12.

<sup>121</sup> Vitso, Adino *Customary law and women among the Chakhesang Nagass*, N.E.H.U. 123-124 (2001)

among others. If the adopted child leaves his parents then, he is required to surrender all the self-acquired property he earned after adoptions and even is required to repay or refund back the expense of the Siikrii ceremony.

Case 2: “Mr. Pukhucho, having no son, adopted a boy name puvezo. The adopted son was given some of his ancestor properties like land, house, field etc. before his death, which was witnessed and countersigned. By the village Council member and the Additional Deputy Commissioner. After death of Mr. Pukhucho, the adopted son, puvezo, claimed other properties besides his due share. As the other member of the family did not agree with him, Puvezo then filed a case in the village court. The village court rejected the claim of Puvezo and asked him to seek apology.”<sup>122</sup>

### 3.1.3. Maintenance:

According to the customary law of Chakhesang Nagas, Widows are not entitled to get the benefit of maintenance, after the death of his husband. In normal situation, until she remains chaste, and does not remarry and look after her child she is allowed to live and manage her husband's property. However in case of infant child, maintenance can be provided to divorced women, for better health and upliftment of the child for a specific period, as she is not entitled for the custody of the child. If a widow were to get married without the knowledge of her in-laws then she gets nothing, not even the custody of her children.<sup>123</sup>

### 3.2 laws relating to Land.

Like other customary laws of Chakhesang Nagas, It has abiding customary laws regarding use of land. In the Phek district of Nagaland which is regarded as the homeland of Chakhesang Naga, the valley land plays a crucial role in the life and economy of the native people. The rural section of the people are almost completely dependent on Jhum Cultivation, terrace farming, gardening and other forms of natural resources.

There are different types of land among the Chakhesang Nagas, be it private, community, clan reserved forest or government acquired land. Private lands are those

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<sup>122</sup> Jeuti, *supra* note 112, at 12.

<sup>123</sup> Visto, *supra* note 118, at 109.

lands, which are generally purchased by the people or which are passed through generation from father to son. Village community lands are those lands which come under the scrutiny or under the charge of Village community. These land can only be used for the benefit of whole community with due permission of the village council. There is also clan land, which is under the possession or used by one particular clan. Government lands are those which are used for the benefit of public at large such as for building hospital, school, police station and others. Agriculture play an very important role in the society of Chakhesang Nagas. “Celebration of festivals, feasts and marriages were done in accordance with the agricultural season. The people practised the method of 'wet rice terraced cultivation'. This method involved the process of ploughing or tilling the field, sowing of seeds, transplanting of seedlings and harvesting of paddy. Each method was done in a particular or specific season of the year.”<sup>124</sup>

Villagers are well aware of their land boundaries. Generally lands are demarcated by erecting stones or by other markers such as footpaths and others. In case of private property, where the owner has absolute control over their properties, they demarcate their land by building large wall, to prevent trespassers. However the village community land and common land, at no time can be claimed by individual, even it cannot be claimed by village head or the member of the village council. The consent of the village council and its member is necessary, while using the common land for the community at large. These common properties and even private properties are inherited by fore father. Whenever there arises any property disputes, it is settled in village council by compromise or by taking oaths. Oath is considered to be the last resort to redress any dispute. If any party refuses to take oath, then they will lose they ownership right over the property and if both the party takes oaths then the disputed property is divided equally among them. Oath swearing process generally takes place, where the villagers gathers as an witness of the process. Oath is generally administered by the most experience person amongst the customary law court.

A rule that is seen prevelant in the kheza district is Tree plantation rights- anyone can plant trees on the side of the pathways in both individual as well as community land. Tree grown for the first time will be cut and taken by the original planter. When trees

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<sup>124</sup> Visto, *supra* note 118, at 60.

sprout again the owner in private as well as community land has full authority over the trees. Forefather's road construction law- People at times gather to construct as well as clear bushy roads. During this time rice is collected from people whose fields are near the road and from people where road ends with their fields.<sup>125</sup>

### 3.2.1. Ownership

Land is considered to be very auspicious among the chakhesang tribe. Unlike other tribes of Nagaland they prefer settled cultivation then jhum cultivation. However there are a few who practice Jhum cultivation as their prime occupation. In Jhum cultivation, lands are generally private or clan land. If it is private, owner has an absolute control over it. If it is a clan land, then every year the head of the clan allocates land accordingly. Jhum cultivation is also known as shifting cultivation. It is also regarded by many as burning and Slash method of Cultivation. In this type of cultivation, generally plot of forest is cleared and when dried up it is burnt and the plain fertile land is used for vegetation. The plot of land is then cultivated for one or two years. However at the present time, this type of cultivation is often disregarded as it destroy forest to great extent.<sup>126</sup> "In most systems the terrace is a low, flat ridge of earth built across the slope, with a channel for runoff water just above the ridge. Usually terraces are built on a slight grade so that the water caught in the channel moves slowly toward the terrace outlet. In areas where soils are able to take in water readily and rainfall is relatively low, level terraces may be used"<sup>127</sup>

### 3.2.2. Mode of transfer of Land.

According to Chakhesang Nagas Customary law, private land can be transferred to anyone among the fellow villager or clan, but however if it is transferred to other villagers then prior approval of village council is necessary. Women have no right to sell land, except their stridhan<sup>128</sup>. In case of sale of property, agreements are made, in the presence of witness, so that there arise no dispute between them. Even community or clan property can be sold for the benefit of whole community.

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<sup>125</sup> Kukhrolo Lasuh, *Customary Laws In Dealing With Crime And Punishment ;A Case Study Of Chakhesang Nagas Tribe* T.I.S.S. 25 (2014)

<sup>126</sup>Brenda, *Impact Shifting Cultivation Environment Mokokchung Nagaland*, N.U.25-28 (2015) <http://hdl.handle.net/10603/48775>- accessed on 18th May 2018.

<sup>127</sup> *Id.* at. 123.

<sup>128</sup> The word streedhan used here does not connote any legal term. It is simply used to explain the property earned by women at the time of her marriage or before her marriage in the form of gift.

### Case 3

“The Khomi village sold its community owned bus to Mr. Chikrosopra of Kikurma village in 2003. The price of the bus was negotiated at Rs. 90,000/- only. But the amount was not paid over a year. The Khomi village people came to know that the bus had been sold by Mr. Chikrosopra, to another person leaving the debt unpaid. The Khomi village therefore filed a case in Kikurma village court against Mr. Chikrosopra seeking repayment of the debt. The Kikurma Village court, after due deliberations gave the verdict according to which a plot of fallow land of the value of Rs 60,000/- owned by Mr. Chikrosopra at Pitezero town should be given to Khomi village council in addition to Rs. 30,000/- in cash to be paid in three instalments.”<sup>129</sup>

Among the Chakhesang Nagas, Mortgage of land and other valuable properties is prevalent. Mortgage of any property for securing a particular amount of loan can be made by verbal agreement in the presence of three reliable witnesses. Mortgage property cannot be sold, transferred before the expiry of stipulated period. However mortgage property is automatically confiscated once the due date is expired. Even property is leased in Chakhesang Nagas society, although that was not an traditional idea. Payment of lease is generally done in exchange of cash, paddy or any other things. The duration of lease depends upon the understanding and the undertaking of both the party. There is no hard and fast rule for lease among the Chakhesang Nagas. In Chakhesang Nagas society, even money lending and crop lending is practiced from time immemorial. In the present society also money lending with a particular rate of interest, with mutual cooperation exists in the society. Among them paddy is taken on loan by villager from another village. A person who takes one basket of Paddy has to pay back two baskets of paddy in the following year<sup>130</sup>. Although this phenomenon has changed, in the present society, it is guided by agreement to avoid any disturbance. Apart from lease even the practice of making will exists in the Chakhesang society. Any person, generally the senior citizen, who is the owner of any property, can make will in favour of any person or persons. Generally wills are registered and are drafted, signed and executed in the presence of witnesses, to avoid future contingencies. The present society of Chakhesang Nagas is a product of various changes incorporated with what people term as the advent of modernity in their society.

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<sup>129</sup> Jeuti, *supra* note 112, at 14.

<sup>130</sup> Jeuti, *supra* note 112, at 12.

*Today came the era of modernity, where the youth especially the uneducated youth in order to earn a good fashionable living, is selling out their property or taking a loan by mortgaging their ancestral property. Later when they are unable to repay back the necessary amount, their land is confiscated. This is a new trend which is completely over throwing the customary society.*<sup>131</sup>

As, Chakhesang Nagas society is patrilineal in nature, it is the responsibility of the head of the family to clear debt in his life time. In case he fails to repay in his lifetime, the obligation to repay the loan passes on to the eldest son of the family. Thus it is pious obligation of the eldest son to clear the debt of his deceased father.

### 3.3. Laws relating to crime, in the Chakheshang Naga Society.

The villagers of phek district while demarcating any offence as civil or criminal take into account the gravity of offence. As rape, adultery, robbery, theft are considered as civil cases, only offences relating to life or murder are considered as criminal offence. There are some of the regulations which are prevalent in the Society of Chakhesang Nagas. A few of them are explained bellow.

Intentional murder – If a person who attempts to murder another person, in the process of self-defence kills the person who attempted the plot then such a case is not held guilty and no complain will be entertained. If a person kills the other person out of hatred or rivalry then all the fields belonging to the person who commits murder will be given to the family members of the deceased. Moreover, the murderer will no longer live in the village.<sup>132</sup>

Moreover intentional murder results into a “tooth for tooth and eyes for an eye”. Therefore, even the defender or supported is guilty in this case. Villagers are not allowed to help the murder if the murderer enter anyone house for seeking refuge, then the person in whose house the murder took shelter is not permitted to kill him.

Unintentional murder- Unintentional murder are those murder where the accused have no malice intention or knowledge about it. According to the customary law of

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<sup>131</sup> Respondent from Phek district of Nagaland.

<sup>132</sup> Lasuh, *supra* note 112, at 14



Chakesang Naga, if a person kills another person by mistake, the accused is required to give three 5 years old Ox and memorial stone to deceased family

During any motor vehicle accident, the case will be only settled after examining the severity of damage caused.

Fights- If there is a physical fight between two members of a gang and if a particular gang injures the other. Then the members of the gang who injured the other party will individually have to pay five thousand rupees each to the injured party.

Theft- If anyone breaks into someone else house and steals grain; steals already cut grain from the field and fish from fishery pond then the offender is fined 31 baskets of grains and 1 Chuvera (the best shawl). If it is regarding stealing of hornet from another person area then fine is 31 basket of grains. One who steals fruits or vegetables from fields will be fined 2 basket of grains. If it is cases of stealing domesticated animals like hen, pig, dog etc. the offender is fined double the stolen animal.<sup>133</sup> Moreover all the stolen items are to be given back to the owner respectively. Even the person who buy those stolen properties are considered as equal offender and penalise in same amount.

Poison user- If anyone who is found using poison, will be at once expelled from the village. Poison is regarded as one the severe crime and hence the offender is awarded the punishment of expelling from village throughout their life time. The accused if innocent is required to swear an oath, and then can return back to normal life

#### Case 4

“Mr.Vehiiswii, who lost his dog, filed a case at the village court against Mr. Vesoseyo saying that his dog was last seen entering the house of Mr. Vesoseyo. When the village court inquired the matter Mr. Vesoseyo and his family member refused to accept the allegation. They took an oath that they did not kill Mr. Vehiiswii dog. Thus the case was settled by the village court putting forth the condition that if

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<sup>133</sup> Lasuh, *supra* note 112, at 14

anybody raise an issue regarding this case, It would be penalised a sum of 2000/- as fine by the village court”<sup>134</sup>

#### 3.4. Administration of justice system among the Chakhesang Nagas.

At present the administration of Justice among the Chakhesang Nagas is carried out by the Village council in accordance with the respective customary law. With the introduction of Nagaland Village and Area Council Act of 1978,<sup>135</sup> every recognised village of the state Government will have a village council. It is the apex autonomous independent body. It mainly comprises of Chairman, Secretary, Gaonburahs and the khel representative. The Khel representatives are usually those person who are chosen by the villagers themselves and then approved by the State government of Nagaland. The village council is the guardian of the customary laws. At the beginning when a dispute arises between two individual, it is tried to be settled by the clan or KHEL member. If they are unable to find an amicable settlement then, they refer the case to the Village Council. Usually heinous crime as that of Rape, murder, kidnapping, abduction is handled by District administration.

However, in practical sense, it has been seen in number of cases which involves heinous crime as such rape, forgery, the matter are resolved by village council. *Generally in case of rape, kidnapping if the accused and the defendant belongs to same village, then there is no interference by government machineries. Unless a F.I.R. is lodged, which is seen in rare cases*<sup>136</sup>

There is a believe among the villagers, which is indispensable part of the society of Chakhesang is that *People who don't accept the orders and directions of village council are not the native people of the villager. If they consider themselves as native people then they must respect the village council decision*<sup>137</sup>

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<sup>134</sup> Jeuti, *supra* note 112, at 14.

<sup>135</sup> The Nagaland Village and Area Councils Act, 1978, Act 1 of 1979.

<sup>136</sup> Respondent 2 from the phok district of Nagaland.

<sup>137</sup> Respondent no 4, a villager from the phok District of Nagaland.

Among the Chakhesang Nagas tribe, Crimes are categories in a hierarchy based structure depending upon on the severity-

- a) Murder ( intentional and both unintentional)
- b) Poison user mostly by female
- c) Rape/ adultery
- d) Stealing and Extortion
- e) False oath
- f) Going against the rules of the village
- g) Withering of evidences

However many villagers believed that false oath is more severe crime than murder as *the one who administer false oath can although cab escape from the eyes of village council but not from god.*

### 3.5 Working of the village council.

Normally in case of trivial issues, it is generally solved by clan / KHEL member. However if they are not satisfied with the decision , they refer the cases to Village council. Only when a complaint is filled, by the aggrieved individual or party himself, the village council will institute a case. “Space is given for the parties involved to come to a compromise where in the community members of that locality also assist in settling the case. However, if no compromise is reach between the two parties then the aggrieved person / party file a complaint against the person / party who had perpetrate crime or conflict. The case fee for the village council court is Rs. 200/- followed by a statement in the village court. Village council court summons a date and hears the case in the presence of village council members, Gaon Bura’s, complainant and defendant”<sup>138</sup>. Sometimes the village council members are also excluded from the decision making in cases when he himself is a part of the case or an eye witness to support his family and friends. “The involved individuals can call two people each for representatives. The jurist then hears the parties voicing out their rights. Based on the

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<sup>138</sup> Lasuh, *supra* note 112, at 25

previous statement made by the complainant the village council allows the complainant to support and the defendant to defend the accusations made against him. They can bring eye witness if they have and also go for spot verification. Jurist judged based on which party reasons more satisfactory and justifiable with the given statement. Judgement is given based on hearing and witness. After the hearing, the VCM's and GB's organised a closed meeting to decide who is more correct. If the jurist cannot come to a consensus then voting power of the jurist comes into play. After the verdict is given, if the parties does not appeal to higher court within 15 days then the decision given is final and no complain is entertained."<sup>139</sup> Lunch/ dinner for the court on the case day are arranged jointly by the complainant and defendant

“In earlier times, cases or disputes are settled by a wrestling match. It is also quite surprising to see that who so ever is truthful wins. In earlier times, our forefather believed in the existence of supernatural being called Romi. During those times people were honest and truthful as bad things befall on the wicked people. In times of conflict or crime if at all conclusion cannot be drawn then an oath (Tasu) is taken by both the parties”<sup>140</sup>. Till today oath is considered to be the last resort to solve any dispute.

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<sup>139</sup> Lasuh, *supra* note 112, at 25

<sup>140</sup> Lasuh, *supra* note 112, at 26.

## CHAPTER 4- LEGALITY OF THE CUSTOMARY LAWS OF THE CHAKHESANG NAGA TRIBES.

If we try to compare the legal system of Chakhesang Tribes of Nagaland with the relevant provision of India statutory laws it would be structurally not possible to fit it within one chapter. It would rather require a deep analysis and a separate research as a whole. But however in this chapter we will try to summaries and analyses few important provision of Chakhesang Nagas tribes through the lenses of Indian legal system.

As already mentioned above, by virtue of Articles 244<sup>141</sup>, 244-A<sup>142</sup>, 371-A<sup>143</sup>, and the Fifth<sup>144</sup> and Sixth Schedules<sup>145</sup> it protects the tribal indigenous communities and their customary practices. Article 371(A) of Indian Constitution<sup>146</sup> provides special status for the people of Nagaland. The Panchayat (Extension to Scheduled Areas) Act, 1996<sup>147</sup>, have also provided tribal community sovereign autonomy. The customary law of Chakhesang Nagas is outside the purview of Penal and civil laws such as Indian penal Code<sup>148</sup>, evidence act<sup>149</sup>, Civil Procedure code<sup>150</sup> and other statutory laws of India.

Before discussing the various provisions of Constitutional law and other statutory laws of India's. It is important to analyse India's stand for tribal or the indigenous people ,through the International laws perspective. As schedule tribe are considered as indigenous or native people various protections have been provided to them in the name of affirmative action. These provisions are discussed at length in this chapter. However United Nation in its Declaration on the Rights of Indigenous Peoples under Article 40 states that "indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of

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<sup>141</sup> INDIA CONST. art. 244.

<sup>142</sup> INDIA CONST. art.244-A

<sup>143</sup> INDIA CONST. art. 371, cl.a

<sup>144</sup> INDIA CONST. schd. 5

<sup>145</sup> INDIA CONST. schd. 6

<sup>146</sup> INDIA CONST. art. 371, cl.a

<sup>147</sup> Panchayat (Extension to Scheduled Areas) Act, 1996, No. 40,Acts of Parliament, 1996 (India)

<sup>148</sup> The Indian Penal Code, Act,1860, No. 45, Acts Of Parliament, 1860(India)

<sup>149</sup> The Indian Evidence Act,1872. No, Acts Of Parliament, 1872(India)

<sup>150</sup> The Civil Procedure Code, Act,1860, No. 5, Acts Of Parliament 1908(India)

their individual and collective rights”,<sup>151</sup> India voted in favour of United nation Declaration on right of Indigenous people. Apart from this, “there is the International Labour Organisation (ILO) Convention concerning Indigenous and Tribal Peoples, 1989<sup>152</sup> which is based on the “respect for the cultures and ways of life of indigenous peoples” and recognises their “right to land and natural resources and to define their own priorities for development. India is not a party to this, but it is a party to the ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957<sup>153</sup> which is outdated and closed for ratification.”<sup>154</sup> Even in India, The Forest Right Act of 2006<sup>155</sup> has been interpreted by judiciary in quite liberal form. In *Samatha v. State of Andhra Pradesh & Ors*<sup>156</sup> judgment where the Supreme Court “declared that the transfer of tribal land to private parties for mining was null and void under the Fifth Schedule.”<sup>157</sup>

Thus Constitution itself protects the customary laws of Naga Tribes. According to Indian Constitution Article 13(3)(a)<sup>158</sup> defines law which in itself includes customs and usages but it has to fulfil the mandate of Article of Article 13(2)<sup>159</sup> of Indian Constitution. Thus it is quite clear that Custom and usages which fulfils basic minimum requirement as such as

- a) Ancient or time immemorial.
- b) Uniform and Continuous.
- c) Certain.
- e) Reasonable.

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<sup>151</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/29

<sup>152</sup> Indigenous and Tribal Peoples Convention, 1989 No. 169 of 1989.

<sup>153</sup> Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957, ILO No. 107 of 1957.

<sup>154</sup> Amit Sinha, Pushkar Anand, “Protecting the rights of tribals”.Hindu opinion FEBRUARY 27, 2017

<sup>155</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007(India).

<sup>156</sup> *Samatha v. State of Andhra Pradesh & Ors*, (1997) AIR SC 3297(India)

<sup>157</sup> *JEUTI*, *supra* note 112, at 12

<sup>158</sup> INDIA CONST. art.13 .cl (a) In this Article , unless the context otherwise requires,- (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

<sup>159</sup> INDIA CONST. art.13 cl.2 The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

f) Not being opposed to Morality, Public Policy or an Express Enactment

g) Requirement of Article 13 of Indian Constitution.

Are deemed to be law in India. In *Suboramanian Chettiar v. Kumarappa Chettiar*<sup>160</sup> custom has been defined as, “A particular rule which has existed from the time immemorial and has obtained the force of law in a particular locality.” In *Hur Prasad v. Sheo Dayal*,<sup>161</sup> custom has been defined as ‘Rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of law.’ Even In *Hur Prasad v. Sheo Dayal*, Sir Hari Singh Gour states that, ‘Custom is an established practice at variance with the general law’<sup>162</sup>

4.1 Constitutional validity of the customary law of Chakhesang Nagas tribe.

The Constitution of India which guarantees Fundamental Right to every citizen Of India and a few among them are non derogatable right. The six fundamental rights are as follows

- a) Right to equality.
- b) Right to freedom.
- c) Right to religion.
- d) Right to cultural
- e) Right of Minorities.
- f) Right to remedies.

Right to remedies which include in itself judicial structure of Supreme court and High Court and other hierarchy of Courts. Thus if fundamental right of any individual is violated they can directly approach Supreme Court and if legal right or fundamental right is violated then can approach High court for Redressal.

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<sup>160</sup> *Suboramanian Chettiar v. Kumarappa Chettiar*(1955) A.I.R. Mad 144(India)

<sup>161</sup> *Hur Prasad v. Sheo Dayal* (1870) 3 I.A. 259 (India)

<sup>162</sup> *Id.* at 150.

However since inception as many as hundred and one acts and amendment have been enacted by government of Nagaland.

Rule of law, has always been regarded as one of the corner stone of Indian Constitution. The essence of Rule of law is based on the principle of equality which is guaranteed by virtue of Article 14 to 18 of Indian Constitution. Apart from this Naga tribes are regarded as the indigenous tribe. Article 366(25)<sup>163</sup> of Indian Constitution defines schedule caste. Hence they are entitled to the positive discrimination under the Constitution of India. They acquire the status of schedule tribe by virtue of their birth status. During the colonial era they were under the status of excluded area and they attain much sovereignty.

Jawaharlal Nehru, a decisive force in determining the outlook of independent India and the first “Prime Minister of the country formulated the following five principles for the policy to be pursued vis-a-vis the ‘tribals’:

- (1) People should develop along the lines of their own genius, and the imposition of alien values should be avoided.
- (2) Tribal rights in land and forest should be respected.
- (3) Teams of tribals should be trained in the work of administration and development.
- (4) Tribal areas should not be over-administered or overwhelmed with a multiplicity of schemes.
- (5) Results should be judged not by statistics or the amount of money spent, but by the human character that is evolved.”<sup>164</sup>

Once the Constitution came into existence they were accorded a special status respectively. However the Constitution of India under “Article 366(25) defines schedule tribes as such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution”<sup>165</sup>. However Article 342 of Indian Constitution gave the ultimate power to the president to define schedule tribe which state that,

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<sup>163</sup> INDIA CONST. art.14.

<sup>164</sup> T. Hravahlou, Supra Note at

<sup>165</sup> INDIA CONST.art 366 cl. 25



“The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be”<sup>166</sup>.

There are other important provisions incorporated in Indian Constitution for the upliftment of schedule Tribe in India. “Article 46 of the Constitution provides that the State shall promote with special care the educational and economic interests of the weaker sections of the society and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation”<sup>167</sup>. Article 330<sup>168</sup> and Article 332<sup>169</sup>, which deal with proportionate representation in Parliament and state legislatures. Article 243D 1(b) Reservation of seats (in Panchayats)<sup>170</sup> and 243(T) (1) Reservation of seats in Municipalities.<sup>171</sup> Apart from this reservation is directly provided to Schedule caste in educational institution as well as public employment. Article 15(4)<sup>172</sup>, Article 16(4)<sup>173</sup> and 16(4B)<sup>174</sup> are the best example in this context.

Thus from the above discussion we can understand that Constitution of India, which although cherishes the principle of equality, but in real sense practices the principle of equity. In the context of the customary laws of Chakhesang Nagas society especially towards women, which is discriminatory toward women, are in gross violation of the spirit of Constitution. Moreover in the context of political right of women, although they are being allowed to cast vote but they are not allowed to be represented in the legislative assembly. This portrays a different perspective of Naga Society where women are trapped in the imaginary wall of traditions and custom, which they are unable to break.

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<sup>166</sup> INDIA CONST. art.342.

<sup>167</sup> INDIA CONST. art.46.

<sup>168</sup> INDIA CONST. art.330

<sup>169</sup> INDIA CONST. art.332.

<sup>170</sup> INDIA CONST. art. 243D, cl 1b

<sup>171</sup> INDIA CONST. art. 243T cl.1

<sup>172</sup> INDIA CONST. art.15.Nothing in this article or in clause ( 2 ) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

<sup>173</sup> INDIA CONST. art.16, cl 4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

<sup>174</sup> INDIA CONST. art.16 cl 4b

The recent controversy about reservation of 33% seat for women in the state of Nagaland had drawn the attention of both judiciary and legislature as a whole. Various studies conducted reveal a dismal picture of the State of Nagaland. Since the first election to the state Legislative Assembly conducted in 1964 to the latest one held in 2008, not a single women has made it to the state legislature. Starting from the first election in 1964 to the latest one in 2008 there has been only 12 women candidates. This accounts for a mere 0.6 percentage of the total candidature.<sup>175</sup>. In 2008, it was the highest in number when 4 women candidates contested the election. Rano M. Shaiza, in 1977, successfully contested the Lok Sabha elections, on a United Democratic Front ticket. She hence became the one and only women from Nagaland to get elected in a state or union election.

The main reason for such segregation can be regarded as the patriarchal mind-set of people. The study also reveals that the traditional political institution is still very much male dominated institution. Though there are a few village councils that do have women as members, the same cannot be generalized for a majority of the other village councils. While interviewing a group of people in phek district of Nagaland, there was a contrasting opinion in this regard. After interviewing a few people regarding the political right of women a Mix respond was found. A few statement are quoted below which explains the society of Naga.

*A men aged 50 stated that Customary practiced are equivalent to bible, it cannot be altered or changed. Women and male are biologically and psychologically different and hence women should better mind their business, that to manage household affair and look after children and husband. They have the right to vote but for representing people in election they are not yet developed enough. Young Generations girl child, who are getting good education might be able to handle the responsibility but at present, women are not eligible enough*<sup>176</sup>

Another lady belonging to the Chakhesang Nagas tribe of Nagaland stated that *Customary laws which does not fulfil the basic mandate of equality should be scrapped of, women should come ahead and fight for their right. Education is the key*

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<sup>175</sup> Monalisa Changkija, *Pride as well as prejudice*, Hindu, Feb.8, 2017, <https://www.thehindu.com/profile/author/Monalisa-Changkija-5699/-> accessed on 28<sup>th</sup> May 2108.

<sup>176</sup> Respondent no. 5, from the phek district.of Nagaland

*to solve the entire problem from its Grass root level as educating women means educating an entire family*

Another woman from Sohomi village stated *that Peace and Harmony should always be prevailed in the Society and keeping this in view women should slowly and gradually come out and hold each other hand and move toward the path of glory*

The bone of contention in this regard was Article 371(A)<sup>177</sup>, which provide special status to Nagaland, Articles 243 (D)<sup>178</sup> which gives 33% reservation for women, in local bodies and Article 243M<sup>179</sup>, which state that the this part doesn't apply to certain area such as Nagaland, Mizoram and Meghalaya. In order to fulfill the mandate of 1992 Constitutional amendment, Nagaland Municipal Act, 2001, through a 2006 amendment, discussion on reservation of seat, for women in Nagaland Local bodies<sup>180</sup>. Faced with vehement opposition, the Nagaland government did not conduct elections to civic bodies for over 10 years.<sup>181</sup>.

With the amendment of 2006 another dramatic story begun where by Spearheaded by the Naga Mothers' Association (NMA), Naga women filed a writ petition challenging the State government's refusal to hold municipal elections before the Kohima Bench of the Gauhati High Court on June 26, 2011<sup>182</sup>. In October 2011, a single-judge bench of the court upheld the Naga women's petition and directed the government to hold elections to municipal councils and town councils on or before January 20, 2012<sup>183</sup>. But before the deadline, the Nagaland government filed an appeal before a Division Bench of the Gauhati High Court, which stayed the previous ruling. One of the arguments put forward by the Nagaland government was the claim that implementing

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<sup>177</sup> INDIA CONST. art.371, cl A.

<sup>178</sup> INDIA CONST. art. 243D, cl 1b

<sup>179</sup> INDIA CONST. art.243, cl m.; Part not to apply to certain areas

(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause ( 1 ), and the tribal areas referred to in clause ( 2 ), of article 244

(2) Nothing in this Part shall apply to

(a) the States of Nagaland, Meghalaya and Mizoram;

(b) the Hill areas in the State of Manipur for which District Councils exist under any law for the time being in force

<sup>180</sup> Arunabh Saikia *As Nagaland prepares to review reservation for women in civic bodies, old fault lines surface*, Scroll, June. 21, 2018, <https://scroll.in/article/855672/as-nagaland-prepares-to-review-reservation-for-women-in-civic-bodies-old-fault-lines-surface>- accessed on 21th May 2018.

<sup>181</sup> Monalisa Changkija, *Pride as well as prejudice*, Hindu, Feb.8, 2017, [https://www.thehindu.com/profile/author/Monalisa-Changkija-5699/-](https://www.thehindu.com/profile/author/Monalisa-Changkija-5699/) accessed on 28<sup>th</sup> May 2108.

<sup>182</sup> Id. at 171.

<sup>183</sup> Id. at 171.

such a law would ‘upset the peace’ in Nagaland. On September 22, 2012, the Nagaland State Assembly adopted a resolution rejecting women’s reservation in U.L.B.’s on the ground that it infringes on the social and customary practices of the Nagas, which Article 371(A) safeguards.”<sup>184</sup>

The Joint Action Committee on Women Reservation (JACWR) then moved a Special Leave Petition in the Supreme Court in September 2012.<sup>185</sup> On April 20, 2016, the Supreme Court upheld the single-judge ruling of the Gauhati High Court of October 2011. So, the Nagaland government enacted the Nagaland Municipal (Third Amendment) Bill 2016, which revoked the September 2012 resolution, paving the way for women’s reservation in ULBs. Early in January, the State government announced that elections to the ULBs would be held on February 1”<sup>186</sup>

As stated by T.R. Zeliang that “33% reservation for women, did not violate or infringe infringing upon Naga customary law and tradition of Nagaland. As the very concept of urban bodies is new and were never a part of the customary practices of the Nagas. He further stated that towns and municipalities are new concepts and have nothing to do with tradition and customary practices of the Nagas. The decision is taken long back during a Cabinet meeting in August 2000 and enjoys peoples”<sup>187</sup>

Although the judgment and the order of the state Government paved way for 33% reservation for women, but the Naga society did not accept it whole heartily. A few respects the decision of Supreme Court and others just demanded autonomy of their customary law.

*Supreme Court shouldn't have judicial authority per se in Nagaland State. Nagaland Government may ignore it, of course women reservation should be inculcated at the wisdom and Authority of the State Government and Supreme Court should be ignored by quoting Article 371A.*<sup>188</sup>

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<sup>184</sup> Id. at 171.

<sup>185</sup> Writ Petition (Civil) (No. 242/2014)

<sup>186</sup> Arunabh,*Supra* note 176, at 170

<sup>187</sup> Arunabh,*Supra* note 176, at 170

<sup>188</sup> Arunabh,*Supra* note 176, at 170

*As per the Article of 371(A) the Nagas have the absolute authority to decide for itself unlike other mainland Indian states and centre has no say over us. This SC's verdict may be an insult to some thinking Nagas, India should respect Article 371A.*<sup>189</sup>

*Nagas women approached to the court is not satisfactory...the matter/problem should have been settled within the parameter of Nagas's customary court. Everyone Should respect and defend Art 371(A). It is our duty to safeguard the hard-earned glory of our ancestor*<sup>190</sup>

*Nagaland is an integral part of India, Supreme court has every right to interfere in all these sensitive issues. Moreover Article 371A, is to be practised within the village jurisdiction and to be only practised in small a petty issues within the village jurisdiction. Each and every citizen of India has to go by the Indian Constitution and abide by the law of land.*<sup>191</sup>

4.2 Validity of customary law of Chakhesang Nagas, with other relevant laws of India.

4.2.1. Criminal law

Apart from Constitutional law, there are other penal civil and other matrimonial laws prevalent in India. Although Nagaland had been provided with special status by virtue of Article 371A, however principle of Natural justice must be followed.

In the context of India, It has a well-established statutory, administrative and judicial framework for criminal trials. Indian Penal laws are primarily governed by three Acts:

1. The Code of Criminal Procedure, 1973
2. The Indian Penal Code, 1960
3. The Indian Evidence Act, 1872

Cr.P.C. is a comprehensive and exhaustive procedural law for conducting a criminal trial in India, including the manner for collection of evidence, examination of

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<sup>189</sup> Respondent no 6; from phek District of Nagaland

<sup>190</sup> Respondent no 7; from phek District of Nagaland

<sup>191</sup> Respondent no 8; from phek District of Nagaland

witnesses, interrogation of accused, arrests, safeguards and procedure to be adopted by Police and Courts, bail, process of criminal trial, method of conviction, and the rights of the accused for a fair trial. The procedure for a criminal trial in India, is primarily, except as otherwise provided, governed by The Code of Criminal Procedure, 1973 (Cr.P.C.). IPC is the primary penal law of India, which is applicable to all offences, except as may be provided under any other law in India. I.E.A is a detailed treaty on the law of "evidence", which can be tendered in trial, manner of production of the evidence in trial, and the evidentiary value, which can be attached to such evidence. I.E.A also deals with the judicial presumptions, expert and scientific evidence. There are certain other laws, which have been enacted to deal with criminality in special circumstances.

It is also important to note that India follows the adversarial system, where generally the onus of proof is on the State (Prosecution) to prove the case against the accused, and until and unless the allegation against the accused are proved beyond reasonable doubt, the accused is presumed to be innocent. In certain exceptional cases, which may relate to terrorism, etc., the onus of proof has been put on the accused person, who claims to be not guilty.

India has a highly developed criminal jurisprudence and prosecution system, supported by judicial precedents; however, there may be certain issues or concerns relating to the execution of the same by Police and implementation by Judiciary. The courts in India, particularly High Courts and Supreme Court have been proactively guarding the rights of the accused. Even Article 21 of the Constitution of India has been interpreted in a highly dynamic manner to protect the rights, life and liberty of the citizens, by also incorporating the principles of natural justice. According to Indian Law criminal offenses are offences against the state, it includes felonies and misdemeanors. The standard of proof for crimes is "beyond a reasonable doubt. "Section 53 of the Indian Penal Code, 1860 prescribes five kinds of punishments.

1. Death Penalty
2. Life imprisonment
3. Imprisonment

- Rigorous
  - Simple
4. Forfeiture of property
  5. Fine<sup>192</sup>

While in the Customary law of Chakhesang Nagas society we have seen that division of any crime ie civil and criminal is mainly based on the two idea. Act that are life threatening are considered as criminal offence and others such as rape, kidnapping are placed within civil jurisdiction. There is no proper demarcation between civil and criminal offence. In the context of Indian criminal law, it is a well codified which defines each and every ingredient of crime.

Among the Chakhesang Nagas tribe, Crimes are categories in a hierarchy based structure depending upon on the severity

- a) False oath.
- b) Murder ( intentional and both unintentional)
- c) Poison user mostly by female
- d) Rape/ adultery
- e) Stealing and Extortion
- f) Going against the rules of the village
- g) Withering of evidences

However many villagers believed that false oath is more severe crime than murder as said by one of the villagers of “ *We have seen in our life time that the one who administer false oath can although get away with the punishment inflicted by gaon buras or village council but they will never be able to get away from punishment of*

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<sup>192</sup> Jeuti Barooah Customary laws of the Chakhesang Nagass of Nagaland, with special reference to their land Holding system.8-9 (2011)

*god. Many even during their life time suffers from chronic diseases or may live a lengthy painful life because of false administration of oath.”*

Normally in case of trivial issues, it is generally solved by clan / KHEL member. However if they are not satisfied with the decision, they refer the cases to Village council. Only when a complaint is filled, by the aggrieved individual or party the village council will institute a case. The Villagers perspective and understanding of crime is very different from the mainstream Indian’s perspective. The society was very simple and still in the age of globalistaion, they adhere to their belief of customary law. In the year 2013, In the Chizami Police station of Nagaland, only 4 cases was registered pertaining to election offences and only 3 cases was registered in the year 2012 and 2011. No criminal offence is registered in the Chizami police station from Thetsumi village.

While conducting research in Thetsumi village, there is a very shocking tradition among Nagas, which is still prevalent in today’s society. This is also prevalent among other Naga tribes residing in Manipur also. In case of Accidental killing where there is a mutual agreement between two villagers such as that if anyone from one side of the village accidentally kills someone from the other side of the village. Then they may seek for refuge in the other village. The relatives of the victim are not allowed to vacate the place, out for revenge or punishment. This practise is carried out so as the accused is not forced to wander off to faraway place seeking for asylum.

Many a time these cases are not brought before village council and they mutually solve their cases. However when a murder case is filled in village council. The first and most important thing they consider is intention. If a person kills the other person by mistake. Then the person who killed has to give memorial stone and three 5 years old Ox.<sup>193</sup>. Apart from these oath is given primacy in Naga customary law. Thus the customary law of Chakhesang Nagas is quite primitive, where even heinous crime, such as rape, which is punished with death penalty under Indian law is just a civil offence in their society.

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<sup>193</sup> Lasuh, Kukhrolo, *Customary Laws In Dealing With Crime And Punishment (A Case Study Of Chakhesang Nagas Tribe*, T.I.S.S, 22-25, 2014 ; <http://ezproxy.tiss.edu:2195/handle/1/2555>.- accessed on 16th June 2018.



#### 4.2.2 Civil and Family laws.

In a simple term civil law can be defined as general law, which is associated with disputes between individuals, organizations, or a two, wherein the wrongdoer compensates the affected one, is known as civil law. Civil law alludes to the system of rules and regulations, which describes and safeguards the rights of the residents of the country and provides legal remedies to a dispute. It includes cases relating to private matters such as property, contracts, torts, family dispute, etc. The party who files the suit is called plaintiff, while the party who responds to the suits is known as a defendant and the entire process is termed as litigation. The basic objective of the civil law is to seek redressal of the wrongs, by imposing compensation on the wrongdoer rather than giving punishment. The wrongdoer bears only that extent of the damages, which are required to make good the wrong done to the aggrieved party. In the context of India civil law is generally guided by the principle of Civil Proceedure code<sup>194</sup>. In the context of dispute relating to Transfer of Property act<sup>195</sup> also play an important role.

In the context of Chakhesang Nagas society, relating to any civil case, it is being seen that dispute are resolved by village council by awarding compensation that varies on case to case basis. A civil case as decided by village council, is enumerated below

##### Case 4

“Mr.Vehiiswii, who lost his dog, filed a case at the village court against Mr. Vesoseyo saying that his dog was last seen entering the house of Mr. Vesoseyo. When the village court inquired the matter Mr. Vesoseyo and his family member refused to accept the allegation. They took an oath that they did not kill Mr. Vehiiswii dog. Thus the case was settled by the village court putting forth the condition that if anybody raises an issue regarding this case, It would be penalised a sum of 2000/- as fine by the village court”<sup>196</sup>

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<sup>194</sup> Code of Civil procedure 1908, No.5 Of 1908 (Acts of Imperial Legislative) 1908.

<sup>195</sup> Transfer of Property act 1882, No. IV, (Acts of Imperial Legislative) 1882

<sup>196</sup> Jeuti Barooah Customary laws of the Chakhesang Nagass of Nagaland, with special reference to their land Holding system.8-9 (2011)

Moreover there is a well-established principle that is “Doctrine of clog on redemption”<sup>197</sup> under section 60 of the Transfer of Property Act, 1882, which states that “when a mortgage takes place, there exists a right of the mortgagee to buy back the property without any encumbrances by paying the loan. This right arises out of equity, and is commonly known as the right to redemption. Any obstruction to this right is void as it constitutes a clog on the equity of redemption.”<sup>198</sup> The maxim ‘once a mortgage always a mortgage’ means that there can no covenant that modifies the character of the mortgage agreed between the parties that would stop the mortgagor to redeem his property back on payment of the principal and respective interests. But we have seen that In Chakhesang Nagas customary law the mortgage property is confiscated if the mortgagee is unable to pay the loan within the prescribed time limit.

In the context of laws relating to succession and matrimonial law relating to divorce, custody of the Chakhesang Nagas, as already mentioned in third chapter seems to be discriminatory toward women. As per as the Hindu law is concerned the Hindu women’s right to property was recognized under Section 14 of the Hindu Succession Act 1956<sup>199</sup>. The 1956 Act was again amended in 2005<sup>200</sup> and section 6, confer birth right to Hindu women belonging to Hindu Mitakshara Joint family. Moreover Supreme court of India have waved large number of cases in order to remove stringent discriminatory provisions towards women. It was in the case of Mary Roy v. State of kerala,<sup>201</sup> where Supreme Court held that Christian women have right to inherit property as that of male. In the case of Githa Hariharan & Anr vs Reserve Bank of India, supreme Court held that “Section 6 of the H.M.G.A, Act, mother can be Natural Gaurdian as that of father.”<sup>202</sup>

Thus the status of women in the Chakhesang Nagas society can be better understood as “Segregated class and not the deprived one”. Women enjoy a good dignified life, but are not permitted to inherit property. Thus there is an urgent need to bring change in society so that women are given equal privilege as that of men.

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<sup>197</sup> Transfer of Property act 1882, No. IV, (Acts of Imperial Legislative) 1882.

<sup>199</sup> Hindu Succession Act 1956, No .30 of 1956(Acts of Parliament)1956

<sup>200</sup> Hindu Succession(Amendment) Act,2005, No .30 of 1956(Acts of Parliament),1956

<sup>201</sup> Mary Roy v. State of kerala, (1986) AIR 1011(India)

<sup>202</sup> Githa Hariharan & Anr v Reserve Bank of India(1999) AIR 1999(India)

*“Our customary law differ from tribe to tribe but women’s right to inherent property remain almost the same among the tribe. Women should be given right to inherent property. The lineage is passed down through male in Naga society as we follow patriarchal culture. Since its only about lineage not property, the women have the right to inherit the property”*<sup>203</sup>

*Nagas are influence by western culture and lifestyle, they talk about changes but in the end, they are too scared to bring change in any sphere including Law. In Modern Society, women are treated equally as that of men. Our Chakhesang Nagas society also treat women equal to that of men, but from the legal perspective they are not equal. Hence law should be amended*<sup>204</sup>.

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This chapter would be incomplete, if the discussion on the codification of customary laws of Chakhesang Nagas is not discussed. While interviewing a few people on Codification of Customary law and does the customary law and the present set of dispute redressal mechanism is best one or there should be some changes on it? Almost every person the researcher interviewed believed that Naga Customary law must be codified, so that the rich heritage and culture could be bestowed upon the upcoming generation.

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<sup>203</sup> Responded no. 9; from Phek District of Nagaland.

<sup>204</sup> Respondent no 10; from Phek District of Nagaland.

<sup>205</sup> Respondent no11; from Phek District of Nagaland.

<sup>206</sup> Respondent no 12; from Phek District of Nagaland.

*“Our society (Naga) was once known for a safe and a peaceful society. But with time, that "safe and peaceful society" seems to be vanishing. Crimes and civil wrong (Tort) has overshadowed our society. A girl child and innocent humans are victimized, traumatized, raped and kill...The present setup of Dispute Redressal Mechanisms are taking a step to tackle these issues, however sometimes emotions seem to be overpowering the object of such mechanisms which in a way, fail to achieve its purpose. Thus the present generation youth wished to codify the customary laws with proper amendments. It is high time, we need to pen it down but it should be done with utmost respect and regard for the women”<sup>207</sup>*

*“On the point of Codification of customary laws, I believe that it must be codified as then it will become rigid and which can be implemented to near perfection and can be preserved for generations to come. Crime and civil wrong in Nagaland in the past few decades are rising at a tremendous pace. In Nagaland the dispute redressal mechanism to these problems should be changed as a whole..... We the Naga tend to follow the western law mixing with the customary law, which in turn makes it more complicated. So, in my opinion It would be better if we stick to the rich customary law of our land for dispute redressal against the crime and civil wrongs .On the point of Codification of customary laws, I believe that it must be codified as then it will becomes rigid and which can be implemented to near perfection and can be preserved for generations to come”<sup>208</sup>*

*“ Crime in our society is less as compare to other state but there is no absolute code of conduct and punishment for certain crime thus the law itself is a crime. Crime can be of any kind thus some crime can take up by our customary laws prevail but in some case involve the law should decide the fate of the crime thus we need absolute law.”<sup>209</sup>*

*“Traditional Naga Society is overpowered with corruption from top to bottom, uncheck lawlessness among the citizen. So the present customary law is unable to create the atmosphere of peace. As the justice system itself have rotten. Corruption prevalent in the customary judicial system is creating and increasing the Gap between have and have not. Thus it is better to be addressed in a court, rather than addressing*

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<sup>207</sup> Respondent No 12; Law student from Nagaland.

<sup>208</sup> Respondent No 13; Law student from Nagaland.

<sup>209</sup> Respondent No 14; Law student from Nagaland

*by some "elders". Nagas are influence by western culture and lifestyle, they talk about changes but in the end, they are too scared to bring change in any sphere including Law. Customary law hence must be codified as well as modified.”<sup>210</sup>*

Thus it is evident from the above discussed fact that Chakhesang Nagas has their own customary law which differ in much aspect from that of the Indian laws. Customary law of Chakhesang Nagas gives supremacy to oath, which is against the basic proponent of criminal law. They do not even consider rape as criminal offence and many a time it is seen that if a girl points toward a man alleging him of rape. If the girl take oath then the person alleged is proved to be guilty. Hence the crux of the issue is that Nagaland should to defend its aged old incredible customary laws and practices but at the same time should keep an eye on time reciprocating to the changes that are fast occurring. As no society, culture and practices are static and hence no customary laws and cultural practices are permanent. The main objectives of any law be it customary or other statutory, is to promote peace and harmony and at the same time to achieve justice. Only when justice is achieved in true sense, people will have faith in system. Therefore, Nagas should codify there rich, incredible customary laws, and try maintaining a harmonious balance between their Customary law and Constitutional and other statutory laws prevalent in India.

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<sup>210</sup> Respondent No 15; Law student from Nagaland.

## CHAPTER 5-CONCLUSION

### Findings

- 1) After discussing the various dimension of Nagaland's customary law, especially among the Chakhesang Nagas, the most important thing that was to be discussed was-Does the concept of state resulted in weakening customary laws of Nagaland? While interviewing a few people, there was a mix views; Few believed that the justice system which is prevalent in Nagaland since inception, the Village council which was the ultimate authority is somehow losing it grip. The society has been influenced by the outer world; education is the positive by product of outer world, while the recent capitalist perspective of development is diluting society's ... the other section of people believes that change are indispensable part of human society. No society, cultures and practices are static and hence no customary laws and cultural practices are permanent. Changes should be appreciated until and unless it's consequences does not result in conflict. However there are other group of people, mainly consisting of women, who have no idea about the concept of state and justice. These women are neither the head of the family nor they have the right to inherent property of their husband or father, but they are leading a respectable and dignified life since inception. These women have full faith in their customary law as well as village council.
- 2) From customary law point of views, people however prefer Village council rather than the Dobashi court. As village council is cheap and no fees are required. While Dobashi court although follows the principle of customary law, but in a much legal version. In civil cases such as land dispute, people prefer village council rather than Dobashi court or other Indian legal system. As they believe that customary laws are more accessible, affordable and convenient with an added advantage of the community people knowing the traits of the defendant and complainant. Moreover there is less chance of pendency of case as found in other High Court and Supreme Court.

- 3) The customary law of Chakhesang Nagas gives primacy to oath. Oath serves as the last means of addressing and solving any dispute. Before the advent of Christianity, people used to believe that a supernatural being or force that was good, just and honest is looking after their native people. The same principle is even reflected in Bible. Thus the principle of Oath taking is still continued and acts as the last method to resolve any dispute. It is being believed that god is watching everyone and the one who take false oath would be severely punished.

As believed by the Naga tribes false oath is more severe crime than murder as “the one who administer false oath can although cab escape from the eyes of village council but not from god.”

- 4) Interpretation of customary law- As customary laws are not written one and is uncodified its interpretations differs and varies from people to people. The head of the village council also interprets the customary laws according to his own understanding. Under the customary law, there is no particular or specific ingredient to constitute any crime. As in case of crime committed by any juvenile or adult or children. There is no proper yardstick that defines juvenile and children. For a few juveniles are children below fourteen years of age; for some it is below sixteen years of Age. A few even determine juvenile on the basis of the existence of pubic hair. Thus the approach is very subjective in nature. The punishment determined for any juvenile also varies accordingly.
- 5) The status of women in the Chakhesang Nagas society can be better understood as “Segregated class and not the deprived one”. Women enjoy a good dignified life. But are not allowed to inherit property. Women are not entitled the right of succession. Women can never be the “Karta” of the family. They are not privileged to have a share in the property of their father or in their ancestor property. In case of Divorce, women are not allowed to keep the custody of male child. Women are even forbidden to remarry after divorce or death of husband. In the political aspect, although they are allowed to caste vote but are not allowed to contest election. The participation of women in Dobashi court or in village council is also negligible.

- 6) Naga society is constantly changing. It is no more guided by the principle of equality, spiritually, ethics and norms. The society is flooded with corruption. Among the Chakhesang Nagas Society, the gap between the have and have not is increasing exponentially. Many believe that because of their traditional stringent customary law, they are unable to welcome economic development as a whole.

The word Naga and Nagaland are two distinct term one connotes the indigenous Naga tribe who belongs to the Mongoloid race. The other denotes geographical area which was carved out of Assam by 13<sup>th</sup> amendment and became a separate state. Customary law of any tribal group can be regarded as the study of the tribe itself. It defines its history, belief, culture and society. It can be regarded as tribal laws, which are prevalent in today's tribal societies. Customary laws thus include rules, which were acknowledged since time immemorial and are still approved and accepted by the society and it becomes an indispensable part of any society.

Thus their model of justice and their definition of crime did not change much after the adoption of Constitution of India. The Village council, which act as the medium for ensuring justice, is still relevant in the context of the Chakhesang tribe. Most of the cases are resolved by village Council. There is very less number of F.I.R. lodges in police station. One of the important aspect of customary laws of Chakhesang Nagas is the fast delivery of justice. As "Justice delayed is justice ignored". The Chakhesang Nagas society believes in the system of reformative justice. They adopt the punitive approach rather than preventive one. The Naga society as whole is required to shift their approach towards justice. Oath should not be the last resort to solve any dispute. The position of women especially in relation with the inheritance of property should improve.

Thus the journey of Nagaland from the Head Hunter, to the present beautifully crafted society is incredible. Even the formation of State and the adoption of Constitution could not change its age old institution. The society is evolving in the era of Modernity, but still it ensures believe in the traditional mechanism of justice. It is time that they should codify, their age old customary law so that they preserved it for next generation.



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