

## Gender Perspective of Art 371 (A): A Social Inquiry on Legal Pluralism in Nagaland

Renchumi Kikon Kuotsu\*

A. Wati Walling\*\*

**Abstract:** *The North Eastern States of India like Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, and Tripura are privileged by the Indian Constitution being accorded special provisions. The states of Mizoram [Article 371 (G)] and Nagaland [Article 371 (A)] were born out of agreements signed between the Government of India (GOI) and rebel leaders who were arguably fighting for secession from the Indian union. No doubt, the Constitution is the supreme law of the land, and the Parliament, the sovereignty in matters of legislation. However, when the state legislature is empowered to reject or modify a law passed by the Parliament, and also, special status conferred to the customs of the people, by the Constitution, one may argue: Which is more powerful; the tribal bodies or the state government; the customary laws or the Constitutional laws? Furthering the discourse is the gendered dimension: How much have women in Nagaland benefited politically or otherwise, with the coming of Article 371(A)? When many women in several parts of India are enjoying the reservation of seats in the local governing bodies, women in Nagaland are yet to benefit from the special provisions given in the constitution. In this quest, the Urban Local Bodies (ULB) election imbroglio of February 2017 will be examined vis-à-vis women's political position in Nagaland.*

**Keywords:** *Article 371(A), Naga Customary Laws, Legal pluralism, Urban Local Bodies (ULBs), Naga Women*

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\* Renchumi Kikon Kuotsu, Research Scholar, Department of Science and Humanities, NIT Nagaland, Chumukedima.

\*\* A. Wati Walling, Asst. Prof, Department of Science and Humanities, NIT Nagaland, Chumukedima.

## **Introduction**

Legal Pluralism<sup>1</sup> in India is an outcome of a diverse element composing the Indian Union. The Nagas (as a State) have their own customary laws which govern all aspects of their public and private life. At the same time, the Indian union (as a Centre) has laws which deal with rights and privileges of men and women which eventually determine their access to power. In Nagaland, we have a situation where both the legal entities interact and intersect claiming their own spaces evidencing the power struggle. It is of interest to examine the way power holders take on events under the guise of customary laws and constitutional law particularly in their engagement with the women's question on power. On one hand, we have the Tribal male bodies<sup>2</sup> as custodians of the Naga customary laws and on the other hand, the Nagaland Legislative Assembly (NLA) established under the oath of the Indian Constitution. This paper attempts to connect the particularity of the experience of the 'gendered Naga citizen' who is caught between the modern constitutional law and the Naga customary laws.<sup>3</sup>

## **Information Base**

The research universe is the state of Nagaland comprising of twelve districts- Dimapur, Kohima, Kiphire, Longleng, Mokokchung, Mon, Noklak, Peren, Phek, Tuensang, Wokha, and Zunheboto. For data collection, apart from the questionnaire, extensive discussions were conducted with men and women in different capacities; student, youth, women and community leaders, elderly citizens, persons from the academics, village women and men, functionaries of social organizations and village councils, ward councilors in towns, elders, and women candidates.

The views on 'Gender Perspective of Article 371 (A): A Social Inquiry of Legal Pluralism in Nagaland' have been analyzed by participatory observation on people's reactions, debates, and discussions right from the time the issue of women's tentative participation in the Urban Local Bodies (ULBs) via 33% reservation came to the forefront in Nagaland in 2006. Coupled with the personal and upfront observation of the whole process being a part of the Naga community, the information drawn from interviews and dialogues with people representing varied shades of life have given immense support in shaping the present discourse. Further, it is being acknowledged that the present endeavor owes a lot to people's collective and personal values and ideologies (both Nagas and non-Nagas) widely circulated by virtual as well as print means of information which have gone a long way in contributing to the strength of this article.

## Origin of Legal Pluralism in Nagaland

The study of legal pluralism in Nagaland requires one to historically enquire into how the Nagas started to have two 'normative orderings'<sup>4</sup>: the Naga customary laws and the constitutional laws. In this venture, one may consider evidences where justice was served by death penalty imposed by the colonial administrator on a native for an act of murder.<sup>5</sup> Again, a colonial ruler 'summoned' the village chiefs to *Golaghat* as they failed to meet him at *Dheemapore* (Grange, 1840, p. 947-966). These acts may be taken as an indication of redefinition of the mode of punishment ranging from imposition of fines for disobedience or in extreme cases, to the point of ex-communication<sup>6</sup> for non-compliance to 'commands' issued by Naga tribal leaders practiced till date. These interactions between the colonial masters and the natives conform to Tamanaha's (n.d., p. 382) view that customary laws have been influenced and retrenched by the indirect dealings of the colonial rulers using 'native courts' and 'indigenous leaders'. In addition to colonial rule, Wouters has added Christianity and interaction with the Indian state as contributory factors for modifications of the Naga customary laws (MEX 7/3/2017).<sup>7</sup>

As far as the other aspects of the Naga life are concerned, the colonial rulers did not meddle in the social life, manner of living, laws, customs and religion of the Nagas. After the Indian independence too, these aspects were kept free from the interference of the Indian government which were further strengthened with Nagaland statehood in 1963 by insertion of Article 371 (A) in the Indian Constitution. The legal acknowledgment and the grant of the right to observance of the Naga practices by the British, and later on by the Indian government allowed the continuation of the Naga system of administration along with the modern legal system based on the constitution of India. This system however, left unfavorable condition to women with an unbridled patriarchic domination practiced traditionally.

## The Coming of Article 371(A)

The Sixteenth state of the Indian union, Nagaland is a state born of a political bargaining between the Government of India (GOI) and the Naga Peoples Convention (NPC) popularly known as the 16-Point Agreement of 1960. Based on the Agreement, the Article 371 (A) was given to the Nagas by the 13<sup>th</sup> Amendment Act of the Indian Constitution.

The Article 371 (1) relating to the Nagas stands as:

Notwithstanding anything in this Constitution- No Act of Parliament in respect of

- (i) Religious and 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 of Nagaland by a resolution so decides.

### **Gendered Roles in Naga society**

The Naga system of administration traces its source in the social arrangement of the village on the premise of patriarchic or male-dominant leadership.<sup>8</sup> The mode of governance adopted by the Nagas in the village administration and society was even lauded by the British administrators and writers as “democratic” (Hutton, 1921, p. 143; Elwin, 1969, p. 325, 352). It was a primitive rule where only the male members could take part because of the prevalent mode of economy based on hunting and farming. Moreover, the maxim ‘might is right’ was customary as headhunting was the procedure in determining one’s position and status in the society. The pride of the village depended on the prowess and skill of men in these ventures. Therefore, it became important that the warriors be taught the skills and art of war in the *Morung*<sup>9</sup> leading to the ruler ship of the most shrewd and able person among the male members who were engaged in the wars and hunting sprees. This is how there was rigid segregation of roles between men and women exacting men in the “public sphere” and women in the “private sphere” (Elwin, 1969, p. 90). Based on this belief, in the research field, the chairman of the Village Council at Tajung village explained that, *‘It is the simple logic that women are not involved in decision-making arena of the village because women were not taught the art of administration in the Morung in the olden days’*. Another theory defining the segregation of roles between men and women in Naga society is based on their difference in physical and mental attributes. This view takes that since women are weaker than men physically and mentally, the activities that involve much hardship and stress are taken up by men. In the same way, some men still have the notion that women *‘do not think much and take decisions based on emotion’*.

The primitive system of governance was altered when the representative system for selecting leaders was introduced in Nagaland by the modern democratic system of governance. The Nagas seemed to have no problems with the new system as it identified with their traditional mode of governance based on representation which they claim is

‘democratic’. However, the core of the matter lies in the fact that this new governance system calls for an inclusion of women in all spaces both private and public, and allows women to take on leadership roles, including the decision-making arena based on the democratic principle of equality and justice. When it comes to the question of women’s leadership role, this new arrangement has at times led to frictions between the traditional practices of the Nagas defined by their customary laws. On this note, an educated man opined, *‘That (old system) has been challenged by the new norm that has come in the state where women also hold leadership role ...’*

### **Dissension between the State Laws and the Customary Laws**

The friction from Legal pluralism perspective in Nagaland can be examined from the factors of three-dimensional aspects: the developmental aspect; the right of the Nagas to utilize land and natural resources; and the dimension of gender-equity. Keeping up with the democratic principle of affirmative action, the special provision was provided with good intention in assisting the Nagas to achieve advancement and progress as per their ingenuity. Today, it is found that the Nagas do not hesitate to cite the contentious Article 371 (A) for protection of their culture in many circumstances. As early as 2006, Dr. Shurhozeli, the then Planning and Urban Development Minister, brought to light the problems posed by the Naga land holding-system and its implications to the development projects. To quote him, “While the objective of such constitutional provision in the state is to safeguard the interest of the community, it has only served as an obstacle to the development process in many occasions”.<sup>10</sup> It may be mentioned that in Nagaland, land is owned individually as well as communally unlike some other states in India where government owns the land. As a result, when development projects are initiated by the government, the issue of land compensation and people not wanting to part with their land are major hiccups that come along. However, there is also another side of the story takes the popular view that ‘land-owners do not want to part with their land’ a debatable issue. This view contents that the government is making this whole thing as a cover to take in people’s thoughts on the development-starved Nagaland state government (Takatemjen, 2015, p. 237). Nonetheless, the hiccups produced by the first two dimensions of legal pluralism in Nagaland have not generated attention to the tune as has been made by the third dimension vis-à-vis the issue of reservation of seats for women to the ULBs.

### **The Municipal and Towns Councils Act, 2006**

With the passage of the Parliament's 73rd and 74th Amendment Act, 1993<sup>11</sup> and the constitutional amendment of Art 243 (T) in 2009,<sup>12</sup> women in many states like Bihar, Uttarakhand, Madhya Pradesh, Himachal Pradesh, Tripura etc. are enjoying reservation of seats in their Panchayats<sup>13</sup> by direct election. To this end, the Nagaland State Legislative Assembly passed the Municipal and Town Councils (First Amendment) Act in 2006 ensuring reservation of one-third of seats in the ULBs and also a rotational reservation of the offices of the chairperson in proportion to the number of seats reserved. Following this Act, there has been a public debate on the dissonance of tribal Naga traditions of self governance and modern formal institutions such as adopted in India. In this debate, the stand of the tribal male bodies is that: firstly, the Nagas have never paid tax for their land and buildings; and secondly, the Nagas have always given an equal status to women. In the light of these developments, the Nagaland Legislative Assembly (NLA) passed a resolution on 22nd Sept, 2012 superseding the Act that was passed earlier in 2006.

Against this background, several tribe-based women organizations under the leadership of the Naga Mothers Association (NMA) along with the Nagaland Women Commission formed the Joint Action Committee on Women Reservation (JACWR)<sup>14</sup> to pursue the implementation of the reservation of seats for women in the ULBs. The JAWCR filed a case against decision of the State Legislative Assembly (2012) represented by two members of the NMA in the Gauhati High Court (GHC) where the Kohima division of GHC on July 31, 2012 asked the state government to set up a committee to look into the claims of certain groups, and directed that the municipal elections be suspended till the committee gave its recommendations. Being not satisfied with the ruling of the court, the NMA challenged the decision of the lower court in the Supreme Court (SC), by filing a Special Leave Petition (SLP).<sup>15</sup> The SC gave an interim relief to the case by upholding the GHC's order to conduct polls to the ULBs in April, 2016. With this new development, the state government started to prepare for the conduct of the said election.

### **A Narrative concerning the Urban Local Bodies (ULB) Election Imbroglio**

The then Chief Minister (CM) declared the Cabinet's resolution to conduct the elections to the ULBs with 33% reservation of seats as per Art 243 (T) of Part IX-A of the Indian Constitution. The CM cited three pertinent reasons for the need to conduct the elections: Firstly, the financial crunch in the state; Secondly, the 'unpredictable' court's judgment following the SLP filed by the JAWCR and; thirdly, the obligation of the state government to the Indian constitution (NP,<sup>16</sup> 26/10/2016; NP 10/12/2016; MEX 30/1/2017).

On this account, the Tribal male bodies warned the then CM of dire consequences was elections conducted and that he would be blamed for any untoward incident that ensued thereafter. Similarly, the intending candidates were issued an 'order' to desist or withdraw from filing nominations. Following this, by the last day of nominations' withdrawal, 140 candidates had withdrawn their nominations leaving only 395 candidates to fight in the 32 ULBs. Those candidates that failed to comply with the dictates of the tribal bodies were served ex-communications for seven to thirty years including a Minister in the GON. In Dimapur, the tribal male apex bodies merged to form the Joint Co-ordination Committee (JCC)<sup>17</sup> demanding that elections be postponed until the provisions of the ULBs were amended according to the cultural milieu of the Nagas.

When the demands of the male bodies were not conceded by the government, the JCC gave a call for boycott of elections and a state-wide *Bandh* which was followed by the signing of an agreement between the GON, JCC and Nagaland Baptist Church Council (NBCC)<sup>18</sup> postponing the elections for two months (with 33% reservation of seats for women) on 30<sup>th</sup> Jan 2017. However, the next day, the government backtracked which was viewed very seriously as an act of betrayal on the part of the government by the JCC. On 31<sup>st</sup> Jan, the protestors resorted to violence and arson in Dimapur and Longleng resulting to the death of two youth in Dimapur, and one from Longleng (at a later day) by police-firing. Notwithstanding the volatile situation, the government went ahead in conducting the elections in seven towns as scheduled on 1<sup>st</sup> Feb, 2017.

The JCC drew up three demands to be fulfilled by the GON: (i) the suspension of the Superintendent of Police at Dimapur under whose authority the firing order was given; (ii) the resignation of the CM and Home Minister who took part in the Tripartite Agreement signed on 30<sup>th</sup> Jan 2017 and; (iii) the nullification of the elections to the ULBs conducted in seven towns of Nagaland. In Kohima, a new tribal body by the nomenclature Nagaland Tribes Action Committee (NTAC) was formed. On 2<sup>nd</sup> Feb, at the height of anger and frustrations, the protestors who were observing *Bandh* initiated by the NTAC attacked several offices and burnt them down. Taking cognizance of the situation that had become so tense, the GON had to relent to the demands of the NTAC and declared the elections to the ULBs as 'null and void.' With much pressure from the Tribal male bodies, the then CM too resigned from the chair on 19 Feb, 2017.

### **Validation of the Male Tribal Bodies**

The narrative of the sequence leading to the nullification of the elections to the ULBs allows one to see the validation of the male tribal bodies whose powers are sanctified by the Naga customary laws. For instance, all the time, the CM cited the inviolability of the constitution, and the obligation of his government to it. However, later on, the government was made to bow down to the demands of the male bodies. These developments reveal several issues pertaining to the inter-play of power dynamics in Nagaland. Firstly, aligned with the idea that in a democracy, the legitimacy of power comes from the consent of the people, the commendable support and positive response of people, including women to the protest calls by the male bodies during this auspicious event makes one to re-examine the location and source of power in a state like Nagaland. Secondly, it is intriguing that, the male bodies are taking the cover of the constitution by citing Article 371 (A) to meet their demands. This is being observed as a 'critical departure from the Naga political discourse which has consistently asserted the position that Nagas never accepted the Constitution of India, nor consented to be part of the Union' (MEX, 28/2/2017). In this direction, Hazarika has pointed out that "It is significant that the Naga groups, which once contested the constitution and the very concept of India and their accession to it with arms, are now using this foundational document to contest each other's views as enshrined therein" (MEX, 21/2/2017). For the male bodies, they claim that their fight is for preservation of Nagas' culture and rights against the intrusion of 'Indian culture'.

Then, what is Naga culture? Is it the culture to confine women in the domestic front? These forms of expressions were openly flouted by some of the tribal leaders during the event. It may be mentioned that in Nagaland, these male bodies claim to be stakeholders in the governance of the state. Therefore, what have ire them must have been the way the GON decided to go ahead with the elections without relenting to their demands for a wider consultation and amendment of the provisions to the ULBs as per the traditional practices of the Nagas. At the hindsight, the event that encapsulated from the women reservation can be understood by linking it with a number of other standing issues that bogged down the Nagas for some time. For instance, with the installation of an opposition-less government in 2015, the NLA had the audacity to conduct sessions for a maximum of 27 minutes where issues concerning the people were hardly put up for debate in the floor of the house. There have also been various allegations of corruption like the backdoor appointments, non-payment of salaries to employees in certain departments, etc. In addition, there is another angle to the strong resentment of the people involving the underground element where the general Naga public has hit the bottom-line with rampant extortion and intimidation. The Framework



Agreement signed between the GOI and NSCN (IM) on 3<sup>rd</sup> Aug, 2015 did not go well with the Nagas of Nagaland for the reason that till date, the content of the Agreement is kept in secret. Hence, we may say that the face-off between the Tribal male bodies and the government vis-à-vis the ULBs elections was primarily generated by the multi-dimensional tribulations faced daily by people that were left unattended for a long time.

### **Contesting Gendered Art 371 (A)**

What is interesting is the way the customary laws and the constitutional laws converges and diverges at points demonstrating the behavior and attitude of the people taking on the varied issues confronting the Naga society. It has been alleged that the Naga customary laws being unwritten and uncodified, men interpret them to their advantage by taking the route of selective approach. In this light, Kikon contends thus: "...Article 371 (A) has favored a male interpretation of customary laws to reinforce Naga patriarchy and exclude women from positions of decision-making processes from the beginning". From the standpoint that the Indian constitution empowers the Naga male bodies to have "full authority and power" over their customs, she alleges that the Indian Constitution is 'patriarchal' and further makes the Indian constitution and the Tribal male bodies to be accountable for "excluding the Naga women from all spheres of representative political processes" (MEX, 23/2/2017).

The idea that "customary laws have a gender dimension" having the potential to put women at a disadvantaged position as "they define the roles of men and women" (Fernandes et al, n.d., p. 22) seem to hold true for the Nagas too. The tribal male bodies with an intention to protect Naga culture, not only succeeded in putting pressure on the state government to declare 'null and void' to the elections that were already conducted but also pressurized the NMA to withdraw the SLP that was filed in the Supreme Court. Moreover, some of the tribal women organizations were made to withdraw membership from the apex women body, i.e., the NMA.<sup>19</sup>

### **Conclusion**

Looking at the political history of Nagaland from the standpoint of gender perspective vis-à-vis legal pluralism, a pertinent question arises; how much have Naga women gained politically as Indian citizens from the marriage between India and Nagaland vis-à-vis Art 371 (A)? To date, there has not been a single Naga woman to occupy a seat in the NLA. Further, the Tribal male bodies' interference in the elections to the ULBs seems to have disrupted women's enjoyment of the affirmative action for political empowerment. In the light of the

ULBs' 2017 fiasco, it appears as if the Art 371(A) is a snag to the fulfillment of Naga women's longing for equal rights and privileges granted to all citizens irrespective of caste, sex, religion, descent and place of birth.<sup>20</sup> If the Nagas are apprehensive of eroding the cultural practices of the Nagas by implementation of the 33% reservation of seats for women in the ULBs, one may refer to the Mizoram case where the state has implemented the reservation policy without fears of infringement to their cultural practices. Moreover, Nagaland government by an Act has reserved 25% of seats for women in the Village Development Boards (VDB Model Rules 1980, Clause 4-b) though not implemented in toto. From the perspective of the political position of women in Nagaland vis-à-vis Art 371 (A), we may conclude with a statement from the editorial column of the MEX that, "Subsequently, the colonial construct of 'customary law' became more narrowly defined and lost its flexibility under the State system in the post-colonial era and this reinforced the hierarchal and patriarchal systems" (MEX 21/2/2017).

## END NOTES

<sup>1</sup> "A legal system is pluralistic in the juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system" (Merry, 1988, p. 871).

<sup>2</sup> In Nagaland, there are tribal bodies representing the interests of the tribe. Again, several tribes come together to form inter-tribal bodies. Given that these bodies or organizations are dominated by males, they are, together called tribal male bodies.

<sup>3</sup> The Nagaland *Gaon Buras* Federation has defined 'Naga Customary Laws' as the customary laws of every tribe brought under the name and style of Naga customary laws (Nagaland Post, 9/11/2016).

Note: The Britishers bestowed upon the village chiefs with the nomenclature '*Gaon Buras*' and made them the custodians of the Naga Customary Laws in the villages.

<sup>4</sup> The concept of 'normative orderings' is taken from Brian Z. Tamanaha (n.d., p. 397)

<sup>5</sup> Captain Butler gives an account on a death penalty sentence upon a man for beheading a coolie in his team at Wokha. (1874/65, p. 9).

<sup>6</sup> Ex-communication is the severest form of punishment practiced among tribes and castes in India. Among the Nagas, this practice involves banishment of the culprit/s from the village or tribe for a period of seven to thirty years and thus renders him an existence without an identity.

<sup>7</sup> MEX stands for Morung Express, a daily newspaper in Nagaland.

<sup>8</sup> The Naga mode of administration was defined as 'so pre-eminently patriarchal as to be no government at all' by R. G. Latham in Elwin, 1967, p. 97

<sup>9</sup> *Morung* is a bachelors' dormitory practiced in the olden days where young boys were taught the art of warfare and village administration.

<sup>10</sup> <http://www.oneindia.com/2006/11/15/art-371a-obstacle-in-nagalands-urban-development-shurhozelie-1163579791.html> (accessed September 29, 2016).

<sup>11</sup> 33% reservation of seats for women.

<sup>12</sup> This Act enhanced the reservation to 50%.

<sup>13</sup> In Nagaland, in lieu of the Panchayati Raj institutions, there are Village Councils at the grassroots village level, and Town Councils and Municipalities in the towns together clubbed as the Urban Local Bodies (ULBs).

<sup>14</sup> The JAWCR comprised of the NMA, Eastern Naga Women Organisation, Naga Women Hoho Dimapur, Tenyimia Women Organisation, Watsu Mangdang, and the State Women Commission.

<sup>15</sup> Source: [www.downtoearth.org.in](http://www.downtoearth.org.in) (accessed August 23, 2014). The Special Leave Petition was later on withdrawn by the NMA when unprecedented problems emerged after the conduct of ULBs elections leading to mob violence and death of three youth in police firing.

<sup>16</sup> NP stands for Nagaland Post, a daily newspaper.

<sup>17</sup> The JCC is a tribal male body formed by the CNTC (Ao *Hoho*, Lotha *Hoho*, Sumi *Hoho*), the *Chakhroma* Organisation, the Western *Chakhesang* Organisation.

<sup>18</sup> The NBCC is the apex body of the Baptist Christian denomination with 80% of Christian membership (approximately) in Nagaland.

<sup>19</sup> The *Angamimiapfu Mechu Khrotho* (Angami Women Organisation), the *Chakhesang* Mothers Association and *Sumi Totimi Hoho*.

<sup>20</sup> Art 14 and 15 in Part III of the Indian Constitution.

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