CHAPTER 6

PROSPECTS FOR CUSTOMARY LAW:
THE VIEWS OF THE ANGAMI AND THE GARO

The primary focus of this chapter is to examine the future of customary law in Northeast India as articulated by the Angami and the Garo participants in the interview schedule and in-depth interviews. The first section of the chapter will discuss the different modes of accommodation of customary law pursued by various nation-states in the world. The second section will discuss the various modes of accommodation proposed by the communities under study. Since many states in Northeast India have taken the path of codification of customary law in an effort to reform them, the third section will examine the big debates on the codification of customary law in India during colonial times and later. With the insights gained from the discussion in the third section, the fourth section will analyse the response of the Garo and the Angami participants to the issue of codification.

When a state encounters customary law system of tribal communities within its territory, it can respond in a number of ways. Two broad ways are either to abolish customary law system completely or to accommodate them at various levels. The former approach might lead to discontentment and disillusionment among the tribal communities which might result in protest movements and demands for autonomy or even secession from the state. Further, a state might find it hard to justify such an approach in the context of many an international covenant, especially ILO Convention No. 169, which safeguard the indigenous people's rights to follow their way of life and social practices.
In case the state gives recognition to the existence of customary law within its territory, then it faces the question of the status of customary law vis-à-vis the national legal system. The government has to deal with the essential question of what sort of approach should be taken for the accommodation of customary law in the context of the legal regime of the wider state. Should the approach be of harmonization of laws? If harmonization, should it take the form of unification, where customary law is assimilated into the state law? Or should it take the form of integration, where customary law is woven into the law of the state? Should customary law be given an autonomous status simultaneously with the prevailing legal regime, thus leading to legal pluralism?

**Modes of Accommodation of Customary Law**

When the African states attained independence, they were left with the presence of different systems of law. These laws broadly fell into two groups: laws of European origin and customary laws of various tribal communities of Africa. Verhelst (1968) notices two broad approaches followed by the African states to accommodate the reality of customary law system. The First was the use of common law process to accommodate customary laws of various tribal communities and the second was the use of legislation or codification. The common law process meant judicial interpretation and judicial development through which customary law was accommodated (Verhelst 1968: 1-12). Legislation or codification meant systematic compilation of customary laws into codes, statutes and restatements (ibid: 13-29).

According to Verhelst, the ultimate aim of judicial interpretation or legislation of customary law was either to reach unification or integration of customary law. By unification of customary law is meant bringing about uniformity of customary law at the
level of an individual ethnic group or at the national level. Unification of customary law at the level of an ethnic group aims at reducing local or village level variations. Unification of customary law at national level tries to formulate one customary law for all tribal communities.

On the other hand, integration of customary law has for its end the amalgamation of received law with customary law. "The purpose of integrating western and indigenous elements is to give a country its own general or common law, that is, a single body of law applicable to all persons without distinction as to race or status". Integration of customary law with western law can take place at different levels or with different branches of law.

Levy (1999) mentions three broad modes of incorporation of customary law within the nation-state system: common law, customary law and self-government. In the common law mode, customary law is incorporated within the common law. "The common law mode of incorporation recognizes customary ways of using powers or establishing legal situations for which the dominant culture has a different set of procedure". For instance, in common law mode of customary law accommodation, customary marriages might gain legal status but it would be through the concept of common law marriage (Levy 1999: 298). Thus in common law mode of incorporation customary law is largely subsumed within the wider law of the state.

In the customary law mode of incorporation, customary law is given better status and autonomy. "In this case the standards to be invoked, the concepts to be applied, the

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meanings to be imputed are those of the indigenous legal tradition. Legal decisions are to be reached in accordance with the demands of customary law, however modified or constrained that law might be".\textsuperscript{226} Thus in this mode of incorporation the state recognizes the existence of customary law based on customary norms, rules and usages. To a large extent in this mode of incorporation, customary law functions simultaneously with common law. It is not entirely subordinate to common law.

Self-government mode of incorporation is the greatest status accorded to customary law within the nation-state system. In this case, indigenous people have been to a great extent recognized as sovereign nations (ibid: 298). "Indigenous law is respected in a way analogous to the respect accorded to the laws of foreign states".\textsuperscript{227} In this mode of incorporation, indigenous people are considered self-governing except with regard to foreign affairs and alliances (ibid: 306). Further, this mode of incorporation grants territorial sovereignty to indigenous communities which the two modes do not grant.

In the contemporary world, each of these modes may not exist in its pure form. There would be inconsistencies in the application of these modes which might lead to hybrids (ibid: 308). For example, Levy mentions that in Australia the aboriginal law has been accommodated applying the principles of both common law and customary law mode of incorporation. On the other hand, the creation of Nunavut in Canada on 1 April 1999 gave partial self-government rights to the Inuit (ibid: 307). The reservations in the US too give partial self-governing rights to the Amerindians.

The discussion based on the models proposed by Verhelst and Levi highlighted the different approaches implemented by various states in dealing with the

\textsuperscript{226} Ibid., 298.
\textsuperscript{227} Ibid.
accommodation of customary law. Some states have abolished customary law system, others have either unified or integrated it with the legal regime of the state and still others have given it autonomous existence along with the statutory law. It is beyond the scope of this study to go into details on each of these approaches. Nevertheless a quick examination of the approaches implemented by some states is warranted to gain a deeper understanding of the issue at hand.

**Abolition of Customary Law**

This is an extreme stand and it will be difficult to find examples in the contemporary world, where a state has completely abolished customary laws. Some of the states have partially abolished the customary law system on the ground that they are not suitable for the present times. In 1970s, in certain regions of Nigeria, customary law courts were abolished and in its place magisterial courts based on colonial English law were established (Nwogugu 1976). By and large, the Francophone and Lusophone colonies of Africa tried to absorb customary law into the general law which resulted in the erosion of lots of customary practices. Ethiopia and Tunisia, for instance, abolished some aspects of customary law (HDR 2004: 58).

During the times of colonial expansion, some colonial powers have blatantly denied the existence of aboriginal customary laws. For instance, in Australia, the colonisers refused to recognise the existence of native laws. For nearly two hundred years Australian courts enforced only English law on all inhabitants of Australia, whether of native or settler communities. It was only 1971 in *Milirrpum v Nabalco* that for the first time Justice Blackburn of the Northern Territory Supreme Court accepted that there had been a system of indigenous legal system existing back in 1788 (Sarre 1997; McLachlan 228)
1988: 384). It is another story that the native laws outlived the deliberate non-recognition by the mainstream judiciary even after more than 200 years.

**Harmonisation of Customary Law**

Harmonisation of customary law refers to the encounter of customary law with statutory law at various levels. This encounter of laws could be as equal partners or as unequal partners. In this context, Allott makes a distinction between unification and integration of customary law with mainstream statutory law. According to him “Unification imposes a uniform law; integration creates a law which brings together, without totally obliterating, laws of different origins.”

The arguments of those who vouch for unification are both political and administrative. The proponents of this stand argue that politically anything that contributes to national unity should be encouraged while that which contributes of national disarray should be obliterated. According to them, the presence of divergent customary laws does not contribute to national unity and therefore they should be either gotten rid of or amalgamated with the state law. From the point of view of administration, unification leads to efficiency, certainty and convenience. In 1960s, the Tanzanian government launched a unification programme of customary law, which according to Allott, had resulted in apparent uniformity (Allott 1984: 65).

On the other hand, integration allots space for the existence of customary law within the statutory system. It does not obliterate the variant law but respects it, trying to reconcile and standardize the conflicting areas between two systems of law. Among the African countries Kenya has implemented this system (Allott 1984). New Zealand

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228 Allott. 1984., op.cit., p.65.
practices a bicultural judicial system to accommodate the legal needs of Maori people who are native to New Zealand (Durie: 2006).

**Legal Pluralism**

Legal pluralism refers to the situation in which two or more laws interact within a state (Hooker 1975: 6). It pits itself against the ideology of legal centralism, which stresses uniform law for all persons, exclusive of all other law and administered by a single set of state institutions. It is premised on the proposition that there is plurality of laws in social arenas in a country. These laws exist as non-state legal orders of social control (Tamanaha: 2000). Most of the Anglophone African countries practised legal pluralism during and after the colonial rule (Allott: 1984). Legal pluralism has taken various forms in contemporary times in African continent (HDR 2004).

According to Merry (1988) there are two types of legal pluralism. The first type refers to the introduction of western legal systems in colonial countries resulting in different social normative systems existing side by side. Merry calls this classic legal pluralism. The second type refers to the existence of plural non-state legal systems in non-colonized states. She calls this new legal pluralism. The laws of cultural, religious, ethnic minorities and those of immigrants fall under the head of new legal pluralism (Merry 1988: 5-6).

Legal pluralism as a way of recognising customary law has become a policy decision in many countries, though its texture and concrete manifestation may differ from one country to another.

Countries from Australia to Canada to Guatemala to South Africa have recognized legal pluralism. In Australia there has been a renewed focus on recognizing Aboriginal and Torres Strait Islander customary law, which has opened the way to indigenous community mechanisms of justice, aboriginal
courts, greater regional autonomy and indigenous governance. In Canada most local criminal matters are dealt with by the indigenous community so that the accused can be judged by jurors of peers who share cultural norms. In Guatemala the 1996 peace accords acknowledged the need to recognize Mayan law as an important part of genuine reform.  

Its popularity and quick acceptance in government circles has made social scientists scrutinize this concept in depth. Some critics have demolished this concept on various grounds. They point out that the concept of legal pluralism is constructed upon an unstable analytical foundation which will ultimately lead to its demise. One of the main limitations of legal pluralists is that they fail to agree on a uniform cross-cultural definition of law.

The Australian Law Reform Commission tried to apply this concept in recommending recognition to aboriginal customary law of Australian indigenous people. An examination of their position regarding the application of legal pluralism to customary laws of native people in Australia will give some refreshing insights into this concept.

Australian Law Reform Commission and Legal Pluralism


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developed by ALRC is a new departure from previous models of the plural legal system.

Most contemporary models of legal pluralism are the offshoot and continuation of the ‘indirect rule’ of colonial times. Scarcely any model has outgrown this colonial hangover.

It is argued here that it is the colonial approach to the recognition of customary law which has characterized, and therefore limited, most plural legal systems to date. The form of such systems was dictated by the exigencies of colonialism itself, and does not yield value-free and ahistorical methods for recognizing customary law. Moreover, the colonial paradigm never assumed that which is the basis of the Commission’s approach, namely, that legal pluralism would be an indefinitely continuing phenomenon.\textsuperscript{232}

The approach of the 1986 Report is novel in the sense that it acknowledges that the recognition given to the customary law is an indefinite phenomena. Up until then, the approach to legal pluralism was caught up in the colonial paradigm of an evolutionary concept of law, which presumed that customary law would be gradually subsumed into the national legal system. Legal pluralism, therefore, was a halfway house to unification or integration of customary law with the statutory law. The 1986 Report charts a new path by giving customary law an autonomous status within the legal system of Australia and making it an enduring phenomenon. This approach is fresh in many ways:

In what ways is this new departure from the colonial paradigm? First, the Commission tailored its proposals to a concept of customary law which was not immutable and rooted in some immemorial pre-colonial past, but which aimed to respond to changing patterns of Aboriginal living. Second, the 1986 report respects the separate and independent sphere of Aboriginal customary law. It does not attempt to co-opt Aboriginal institutions in order to promote the interests of the State, in the way that was characteristic of the methods of indirect rule...Third, the proposals do not envisage the rigid classification of Aboriginals and other Australians into two separate spheres each governed by a separate legal system...Fourth, the report does not predetermine the areas in which State law will allow customary law to survive, as was common in the colonial approach, but rather examines areas of State law where the non-recognition of customary law has created injustice...Finally, the report does not envisage an inevitable

withering away of customary law and an assimilation of Aboriginal people. Rather, it creates conditions for the indefinite continuity of a plural legal system in Australia.\textsuperscript{233}

The report sketches a very optimistic picture for the separate and autonomous status of customary law. The report had drawn a lot of criticism from conservatives and legal centrists in Australia and most of its recommendations have not been implemented. For instance the Federal Attorney-General’s Department itself opposed the recommendations of 1986 Report: “Given that Australia is a multi-cultural society where the customary laws and traditions of many minorities exist outside the Australian legal system, to provide legislative recognition to the customary laws of one minority group would be highly inflammatory.”\textsuperscript{234} The response from government circles has been negative because it restricts the national judiciary by defining its limits vis-à-vis the customary law. If the recommendations were to be implemented it would have had far-reaching consequences on the nation as a whole.

\textbf{Modes of Accommodation of Customary Law among the Angami and the Garo}

The second hypothesis of the study states that the emerging public sphere among tribal communities in Northeast India seeks a creative fusion of the liberal democratic regime with customary laws. This follows from the first hypothesis which states that the weakening of customary law has resulted in begetting deep unease in the tribal community. According to second hypothesis the unease due to deterioration of customary law gets articulated in the public sphere. The second hypothesis, therefore, envisions an emerging public sphere among tribal communities which seeks a creative fusion of the liberal democratic regime with customary laws.

\textsuperscript{233} Ibid., 365

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This section of chapter six brings together the varied strands of opinions that get articulated in the public sphere in the Angami and the Garo tribal communities which gives an opportunity to test the second hypothesis. To do so, the following question was posed to the respondents of the interview schedule among the Angami and the Garo tribal communities: “Which system do you think is good for the village administration in your state?” The answer to this question would, apart from revealing the choice of the respondent regarding the system of administration, also points out a way forward for the customary laws. In other words, the answers to this question would chart out a course of action in the future for the accommodation of customary laws vis-à-vis liberal democratic institutions of the state. This analysis of the answers would give an opportunity for testing of second hypothesis.

The discussion that took place at the outset of this chapter talked about three modes of accommodation of customary laws, namely, common law accommodation, customary law accommodation and self-government mode of accommodation. It is hoped that the answers of the respondents also would help find out the mode of accommodation suitable for customary laws in the context of Northeast India.

Pie Chart 6.1 displaying data from interview schedules shows that 105 Angami (70 %) and 74 Garo respondents (49 %) opt for only customary law administration as the system of governance in their area of inhabitation. Pie Chart 6.2 displaying data from in-depth interviews shows that 33 out of 50 Angami interviewees (66 %) and 18 out of 50 Garo interviewees (36 %) exercise their choice in support of customary law administration in their villages. Among the Angami the difference between two types of data is 4% while it is 13 % among the Garo. Thus while the data from the in-depth
interviews seem to corroborate the data from the interview schedules among the Angami, this does not seem to be so among the Garo.

Pie Chart 6.1: Which System is good for Village Administration?

Pie Chart 6.2: Which System is good for Village Administration?
(Data from in-depth interviews)
Among the Angami, 70% respondents in interview schedule and 66% interviewees in in-depth interviews endorse customary law system as the system of governance for their villages. On the other hand, 29% of respondents in interview schedule and 34% interviewees have agreed upon a combination of customary and state law system of administration for their villages. Only one Angami respondent in the interview schedule and none among the Angami interviewees have opted for only state law institutions as a system of governance. Thus the data from interview schedule and in-depth interviews seem to reinforce each other. Nearly two thirds of Angami respondents in interview schedule and the same proportion of interviewees in in-depth interview support only customary law administration in their villages and approximately a third of them endorse a combination of customary and state law institutions.

Among the Garo, 49% respondents in interview schedule and 36% in-depth interviewees exercise their option in support of only customary law administration in their villages. In contrast, 50% Garo respondents in interview schedule and 58% of them in in-depth interviews have preferred a system wherein both customary law and state law institutions play an equal role in the administration of the villages. Thus over half of the respondents seem to support both customary and state law systems working together in their villages.

Graph 6.1 shows the disaggregated form of the data to the question of choice of administration system according to various professions of the respondents. Among the Angami, more than 75% of respondents from the category of village council members (VCM), women association members (WAM) and village elders (VE) have opted for only customary law system as the mode of governance in their area of habitation. 60%
from the category of youth association members (YAM) and church leaders (CL) and 50%
% of teachers (TR) have opted for native system of village governance.

Graph 6.1: Choice of Administration System among the Angami

<table>
<thead>
<tr>
<th>Choice of Administration System Among Angami</th>
</tr>
</thead>
<tbody>
<tr>
<td>Village Council Member</td>
</tr>
<tr>
<td>Only Customary Law System</td>
</tr>
<tr>
<td>38</td>
</tr>
</tbody>
</table>

Graph 6.2: Choice of Administration System among the Garo

<table>
<thead>
<tr>
<th>Choice of Administration System Among Garo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Village Council Member</td>
</tr>
<tr>
<td>Only Customary Law System</td>
</tr>
<tr>
<td>33</td>
</tr>
</tbody>
</table>

Why is it that more than 75 % among VCM, VE and WAM look ahead only for customary law administration in Angami villages when the percentage is lower among

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other categories? An explanation for such an overwhelming support for customary system among these groups could be that they are a group who are very intimately linked to customary laws compared to church leaders, teachers and youth who might look at the customary law system critically. Secondly the extent of exposure to other cultures too might have had its impact. While TR, CL and YAM are more exposed to outside world through education and interaction with other cultures, such an exposure might be less for VCM, VE and elderly WAM of the villages. This might have influenced VCM, VE and WAM to endorse overwhelmingly only customary law governance in the villages while TR, CL and YAM discerned other options like the creative fusion of two systems of governance.

Among the Garo, 66% of VCM and 65% of VE have backed customary law system as the best system for village administration. 50% of WAM, 40% of CL and teachers, and 35% of YAM also have supported customary law system as their choice for village governance. Like in the Angami group, those who had exposure to other cultures and better scope for education, i.e., YAM, TR and CL, seem to be gradually making space for the simultaneous presence of customary law system and state law institutions. The parallel functioning refers to a creative fusion of these two sets of institutions which will be elaborated a little later.

In contrast to the Angami, where most groups supported customary law system with 60% and above proportion, among the Garo, only two groups, i.e., the VCM and VE, supported the native system of administration with the same proportion. As noted in Chapter 5, the above data indicates that among the Garo, the state institutions have made
dent into the space occupied by customary law system while among the Angami, the customary law system still holds sway.

It was also noted in chapter 5 that the Angami customary law system has remained resilient because of both internal and external mechanisms that are in place, while the Garo native system has deteriorated amidst the entry of state law institutions. A further analysis revealed that the decline of Garo customary law institutions is due to the internal deficiency like the inefficiency of nokmas, as well as the failure of protective mechanisms put in place by the Government of India.

Such a varied trend among these two communities also manifests itself in the options people make in terms of their preferred system of administration and conflict resolution. While a majority among the Angami tenaciously hold on to customary law system, the support base is thinner among the Garo for customary law system as their preferred choice.

A question was posed to find why the respondents preferred a particular system of conflict resolution or administration. Table 6.1 shows the reasons for choice of customary law system among the respondents in interview schedule. A majority of them, 72 Angami respondents and 69 Garo respondents, justify preference of only customary laws on the basis of the close linkage between customary law and culture. Further, 57 Angami and 52 Garo have asserted the choice of customary law on the ground of their reconciliatory approach. These reasons for justifying customary law system like its close affiliation with culture, its reconciliatory approach, its easy access to conflict resolution mechanism, etc have been elaborately dealt in chapter 4 and 5. A discussion here of these points will be repetitive. However a brief analysis of the discussion from the point of
view of future prospects for customary law system especially based on the observations of participants of in-depth interview will follow.

### Table 6.1: Why only Customary Law System is Sufficient?
(data from interview-schedule)

<table>
<thead>
<tr>
<th>Designation</th>
<th>VCM*</th>
<th>WAM</th>
<th>YAM</th>
<th>CL</th>
<th>TR</th>
<th>VE</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Cases can be settled in CL system</td>
<td>14</td>
<td>6</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td>34</td>
</tr>
<tr>
<td>Village Court knows the people and hence fair verdict</td>
<td>19</td>
<td>7</td>
<td>6</td>
<td>9</td>
<td>8</td>
<td>8</td>
<td>57</td>
</tr>
<tr>
<td>State Law system is tedious</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Customary law system is closely linked to our culture</td>
<td>25</td>
<td>11</td>
<td>8</td>
<td>9</td>
<td>6</td>
<td>13</td>
<td>72</td>
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<tr>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
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<tr>
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<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Customary Law System follows Reconciliatory Approach</td>
<td>27</td>
<td>5</td>
<td>2</td>
<td>7</td>
<td>5</td>
<td>11</td>
<td>57</td>
</tr>
<tr>
<td>Not Applicable</td>
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<td>4</td>
<td>8</td>
<td>8</td>
<td>10</td>
<td>3</td>
<td>45</td>
</tr>
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<td>31</td>
<td>34</td>
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<td>43</td>
<td>279</td>
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### Garo

<table>
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<th>YAM</th>
<th>CL</th>
<th>TR</th>
<th>VE</th>
<th>Total</th>
</tr>
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<tr>
<td>All Cases can be settled in CL system</td>
<td>7</td>
<td>1</td>
<td>1</td>
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<td>1</td>
<td>3</td>
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</tr>
<tr>
<td>Village Court knows the people and hence fair verdict</td>
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<td>1</td>
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<td>1</td>
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<tr>
<td>Customary law system is closely linked to our culture</td>
<td>31</td>
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<td>Only rich and wealthy only afford Statutory courts</td>
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<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Modern system is corrupt</td>
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<td>0</td>
<td>0</td>
<td>0</td>
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</tr>
<tr>
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<td>13</td>
<td>12</td>
<td>12</td>
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<td>23</td>
<td>31</td>
<td>27</td>
<td>42</td>
<td>229</td>
</tr>
</tbody>
</table>

This question was posed to elicit multiple responses.

- **VCM**: Village Council Members
- **WAM**: Women Association Members
- **YAM**: Youth Association Members
- **CL**: Church Leaders
- **TR**: Teachers
- **VE**: Village Elders

240
Table 6.2: Why do you prefer both Customary and State Law System?  
(Data from interview-schedule)

<table>
<thead>
<tr>
<th>Designation</th>
<th>VCM</th>
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<th>YAM</th>
<th>CL</th>
<th>TR</th>
<th>VE</th>
<th>Total</th>
</tr>
</thead>
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<tr>
<td>Some Cases cannot be settled in Customary Law System</td>
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<td>3</td>
<td>7</td>
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<td>0</td>
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<tr>
<td>Option for higher appeal required</td>
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<td></td>
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<table>
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<th>WAM</th>
<th>YAM</th>
<th>CL</th>
<th>TR</th>
<th>VE</th>
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<td>13</td>
<td>10</td>
<td>12</td>
<td>10</td>
<td>73</td>
</tr>
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<td>2</td>
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<td></td>
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<tr>
<td>Option for higher appeal required</td>
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<td>4</td>
<td>1</td>
<td>1</td>
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<tr>
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<td>10</td>
<td>7</td>
<td>8</td>
<td>8</td>
<td>9</td>
<td>75</td>
</tr>
<tr>
<td>Total</td>
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<td>19</td>
<td>23</td>
<td>19</td>
<td>163</td>
</tr>
</tbody>
</table>

This question was posed to elicit multiple responses.  
VCM: Village Council Members  
WAM: Women Association Members  
YAM: Youth Association Members  
CL: Church Leaders  
TR: Teachers  
VE: Village Elders

Following proposals emerged from the interviewees while discussing the future prospects for customary law system in the geographical area inhabited by the Angami and the Garo tribal communities. The focus was to retain or regain the legitimate space for customary law system in the context of the important role played by it in the tribal communities of Northeast India. What would be the space for customary law system in the unavoidable presence of state law institutions was the guiding question which animated the discussion.
Reorganize Customary Law Courts

Some interviewees among the Angami stated that in case customary law system has to function as the primary system of governance in the villages, drastic reorganization of these courts is necessary. According to Mr. Vilhüsa Khatso, who strongly endorsed customary law system of governance in Angami villages, there should be a hierarchy of customary law courts so that all cases on appeal can be taken care within the customary law system. “The state law courts should be abolished from our state and all cases should be tried in customary law courts only. Of course a hierarchy of customary law courts should be established to this end.” Mr. Khatso makes a strong case for the strengthening of customary law system within Angami villages and suggests that a hierarchy of customary law courts be put in place.

Such a provision was suggested by The Rules for Administration of Justice and Police in Nagaland (Third Amendment) Act, 1984, passed by the Nagaland Legislative Assembly which talks of constituting three classes of customary courts namely Village Courts, Subordinate District Customary Law Courts and District Customary Law Courts. This Act has received presidential assent in 1987. As noted in the introduction to Chapter 5, such a structure is already in existence in Nagaland. But contrary to Mr. Khatso’s contention, this Act only suggests a hierarchy of customary courts from which a person has the freedom to go beyond it to state law system.

On the other hand, Mr. Keipuzo Peinyü points out to an indigenous structure, i.e., Angami Public Organization (APO), which has been in existence for nearly 40 years.
APO is an apex body, that came into existence in 1972 which works for the welfare of the Angami tribal community. Mr. Peinyų suggests that all conflicts to land between villages can be sued in APO. “If it is land dispute we can go to Area Courts like Southern Angami Area court and we have the structure of Southern Angami Public Organization in place to settle the disputes. If it is not settled there, then there is APO or Angami Public Organization, the apex Angami body. These can very well settle the disputes.”238

APO as an apex Angami tribal organization has, over the decades, wielded considerable influence upon the Angami tribal community. It has sub branches in each zone: Northern Angami Public Organization (NAPO), Southern or Japfüphiki Angami Public Organization (JAPO or SAPO), Western Angami Public Organization (WAPO) and Chakhro Angami Public Organization (CAPO). A dispute can be appealed from village court to public organization in a zone. If a party is not happy with the decision at the zone level, then it can appeal to the APO for reviewing the verdict. Mr. Phelhukhwe Kirha, president of SAPO, mentioned that many inter-village disputes are settled in these forums.239

In chapter 5 it was noted that the customary law system has been weakened in the presence of state law institutions. Most interviewees held that nokma’s powers are depleted since they are appropriated by the police and the district autonomous council. In such a situation what role can nokma play? Mr. Skylance G. Momin, who is the president of nokma council of West Garo Hills District, thinks that nokmas have a role to play and they can be effective instruments of administration in the villages. He suggests the networking of nokmas and training them as one of the vital steps for their revival.

238 The interview with Mr. Keipuzo Peinyų took place Nerhema in his house on supra 19 September 2006.
239 Mr. Phelhukhwe Kirha, supra, n. 156.
It is possible to deal with all cases in the villages without the help of the police. That is why the *nokma* council is making the *nokmas* aware of their powers and responsibilities. We have a 1413 *nokma* in Garo Hills. We are uniting the *nokmas* and training them. When we bring them together, the administration in each and every village will be the same. The penalties imposed for various crimes in the villages should be same. There should not be much disparity on the amount of fine imposed.\(^\text{240}\)

Mr. Momin spells out a plan of action for *nokmas* in order to make them effective especially in the administration of justice. According to him there are *nokmas* in the length and breadth of Garo areas. This network of *nokmas*, which is to a great extent in total disarray now, can be reorganized. The office of the nokma can be infused with energy when the nokma are trained and some uniformity is brought about regarding imposition of penalty.

Prof. Milton Sangma, who along with Mr. Skylance G. Momin is one of the brains behind the initiative of forming *nokma* council, too comes out with a plan to revitalize the office of nokma. In a long comment he suggests that district council should recognize the powers and functions of *nokma* within the ambit of customary laws of Achiks.

Yes, we are trying to educate and train the *nokmas* and the Achiks. Instead of going to the DC’s court or district council court, most of the cases can be settled at the village court level itself. The *nokma* council which is present in all three districts of the Garo Hills can easily network with the *nokmas* of all villages. Secondly, we are demanding that the government restore the legitimate rights of the *nokmas* appropriated by the district council and police. Sometime ago the *nokma* council went on a delegation to district council and asked them for some responsibilities. At present the *nokma* councils in three Garo hills districts are doing things on their own without any recognition from district council. The district council has not passed any law or act giving them the clear cut duties and responsibilities. Right now the nokmas are performing the functions as per the Achik heritage. But that is not written and given legal sanction. So many state law bodies bypass the nokma. See criminal and civil cases are directly handed over to the police. So *nokmas* are trying to stop this from happening. And in fact, in *nokma* office, we have created one wing known as complaint committee where

\(^\text{240}\) Mr. Skylance G. Momin, supra, n. 185.
about five nokmas are put in-charge. So villages with boundary dispute / a.king land boundary dispute come to them to settle land disputes. Lots of cases come to us and we amicably settle them. In Khasi hills also so far they used to settle cases according to the customary laws. But now they are going to pass a bill to legally empower them with definite and clear-cut duties and responsibilities. And so yesterday we approached the governor to use his good offices and to impress upon the government of Meghalaya and to direct the district council, Tura, to pass that kind of similar act empowering the Nokmas. The governor assured us that he will try to do something about this.\(^{241}\)

In this intervention, Prof. Sangma makes a fervent appeal for the recognition of the powers and functions of the nokmas by the district council which have been slowly appropriated by the state law institutions. He suggests that district council should pass laws and come out with provisions in support of nokmas. He even mentions that the nokma council met the Governor of Meghalaya to impress upon him the urgency of restoring the powers of nokma. The nokma council also requested the Governor to direct the Garo District Council to pass laws to recognize and strengthen the office of nokma.

**Joint Operation of Customary Law and State Law**

Pie Chart 6.1 shows 44 Angami respondents in interview schedule opting for both customary and state law institutions. According to the respondents these two systems need each other’s support to be effective. One of the village elders stated that each case is unique. According to the nature of a case, one should decide which type of court to approach.

I feel we need to see the case and decide which system is better to solve a particular case. There are cases, which can be easily solved by customary law courts and there are cases, which can be easily solved by state courts. The nature of the case should decide which court should intervene. Therefore I suggest that we need both these types of courts to handle our disputes in Nagaland. We should not be narrow-minded and insist on our own traditional system. Where helpful we should get the assistance of regular courts too.\(^{242}\)

\(^{241}\) Prof. Milton S. Sangma, supra, n.201.

\(^{242}\) The interview with Mr. Vimedo Rutsa took place in his house in Kohima on 19 August 2006.
Making a case for simultaneous existence of state and customary law courts in Angami area, this elder observes that what matters most is the nature of the case. Whichever court settles the disputes easily such a court should be approached by a complainant. One should not be blinded by tradition and age-old practices.

A Garo elder too suggested that one should think in terms of case by case approach to decide which system is better. “We have both the nokma system and new political structures. In this case here in order to solve the problems small cases will be dealt by the nokmas. The police will solve big cases. So I feel that we need both the system to work in tandem.”243 The Garo elder seem to presume that only petty disputes can be settled by nokma but the grave ones go to police.

Mrs. Bernida Ch. Marak, a Garo women leader, pleaded for the existence of state law system at a time when the nokma system has become weak. “I am really not sure whether nokma is powerful and capable enough to settle all the cases within the village. As of now I can say that we need the police to maintain law and order situation in the village because people do not bother about the nokma. They are not frightened of him. He seems to be only the owner of a king land and people go to him for recommendations and signatures etc and not for settling disputes.”244 It was noted in chapter 5 more and more people are taking recourse to police because customary law system has no answer to many new cases. Secondly the personnel of customary law courts are illiterate and incapable of handling complicated cases and the educated Garos do not get enthused to approach the inefficient customary law system.

243 Mr. Orisson Ch. Marak is a Village elder at Dingnapara, West Garo Hills District. The interview with him took place at his house in Dingnapara on 11 November 2006 between 3.15 and 4.15 pm.
244 Mrs. Bernida Ch. Marak, supra
Mrs. Miriam d. Shira too noted that customary law system is inadequate to handle grave criminal cases. “We need both the systems, customary as well as state. The village community cannot deal with certain grave criminal cases. Police in these cases is definitely are needed to maintain law and order situation. Those days people were sober but nowadays the situation is different.”

Inadequacy of customary law system was felt in the area of matrimony. In the present times, when Garos marry other tribals and non-tribals, it leads to certain complications. According to Mr. Porjen D. Sangma,

We cannot deal with all the issues according to customary law. I mentioned about inter-marriages. What happens if a Garo marries a non-Garo...what happens to the property? We do not have answers for these issues in customary law. The customary law books by Julius and others have dealt with issues like marriage, adoption, inheritance of property etc in normal circumstances. What about inter-tribal marriages and marriage with non-Achiks? If the heiress in nokma's house, marries a non-tribal what happens to the property? Who inherits the a.king? According to our customs the nokmaship cannot be transferred to anyone else except the daughter or the adopted daughter. But in this case the daughter has married an outsider? The customary law courts do not deal these issues properly. As a result, they are routinely dealt by the statutory courts.

As noted in the literature review in the introduction to the study, there are a few books on the customary law of Garos. But these books do not deal with marriages in which there is a non-Achik party involved. This is because Achik customary laws have nothing to say about such marriages. In cases like this one is left with no choice but to approach the state law system. Mr. Sangma suggests that in cases like this there is need of state law system.

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245 Mrs. Miriam D. Shira, is a former Minister of Transport and Health, Government of Meghalaya. The interview with her took place in Tura at her residence on 18 October 2006 between 4.45 and 5.35 pm.

246 Mr. Porjen D. Sangma was Assistant Chairman, Meghalaya Law Commission, at the time of the interview. The interview with him took place in his office in Shillong on 6 February 2007 between 12.15 and 12.55 noon.
One of the Angami interviewees noted that some customary laws are obsolete and will not make sense in a changed situation. In an atmosphere in which customary laws have become ineffective, one needs to have the support of an alternative legal system. In the case of Nagaland, such an alternative system is provided by the state.

We are in different times and we need to accept this. Customary laws were effective during the time of our ancestors but not now. These days Nagas themselves do not respect the customary laws. Some of the laws are really outdated. In my opinion practices like oath taking will not last long as time passes. We cannot harp back on our past rather we have to move ahead. So I feel that we need the help of the statutory laws and formal courts. Both have to work hand in hand without belittling the other or without trying to dominate one another. The two different systems have to meet on an equal footing and this encounter will definitely benefit the Nagas.247

The village elder makes some important observations regarding the limitations of customary law system. He holds that some outdated practices like oath taking might not be relevant in the changed social and cultural context. Instead of looking back to the past, one has to move forward in a changed situation. In the present scenario, he visualizes a partnership between customary and state law institutions on equal terms. He also makes a point that each system of law should respect the other.

Oath taking as an outdated practice was reiterated by a lawyer. This lawyer went further and pointed out that some people have started abusing this practice in order to acquire land. “I think we need both customary law courts as well as the Indian legal system because sometimes there are some people who take oath even though the land does not belong to them. Therefore abuse of the customary law takes place. This is unfair

247 This village elder, a knowledgeable person on Angami customary laws, wished to remain anonymous. The interview took place in Chiephobozou in September 2006.
to the other party. In such cases we need another system which can set right this wrong. It is better that a chance is given for appeal to higher courts in such cases.  

This lawyer reveals the abuse that takes place in the practice of oath taking. In the past, oath taking was the ultimate remedy to settle a dispute. When no compromise and negotiation worked, the accused was asked to take oath on his life or on the lives of his relatives. Many Angami interviewees mentioned that people used to shiver to take oath out of scare that the spirits will take revenge if someone tells lies. But now with the coming of Christianity all these fears of the spirits have disappeared. People no more get frightened to take oath even when it means telling lies. “Earlier there were people who followed only Naga religion. But these days most people have embraced Christianity. They are now not that keen on following our ancient practices. Earlier there was fear of Spirits taking revenge if some disobeyed customary laws. But these days with the coming of Christianity there is no more fear of violating the customary laws. Some Christians do not even bother to keep Gennas.”

The need for joint operation of customary law and state law system was found in the case of urban localities which had the presence of multi-ethnic, multicultural, multi-religious and multi-linguistic communities. “Chiephoboziou is a township where people of different communities live together. The customary laws of different communities vary and hence we need the help of police also when people of two different communities are

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248 This interviewee wished to remain anonymous. The interview took place in the residence of the interviewee in August 2006.

249 Mr. Vipranol Thakro is a village elder in Khuzama, Nagaland. The interview with him took place at his residence in Khuzama on 2 September 2006 between 7.35 and 8.30 pm.
involved in a dispute. So sometimes we may need the intervention of the police and ADC to maintain law and order situation.”

Similar opinion was expressed by Dr. Caroline Marak in the context of an outsider getting entangled in a conflict with a Garo. “The need of police arises when a non-Garo party is involved in a conflict within Garo hills district. It will not be fair to impose on non-Garo parties Achik customary laws. In such a situation, it is important that the case be tried in statutory courts.” In cases where non-Garos are involved, there would be need of state law system.

The discussion above on the choice of administration and conflict resolution system made it clear that both the Angami and the Garo communities have made space for customary law system. The Angami have overwhelmingly supported the continuation of customary law system while some among them have also have asserted the need of state law institutions to deal with newer disputes. Among the Garo, there has been strong support in favour of the simultaneous presence of customary and state law institutions. The discussion has revealed the fact that both communities have asserted that customary laws are close to their culture and identity and therefore have to find major presence in their administrative and legal systems.

Reform Customary Law

The last question in the interview schedule asked the respondents to articulate their ideas on the possible mode of continuation of customary law. The question was worded, “What changes would you suggest that the customary law should undergo?” This question was posed to elicit responses from the point of view of future prospects of customary law. Most of the respondents gave multiple responses.

250 The interview with Mr. Vineizo Tsurho took place in his house in Chiephobozou on 17 September 2006.
251 Dr. Caroline Marak, supra, n.198.
Table 6.3: What Changes Should Customary Law Undergo?

<table>
<thead>
<tr>
<th>Change in Customary Law</th>
<th>ANGAMI</th>
<th>GARO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VCM</td>
<td>WAM</td>
</tr>
<tr>
<td>Prescribe and strengthen CLS*</td>
<td>42</td>
<td>13</td>
</tr>
<tr>
<td>Customary Law should be codified</td>
<td>28</td>
<td>5</td>
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<tr>
<td>Government should not intervene in CLS*</td>
<td>17</td>
<td>2</td>
</tr>
<tr>
<td>Increase Women Participation in Village Administration</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Change Inheritance Laws in favour of Daughters</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Customary law should be evolved for murder cases</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Seven Times Payment should be reduced</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Customary law and Christian rules should be integrated</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Oath taking should be banned</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>108</strong></td>
<td><strong>38</strong></td>
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<table>
<thead>
<tr>
<th>Change in Customary Law</th>
<th>ANGAMI</th>
<th>GARO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VCM</td>
<td>W</td>
</tr>
<tr>
<td>Prescribe and strengthen CLS*</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Nokma's Powers have to be increased</td>
<td>22</td>
<td>7</td>
</tr>
<tr>
<td>Reform Nokma System</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Trained Nokmas and Laskars</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Customary Law should be codified</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>Change Inheritance Laws in favour of Sons</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>Shift to patrilocal Society</td>
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<td>2</td>
</tr>
<tr>
<td>Awareness Programs to strengthen Customary Law</td>
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<td>0</td>
</tr>
<tr>
<td>Penalties for offences should be raised</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Nokmaship should be open for election</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Increase Women Participation in Village Administration</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>88</strong></td>
<td><strong>37</strong></td>
</tr>
</tbody>
</table>

This question was posed to elicit multiple responses.

*CLS: Customary Law System
VCM: Village Council Members
WAM: Women Association Members
YAM: Youth Association Members
CL: Church Leaders
TR: Teachers
VE: Village Elders
Table 6.3 displays 119 Angami respondents (79.3%) suggesting that their customary laws must be preserved and strengthened. This is more than three thirds of the respondents endorsing the continuation of the system. What do they mean by preserving and strengthening customary law? The other responses displayed on Table 6.3 point out to what is meant by preserving and strengthening customary laws. 64 of them want customary law to be codified, 32 of them would advise the government to keep off from customary law system, 21 of them suggest that inheritance rights should be changed in favour of women and 33 of them mention that provisions should be implemented making way for the participation of women in politics. About 9 of them suggest that customary law should evolve to tackle grave crimes like murder and 7 of them suggest that penalty of 7 times repayment must be reduced.252

In chapter 3, while discussing the nature of customary law from the point of view of change it was noted that those who held on to the divine and ancestral origin of customary law asserted that customary laws cannot be changed. For this group customary laws remain sacrosanct without any change. They will not appreciate any change in inheritance laws in favour of women. Neither would they make space for participation of women in political institutions of the village. Table I in Appendix D has data that shows the reaction of respondents to the participation of women in political bodies of the village. 30 out of 150 (20%) have mentioned that they are unhappy with the increasing participation of women in the political forums. 9 out 150 of them had mixed feelings. That shows that there is sizeable number among Angami respondents who are against

252 *Se thenyle* or penalty of seven times repayment is imposed on those who indulge in stealing. If an object stolen is proved, the person proved to be guilty is made to repay seven times the value of the stolen object. The penalty is considered heavy in Angami community and it works as a deterrent. Some respondents found the penalty too heavy and were suggesting that it be lessened to two times or three times the value of the object stolen.
gender parity. It is this group among the Angami which thinks that a conservative reading of customary law would suffice to meet all the legal requirements in the Angami villages.

Similar was the case as regards inheritance laws. According to Angami customary laws, ancestral property goes only to sons. Daughters can be given acquired property as gift at the wish of the head of the family. So effectively daughters do not have inheritance rights. A question was posed to the respondents with regard to bringing about changes in inheritance laws in favour of women. Table II in Appendix D also contains data about change in inheritance laws. 127 Angami respondents opposed any change in inheritance laws. Only 23 among the Angami respondents supported changes in property rights in favour of women. It was also noted that out of 20 women respondents, 17 of them said there should not be changes in inheritance laws.

One of the reasons for not giving property to the daughters is the fear of fragmentation of ancestral or clan property. Daughters are married outside the clan. If daughters are given property, they take away the property of the clan and this leads to fragmentation of the ancestral property. Therefore the property is passed on to sons only. Since nearly 85% (127 out 150) Angami respondents in interview schedule assert that daughters cannot inherit ancestral property, one can reasonably conclude that Angami tribal community is not ready for gender parity in the area of inheritance rights.

A big number, 64 of them, has opted for codification of customary law. But when they were cross questioned on the meaning of codification, the answers differed from person to person. For most of them it just meant documentation of customary laws by a representative body of the Angami community so that the age-old laws are kept in writing
and not lost. Since codification is a much debated issue, and many tribes have gone ahead with this process, an elaborate discussion on it will follow in the next section.

There were 9 respondents who suggested that customary laws should evolve or create new laws to deal with murder and other serious criminal acts. It was noted in chapter 5 and 6 that customary laws are inadequate to handle grave crimes. It is at this point that police come into picture to take care of these heinous crimes. These 9 respondents think that police or state law system should be kept away from handling any sort of offences, whether petty or grave. Their fear is that once a little space is made for state laws, they may usurp more territory of customary law system. Therefore the suggestion is to create penalty for any type of offence, however grave it might be, so as to make customary law system adequate to meet all contingencies.

Table 6.3 shows 55 Garo respondents in interview schedule stating that customary laws need to be preserved and strengthened. 51 respondents have mentioned that nokma's powers should be increased, 16 have asked for reforms to be introduced in nokma system, 13 have suggested that the customary laws personnel should be trained and 10 have suggested that awareness programs on customary laws have to be conducted periodically to increase the knowledge of customary laws among the Achiks. All the five responses mentioned are related to the post of nokma directly or indirectly. The desire of the respondents to revive the deteriorating office of the nokma gets expressed in no uncertain terms in these responses. In chapter 5 it was noted that customary law system is weakened primarily because of the illiteracy and incompetency of the nokmas. The suggestion to raise powers of the nokma, to train them and to reform this office is all towards reviving this institution which is the bearer of Achik customary laws.
41 out of 150 Garo respondents opted for the codification of the customary laws. The demand again is in the backdrop of deteriorating influence of customary laws. Some felt that codification will result in bringing about uniformity among the many Achik customary law systems which are varied according sub-groups of Achiks. Some also pointed out that codification would give legal status to the customary laws which are otherwise belittled as just customs and usages. Since the section that follows will have lengthy discussion on codification, it would be enough to limit the analysis.

Table 6.3 shows 34 Garo respondents supporting inheritance rights for sons. Garo society is matrilineal and hence property is inherited along female line. As a result only daughters inherit property. There has been desire on the part of some Achiks that sons too should have rights to inherit property. To a question whether inheritance rights should change in favour of men, 45 of the respondents agreed that sons too should have property rights.253

Table 6.3 shows 12 Garo respondents suggesting that Achiks should shift to partrilocal society. Garo society is matrilocal; after marriage the boy goes to the girl’s house for residence. The interaction with predominantly patriarchal society in other states of India has influenced some Achiks to suggest that their social organization system be changed to patrilineal system.254 During interviews some respondents, especially men, mentioned that before marriage they work for their sisters and after marriage they work for their wife. So they lack motivation to work hard. There is a raging debate going on in Achik society on the change of matrilineal and matrilocal society. Some authors have observed that the state law system which is male oriented has its impact on encouraging

253 Refer Table II in Appendix H to view data on whether inheritance rights should change in favour of sons in Achik society.
254 For data on whether social organization system should change view Table III in Appendix H.
measures that result in ushering in patrilineal tendencies in matrilineal society (Fernandes and Barbora 2000: 116-119).

Creative Fusion of Customary Law with Liberal Democratic Institutions

The discussion on the future prospects of customary law highlighted various proposals for the accommodation of customary law. Both tribal communities, the Angami and the Garo, have asserted the significance of customary laws in terms of their culture, identity and system of conflict resolution. They have also noted that customary law domain is not something fixed and stagnated as was noted in the huge debates on customary laws in chapter one. Customary laws try to reach out to other domains according to their terms, on their ground rather than being co-opted into something which is the other. They construct reality through the lens of customary law.

Therefore when the second hypothesis speaks of creative fusion of customary and state law institutions, it is making space for the other in terms of customary law system. Customary law domain takes primacy of position in any bargaining and negotiation with the other. There can be borrowing from the other or reaching out to the other but this is in terms customary law domain. Such an understanding was vocalized in the data collected from interviews as well as in the interview schedules.

Codification Debate

Change is an inevitable phenomenon and customary law is not an exception to this. Change occurs as a response to an encounter with external forces as well as internally triggered developments. In the context of customary law, change occurs due to the continual dialectic between tradition, a concept containing the ancestral wisdom and knowledge of a particular community, and modern life conditions (Svensson 2002: 2). Those aspects of tradition that are appropriate for current usage undergo reform,
adapting to the demands of changing times. Conversely those elements in customary law which are inappropriate and obsolete get purged, making way for new norms. Thus customary law has been ‘subject to constant revival and reinvention by indigenous people’ since its inception (ibid).

Svensson (2002) talks of change in customary laws initiated by the practitioners of these laws in response to external influence or as a self engineered project to redefine itself so as to remain relevant. This process has its starting point in the people or community. There is another process which is engineered by the state to bring about change and reform. This had top-down approach and is called codification.

Codification means documentation of customary law at the behest of the state, making them undergo a process of standardization and finally ratifying them in the state legislature (Vijayakumar 2006: 11). Once they are ratified in the state legislature these customary laws become codes which are later referred by the law enforcement agencies to settle disputes. After they are ratified in the state legislature, they can be amended only by the legislators thus bringing about an element of rigidity.

In Nagaland, in an effort to give boost to the integration of Naga-inhabited areas, the Government of Nagaland had mooted the idea of a single Naga customary law a couple of years ago (The Telegraph 2005). The then minister for art and culture, Mr. K Therie, had said that such a step would ‘further the integration process’. He had also mentioned that no final decision had been made. What would be the mode of unifying the Naga customary law was not mentioned, but what was presumed is that these laws have to undergo a process of codification.

Codification seems to be the preferred way of modernizing customary law. This issue is of great importance in Northeast India, because many tribes want to go back to
their customary law in their search for a new identity amid what they feel are attacks on their culture and economy. Many women associations in the Northeast, too, have supported codification since this process gives an opportunity to remedy the historical injustice meted out to them. The Chakmas in Mizoram have codified their traditional laws. In Meghalaya, the Garo Hills District Autonomous Council (GHDAC) has initiated this process in 2005 and the codification committee set up by it has submitted its report. Though it is nearly four years since the report has been submitted, the GHDAC is yet to deliberate upon the report.

**Background to Codification**

It will be appropriate to situate this issue in the larger context of political and legal discourse during colonial times. One of the contentious issues the colonial powers constantly encountered was the application of law in the colonies. They had to resolve what type of law had to be enforced among the colonists, between colonists and indigenous people, and among indigenous people themselves. They were constantly torn asunder between the economic motivation of colonialism and the desire to preserve indigenous customary law (Cohn 2003: 463). The repercussion of this tension between the forces of building colonial political and legal structures and preserving indigenous ones was felt throughout the colonial rule (MacLachlan 1988).

Echoing the just-noted tension, there were two strands of thought that competed with one another regarding the place and significance of customs and traditions in the governance of colonies. The oriental thinking, which became famous after Henry Maine’s *Ancient Law*, insisted that the discovery of custom and tradition of the colonies

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255 In a seminar organized by the Nagaland University held in Kohima in 2004, a Naga woman participant stoutly defended the codification of customary law as a remedy to set right the injustice meted out to women in Naga society.
was crucial to maintain the law and order situation. On the other hand, the Utilitarians, led by Bentham and Mill, relentlessly attacked this trend, accusing them of upholding the old social order, which was against liberty and reason. The Utilitarians underscored the importance of an individual against the community. For Utilitarians, law was an exogamous concept while it was an endogamous concept for the Orientalists (Bhattacharya 1996: 22).

Neeladri Bhattacharya captures this tension between the two schools of thought succinctly:

Against the Utilitarian disdain for tradition, they celebrated tradition; against the Utilitarian argument of practical reason and the principle of Utility, they invoked the authority of custom; against the Benthamite plea for radical reform by the state, they saw the need to conserve and build on established rules; against the aggressive utilitarian projection of British rule as an enlightened alien power, they hoped to transcend the alienness by presenting colonial rule as rooted in indigenous society.\textsuperscript{256}

It is this larger debate between the Utilitarians and the Orientalists that shaped the colonial policy towards the customary law of indigenous people.

The policy took the shape of 'indirect rule' or government through the indigenous institutions, which some thought was the outcome of the exigencies of the situation. As S G Moore puts it, "In the colonies, the laws of indigenous population were of major importance to the administering powers. Order had to be maintained with a small staff, limited funds, and little equipment. Colonial administrators could not possibly hope to revamp completely the indigenous legal political system and for that matter, in many places, did not aspire to do so. Like it or not they had to acknowledge the local legal order." (Cited in McLachlan 1988: 379-80). Indirect rule, therefore, was the offshoot both

of deliberate official policy and the economic and administrative exigencies of the situation.

The shadow of political expansion and commercial gain always hovered around the noble obligation of preserving the indigenous institutions. The larger debate between the Utilitarians and the Orientalists, and the internal tension of the motives of the colonial powers dictated the approach the codification process should take in the colonies.

**Approaches to Codification**

It is important to understand the concepts and the approaches that guided the ethnographers and administrators in codifying customary laws. During colonial times, there was no single conception or framework for the codification of laws. The texture of their conceptions varied (Allott: 1984). The debate between the Utilitarians and the Orientalists surfaced again to shape the framework of reforming customary laws. “Within one tradition of English common law thinking the object of state intervention was to discover and record existing practices, not to transform them; to systematize but not invent...Codification had to be an unprejudiced act based on objective observation, untainted by Western concepts and *a priori* ideas. Custom had to be presented and codified as it was, not as it ought to be.”257

Bennett and Vermeulen (1980: 208-209) talk of two approaches that guided the African codification process. The first approach relegates customary law to a secondary position. The part played by customary law in this approach is of moulding the proposed legislation, rather than of inspiring its provisions. The drafters of codification in this approach aim at a synthesis of the native law with the foreign law, heavily banking on the latter. In the extreme, this may even result in the complete abolition of customary law.

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257 Ibid., p.37.
The Ethiopian codification project of 1960s typifies this approach. The drafters of the Ethiopian code borrowed heavily from France, Italy, Switzerland, Greece and Egypt.

In the second approach, customary law is given the primary position. Codification is done in close conformity with it. Customary law is taken to be the best conflict resolution system to meet the legal requirements of the people. The drafters obviously would have the daunting task of reconciling the conflicting customary laws of various regions. They also would have to modify and reform the customary law in order to modernize them. Where necessary some of the customs and traditions would have to be abolished. Further, some of them have to be amalgamated with non-indigenous laws. In Madagascar Republic, according to Bennett and Vermeulen, the Malagassy Code had taken this approach for codification.

In the context of codification process in colonial India, Bhattacharya (1996) mentions two diametrically opposing tendencies shaping the codification process. He pits the Code of Gentoo Laws, the first major colonial digest on Hindu law of 1776, against Tupper's Customary Laws of Punjab of 1881. According to him, these works represent two different approaches to the process of codification. The Code of Gentoo Laws depended heavily on the scriptural texts or the dharmashastras. The underlying assumption was that the traditions and norms were stored in these texts and they had to be retrieved. The customs and usages were not to be trusted since they were the corrupted form of true and authentic laws which were deposited in the scriptures. So the British administrators brought together the best of the pundits to translate the texts from which the Code of the Gentoo Laws was drafted into English.
The Punjab tradition revolted against this trend of compiling laws from the scriptures and sacred texts. The Gentoo laws did not make sense in Punjab. Tupper, the architect of Punjab Customary Law, advocated the approach of basing the law on immemorial custom and the authority of tradition. Thus the officials were sent to meet village elders and wise men to discover and record the customs of the villages. "So British officials in Punjab, particularly after the rebellion of 1857, went in search of chaudhris and muqaddams and instituted them where none existed". The customs collected by these officials were later codified and published as Punjab Customary Law.

Initially scriptural authority enjoyed supremacy. The scholars and experts in scriptural texts were widely consulted and their voice was ultimate in interpreting laws. But in the 19th century, the ongoing tension between scripture and custom, between text and tradition tilted in favour of custom and tradition. There were certain cases in which customs could even overrule the scriptural texts. Hooker recounts a situation when a custom was upheld by the Privy Council: "A similar position was arrived at in the Mofussil, although neither the Regulation of 1772 nor the later Regulation of 1793 referred to custom as a source of law. However, the Privy Council early decided that 'under the Hindu system of law, clear proof or usage will outweigh the written text of the law.' The point was settled even more clearly when it was stated that custom, where proved, could oust the general law." The point was settled even more clearly when it was stated that custom, where proved, could oust the general law."

Codification Debate in India

The study of codification of personal laws in colonial India is a vast subject. For the purpose of the present study it will be sufficient to analyse two moments in the

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258 Ibid., p. 31.
history of codification; first, the codification of civil, criminal and penal laws after the 1857 war and the second, the codification of the Hindu personal law in 1955.

As mentioned above, the Code of Gentoo Laws was the first major colonial digest on Hindu law. It was published in 1776 by the East India Company and was used in the Company’s courts to settle disputes arising from personal laws. Where the Code of Gentoo Law was insufficient, it was made good by the application of Common Law of England. There was widespread dissatisfaction with the Code of Gentoo Laws on two counts. First, the law differed from one region to another; so the courts faced many difficulties because application was not possible. Second, while drafting the law, the scriptures were taken into account and customs and usages of the people were neglected (Bhattacharya 1996).

It is with the demise of the East India Company in 1858 that the stage was set for a formal codification process in India. The British Government enacted the Code of Civil Procedure 1859, the Code of Criminal Procedure 1860, and the Indian Penal Code 1861 (Hooker 1975: 63). “The aim of codification was not merely to systematize the law already in force but to provide and establish a rule where such seemed lacking…the Codes do not represent any fusion of English law with the personal laws of India, and, apart from drafting to suit specifically Indian conditions, their influence on substantive principles of Hindu law as already developed in the courts was minimal.”260 The personal laws of Hindus, Muslims and Christians were not codified at this phase.

Since this phase of codification took place under the British rule there was not much scope for public debate and discussion. But later on, when the Christian, Muslim and Hindu personal laws were gradually codified, lots of heated discussions took place in

260 Ibid., p.64.
the legislature. This is beyond the scope of the study. The rest of the discussion will be centred on the codification of Hindu personal law that took place in 1955.

**Codification of Hindu Personal Law, 1955**

In the years 1955-56, four acts\(^{261}\) were passed in the Indian parliament, which are now referred as codification of Hindu law (Hooker 1975: 70). The desire for unity and certainty of the law, equality of the sexes, and the elimination of restrictive and antique rules seem to have been the objectives that guided this legal reform.\(^{262}\)

One of the main objectives of codification was the unity of the law. The drafters of code argued that this had to be realized first among the Hindus and it was thought that this would have multiplier effect on other religious communities, namely the Muslims and the Christians. According to them this would eventually lead to the Uniform Civil Code as envisaged by the Indian Constitution in Art. 44 (Derrett 1968: 330). They further argued that the rules being enforced in the courts were not certain and hence reform was needed to make them rigorous.

Not only are we in great difficulties in attempting to give expression to our conception of the law in any given jurisdiction, but we are really in doubt as to whether the law itself exists in an expressible form. Whatever is known about the law is a hotchpotch of rules, often inconsistent with one another, ill assorted, mutually incompatible, intellectually lacking in uniformity, unsatisfying... Encumbered with rules which do not govern, principles which do not guide, maxims which are ambiguous, sources which may be followed or not at choice and rules of interpretation which are as flexible as the sources upon which they are supposed to throw light, the system – if it deserves the name – is unlike any other now in force.\(^{263}\)


The second important argument was the equality of the sexes. The drafters were keen on doing away with a tradition that restricted the role of women in family and in larger society. The code was aimed at giving them inheritance and maintenance rights. "The influence of Western standards and the expansion of opportunities for Indian women was nowhere more violent than in contexts where tradition obliged the female to remain subservient to the male."\(^{264}\)

Elimination of restrictive and antique rules was another aim that led the drafters to push for codification. This was an effort to abolish the caste system from Indian society. They pointed out the dichotomy that existed between the Constitution of India and Hindu Law. "It is said that caste, which has been condemned in the constitution, and which is no longer to be regarded in any secular matter, is perpetuated by the current Hindu Law... All this is quite unnecessary and out of accord with modern needs, except in the view of the "orthodox", to whom the caste-system still stands for a natural phenomenon of spiritual significance."\(^{265}\) So the drafter argued that in order to abolish differential treatment in private law on the ground of caste, Hindu law had to undergo codification.

Of course there was rebuttal of these arguments by orthodox Hindus that the Hindu law was divine in origin and hence beyond change. The orthodox Hindus pointed out that the code adversely affected the religious doctrines of Hinduism and that parliament was not the right forum to bring about changes in Hindu Laws. It was the prerogative of the *pundits*. Interestingly they also mentioned that in case of codification litigation will increase and the laws will become rigid.\(^{266}\)


\(^{265}\) J. D. M. Derett, 1957., p.25.

\(^{266}\) Derett has dealt with the codification debate surrounding Hindu Law elaborately in Derett 1957, pp.38-41.
What have been the effects of codification? In rebutting the arguments of those who were in favour of codification of Hindu law, the critics had mentioned that there will be a flood of litigation and mushrooming of lawyers. There were many more such ill effects anticipated by the detractors of codification. Whether these conjectures are true or not, an analysis as to what transformation the indigenous laws went through itself will be a useful exercise.

**Critique of Codification**

One of the damning criticisms of codification was that it would result in rigidifying the flexible nature of customary laws (White 1965: 89). In fact, Maine had pointed out this in his works.

At the touch of the Judges of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to great extent replaced by rules having their origin in English laws books. Under the hand of the judges of the Sudder courts, who had lived since their boyhood among the people of the country, the native rules hardened and contracted a rigidity, which they never had in real native practice.\(^{267}\)

Maine assumes that native law was flexible and codification ‘fixed’ its meaning and application and thus made it rigid. The aim of native law was to settle disputes in such a way that it resulted in the harmonising of relationship between two quarrelling parties. The application, analysis and interpretation of the rules are not of primary value in the context of dispute resolution. Through compromises and negotiations the conflict is resolved (Bennett & Vermeulen 1980:213; Gluckman 1973: 21; Buxbaum1967: 4). This flexibility will be lost, according to Maine, when codes come into existence.

For instance, in Indian villages, dispute resolution was the function of village *panchayat*. The guiding spirit in *panchayat* in dealing with clashes and conflicts was that

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\(^{267}\) Cited in Hooker. 1975.op.cit., p. 67.
the conflicting parties later on had to live together in the village and therefore, not strict adherence to rules but negotiated settlement through compromises had to be worked out. “The effort in a panchayat was to find a solution which would not sever ties but maintain them; this was done through long talks and informal pressures on the concerning parties.”

However, Bhattacharya finds this argument of native laws getting ossified or solidified due to codification problematic.

The common argument that customs are frozen through codification is premised on a simple contrast between the oral and the textual. The oral tradition is seen as fluid, open to a variety of interpretations and meanings, a range of appropriations according to the contests. When the oral tradition is textualized the fluidity disappears, meanings are fixed: put into writing, they become frozen into codes. We now recognize that this opposition is problematic. Texts too can convey a variety of meanings; and new meanings are continuously inscribed onto texts in the process of interpretation and elaboration. Codes, like all texts, are open to multiple reading, and the same code can produce different judgments. Codification may seek to fix the meanings of practices, but the original intentions do not always materialize in the same ways. Judicial records reveal how codes were read in conflicting ways, questioned and rewritten. The search for certainty and fixity remained elusive.

A similar tenor of argumentation can be noted among those who drafted the Hindu personal law in 1955. Pointing out the experience of continental countries they argue that this accusation is ill-based. “In most continental countries, where the vitality of the civil law cannot be doubted, codification has been tolerated sufficiently well, and reform of the civil codes is a process which quietly incubates, readily springing into action at infrequent intervals, and bringing the provision of the relevant articles up-to-date, whenever they cease to find effective champions.” That codes give sufficient

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270 J. D. M. Derrett, 1957 op.cit., p. 50.
space for interpretation and re-interpretation seems to be the argument put forward by the
drafters of codification.

The proponents of codification assert that uniformity and certainty of law was one
of the major objectives of codification of customary law. They argue that it eliminates
issues of conflict between different species of customary law. In their view, this is
required for smooth administration and for just settlement of disputes. It is true that
uniformity will lead to efficiency in administration – but at a considerable cost. Allott
(1981: 66) points out that the moment a customary law or usage has been codified, its
bonding with people is cut. It no more remains a custom, which is shaped and moulded
by the community. In truth it becomes a statutory law.

Another accusation that was hurled at codification was that it would unleash a
flood of litigation (Derrett 1957: 39). Such an accusation has an in-built presumption that
the very existence of court system and judicial organization will result in endless
litigation and mushrooming of lawyers. This will make the legal field specialized and this
in turn will make the dispute resolution process expensive. In fact, there seemed to have
been a massive increase in the volume of litigation before the courts after the civil and
criminal codes came into existence in 1860s (Hooker 1975: 64).

The proponents of codification project are not blind to this limitation. They agree
that there would be sudden increase in litigation, but that this would be just a transitional
feature (Derrett 1957: 50). There has been no strong rebuttal of this accusation by the
supporters of codification because in this case they are on a weaker ground. There are
cases where people who are economically better off would drag their opponents to the
court in order to win the case (Hooker 1975: 65).
Another loophole of codification, according to its detractors, is that the codified law would tend to see the suit as between individuals alone. This is at the risk of neglecting the community dimension of a case and it would result in jeopardising the peace and unity of a village (Hooker 1975: 64; Durie: 2006; Vijaykumar 2006: 93-96). While the customary law system looked at the cases from the point of view of the community, the codes tended to stress on the individual dimension.

According to the customary law system, a conflict disturbed the equilibrium of the community and this should be set right by reconciliation. As Driberg, an administrator and anthropologist, found out “…the aim of the law was the maintenance of equilibrium, and it was based on ‘collective organisation’ and not, like western law, on ‘an individualistic assumption’. Because the law sought to restore the balance, judgements were ‘constructive and palliative’ and not penal.” Gluckman’s work among the Lozi tribe of Barotse in Zambia too echoed this dimension. He elaborately describes the dispute settlement process in a Lozi kuta (court) and how the members of the jury find ways of setting right the broken bonds.

The Lozi disapprove of any irremediable breaking of relationships. For them it is a supreme value that villagers should remain united, kinsfolk and families and kinship groups should not separate, lord and underling should remain associated. Throughout a court hearing of this kind the judges try to prevent the breaking of relationships, to make it possible for the parties to live together amicably in the future. Obviously this does not apply in every case, but it is true of a large number, and it is present in some degree in almost all cases. Therefore the court tends to be conciliating; it strives to effect a compromise acceptable to, and accepted by, all the parties.

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As against the community dimension guiding the judgement, the codified system would endeavour to prove that one party right and the other wrong. The idea here is applying a particular rule to a specific conflict in order to arrive at a decision, which rewards the innocent and punishes the culprit. In a particular case, therefore, one party is just, while the other is unjust. In such a scenario, there is no scope for compromise and reconciliation (Hooker 1975: 65). The hatred and rancour between parties will continue when they go back to their villages. A new modus vivendi was not arrived at and hence the harmful effects of dispute may not have been completely erased off (Bennett 1980: 213). The settlement, since it focused on the individual alone, is piecemeal and not holistic.

Another consequence of codification, according to Hooker, is the silencing of indigenous local political institutions and loss of a good deal of their former powers. According to him, native tribunals lost out on financial help from government and lost its support in enforcing laws (Hooker 1975: 65).

The above discussion on codification of personal and customary laws in India and African countries has driven home its effect on customary law. While codification results in uniformity and certainty in the application of customary law, this is at a great cost of ossifying the flexible nature of customary laws. The other adverse effects such as silencing of self-governing institutions, loss of a swift, simple and economic conflict resolution system, erosion of a reconciliatory and holistic conflict resolution system and the freezing effect of codification on culture have been enumerated above. The next section will examine the response of the Angami and the Garo participants to the project of codification of customary law.

Codification Debate among the Communities under Study
This section deals with a critique of the codification approach to customary law from the point of view of the Angami and the Garo participants in this debate. It will discuss the various stands of the participants in this debate and interrogates the reasoning behind such a stand.

Table 6.3 in section two of this chapter displayed data on the number of respondents opting for codification as one of the ways of reforming and strengthening customary laws. 64 Angami and 41 Garo respondents mentioned that the customary laws of their community should undergo a process of codification. But their understanding of the concept of codification differed. For some it was meant ratification of customary law by the state assembly, for others it was meant recognition of customary law by the state government and for still others, it was just meant standardization of customary laws.

Pie Chart 6.3 shows data generated from the in-depth interviews among the Angami and the Garo tribal communities on the issue of codification. 20 out of 50 Angami interviewees (40%) agree that customary laws should undergo a process of codification and 30 interviewees (60%) are against such a step. Of the 30 who oppose codification, 18 hold that codification leads to statutorization of customary laws leading to rigidity and inadaptability to the needs of the litigants. The remaining 12 oppose codification on the ground of village specific origin of customary laws. Pie Chart 6.3 also shows 33 Garo interviewees supporting the step of codification and 17 of them opposing it on the ground that this process leads to ossification of customary laws. Once they are codified they become codes and no more customary laws.
Pie Chart 6.3: Should customary laws be codified?

(data from in-depth interview)

The meaning of codification varied from one interviewee to the other. Pie chart 6.3 shows 53 respondents across the Angami and the Garo community agreeing to the codification of customary law and 47 of them opposing it. The 53 who agreed were asked what did they mean by codification of customary law. Statement 6.1 below shows the varied meanings of codification as understood by the interviewees. 12 out of 53 thought that it is ratification of common customary law of the Garo by the State Legislative Assembly. 16 of them meant just recognition of common customary law by the government of Meghalaya. 25 of them thought that it is standardization of customary law with no role for state. The 47 who opposed codification knew that it involves the process of ratification and on that basis they rejected codification.
**Statement 6.1: What do you mean by codification?**
(data from in-depth interview)

<table>
<thead>
<tr>
<th>What is meant by Codification?</th>
<th>Angami</th>
<th>Garo</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codification meaning Ratification by the State Legislative Assembly</td>
<td>2</td>
<td>10</td>
<td>12</td>
</tr>
<tr>
<td>Codification meaning Recognition by the State Government</td>
<td>1</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>Codification meaning Standardization of Customary Laws</td>
<td>17</td>
<td>8</td>
<td>25</td>
</tr>
<tr>
<td>No Codification</td>
<td>30</td>
<td>17</td>
<td>47</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>50</td>
<td>50</td>
<td>100</td>
</tr>
</tbody>
</table>

20 among the Angami and 33 among the Garo interviewees have endorsed the codification of customary laws. As seen in Statement 6.1 only 12 of them have supported full blown codification which involves ratification by the State Legislative Assembly. On what grounds do they justify their stand of codification of customary laws?

While discussing the major debates around codification in India, especially in the context of codification of Hindu law, the proponents of codification asserted that such a step brings about uniformity and certainty of law. They argued that it eliminates issues of conflict between different species of law based on region and sects of the religion. In their view, this is required for smooth administration and for just settlement of disputes. The argument of the Garo and the Angami supporters of codification was no different. One of the Angami interviewees argued that codification of customary laws will bring about uniformity of laws across the Angami community and in the state of Nagaland. According to Dr. Adino Vitso,

> In certain cases it will bring about clarity in the application of customary laws. There times these days due to the whims and fancies of the GBs ad DBs there is misinterpretation of these laws. This can be stopped if customary laws are codified. This will bring about uniformity across villages and regions. Secondly the elders who knew the customary laws well are disappearing and we the young ones no very little about these laws. So therefore it is important that a systematic effort is made to record and document these laws and I thought codification is the best option.273

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273 The interview with Dr. Adino Vitso took place in her office in SIRD, Kohima, on 5 October 2006.
According to Dr. Vitso uniformity seems to be the main benefit of codification of customary laws. In the context of misinterpretation of customary laws by gaonburas and dobashis, she thinks that codification will bring about clarity in the application of laws. Secondly in the context of the oral nature of customary laws, she feels that those who know them well are very few. It is better to systematize and record them which is one of the main objectives of codification. Mr. Beto Sale too holds that codification will bring about uniformity and unity.

This is a delicate subject. Since Nagaland State is inhabited by so many communities and tribes, the customary laws vary very much. In such a scenario, I feel codification will bring about some uniformity and may even lead to unity in the state. At the same time, our identity is closely tied to our customary laws. If we dilute them or lose them, our unique identity too is threatened. Perhaps where there is commonality between communities we should codify the laws and where there is difference that should be upheld.274

Mr. Sale was circumspect in the defence of codification. He was aware that the Angami community was fiercely attached its customary laws since their identity is linked to it in an intimate way. So he did not make a case for full blown codification of customary laws. Many Angami interviewees voiced such a caution while endorsing codification of Angami customary laws.

Among the Garo the support for codification was robust. This could be because there are 12 Garo sub-groups each following its own set of customary laws. As pointed out in chapter 3, these laws are place specific and hence they vary a lot. In such a situation of deep variations in customary laws, Mrs. Fridina K. Marak strongly endorses codification of Achik customary laws.

With the increase of population and with the coming of education, there should be precise and clear rules and regulations to govern society. Otherwise there will be

274 The interview with Mr. Beto Sale took place in his house in Kigwema on 4 October 2006.
no unified force. Compared to the past, the situation has changed a lot. In the past, movement and migration was limited. People would scarcely go beyond the boundaries of a village. But look at what is happening today. There is such a lot of migration. People from one sub group and region marry people of another sub group and region. These inter-marriages leads to lots of interaction between people of different sub groups who follow different customary laws. This is where the confusion and conflicts arise. Which set of customary law to follow? Therefore it is advisable to have one single uniform customary law for all Achiks across regions and sub groups.275

Mrs. Marak argues that there is lot of interactions between subgroups of Achiks which leads to marriages between members of sub-groups. This intermarriages lead to complications in the application of customary laws. She also notes that there is lots of migration within Garo Hills unlike in the past when people were mostly stuck in their villages. This migration and settling in different parts of Garo hills too results in the problem as to which set of customary laws to apply to people of different sub-groups. In a situation of this sort, she suggests that it is better to have uniform customary laws. She also knows the impact of ratification in the state assembly on customary laws but she thinks that Garo customary laws are too deep rooted to be uprooted. “If we do not update ourselves, the Achik community will break up. Even plants have their own roots. There is a litchi tree in my front yard. This was uprooted some 50 years ago. But it refused to be destroyed. Look at this plant…it has grown and is yielding fruits. So too the roots of Achik niyoms will never die.”276

Mr. Hubert B. Marak, a government official in law enforcement agency, makes a convincing case for the codification of customary on many grounds. He lauds the step taken by Garo District Council to codify Achik customary laws.

Actually the effort of codifying the customary law is laudable. Since there is no written document on customary laws, which is formally recognised by the government, this effort has to be supported. The district council a couple of years

275 Mrs. Fridina K. Marak, supra, n. 136.
276 Mrs. Fridina K. Marak, supra, n. 136.
ago instituted a sub committee to do this work of codification of customary laws. I feel this has to be done lest we forget these laws and wrongly quote these laws. Well, there are CL works of individuals. First, they may not be acceptable to all. Secondly none of these books have legal recognition. Thirdly, even though these books are available, they are not exhaustive and therefore the need for codification of customary laws. The work of the committee will be to compile laws, which are acceptable to most of the people. The previous works are preliminary in nature and deep research has not gone in to them. I have read most of the books available on this subject. Whatever is written there, I already know it. The information that I want cannot be extracted from them. So as a practitioner and interpreter of law, I do see the need of some serious work on the subject of customary law. Unless there is some sort of uniformity, the administration of justice will be difficult and cumbersome. Some sort of accepted and codified written law is necessary in order to deliver justice these days.277

Mr. Marak argues for the codification of customary laws on multiple grounds. According to him there is the dire need of preserving customary laws in writing before their lost. Secondly although there are many books on Achik customary laws none of them are exhaustive. Thirdly, unless there is uniformity in customary laws the administration of justice becomes difficult. On these three grounds he makes a case for total codification of customary laws.

Mr. Marak's first point of recording customary laws was echoed by another interviewee but for a different reason. Mr. Sanggra A. Sangma argues for codification of customary law so as to protect them from getting tainted by other systems of laws which make entry into Garo hills. His contention is that customary laws should be safeguarded from getting diluted or contaminated from the customary laws of those Garo who come from Assam and Bangladesh and to do so codification is the best option. The codification customary laws should take place before any contamination takes place.

This is very difficult but keeping the larger interest in mind we should go in for a common customary law for all Garos. We have some differences in customary laws across regions and sub groups. We should keep aside these differences and try for some uniformity. There are some among us who have come from Assam

277 Mr. Hubert B. Marak, supra, n. 180.
and Bangladesh with a different worldview altogether. They are influenced by other cultures and their customary laws are quite different from ours. My view is that they should not contaminate the original customary laws. For example people who come from outside do not mind embracing patrilineal system. We have many of this taking place in our district. Hence for these reasons I feel it is good that we have a common set of laws for all Garos.

Mr. PoIjen D. Sangma argues that customary laws without codification do not have legal backing. “Without codification these customary laws are not accepted in the court of law. It is very difficult for advocates to deal with these customary laws because they are not written and codified. We cannot protect ourselves unless we codify these laws. We are entitled to inherit the property of our parents. But this is not recognised in the court of laws. If someone challenges it there is not legal backing for the customary law.” According to Mr. Sangma the Garo have nothing to lose in going for codification of customary laws. On the other hand, they stand to gain from such a step since their customary laws get legal recognition and backing.

Mr. Sangma points out some hard truths about how custom and customary laws are viewed in state law institutions and in the chambers of policy-makers. His point is important from the point of view of encounter of customary law with state law. State law defines itself as superior, refined and rigorous. Any interaction with it can take place on its terms. In another context Upadhyay makes a similar point.

“...customs are mere sources of law, not law by themselves. Their recognition as sources of law itself is not easy and courts can be unpredictable in this regard. Thus to be counted, they need to be recorded as rights. And if they are not recorded they are big nothings! Simply put, the customary rights need to be recorded as state-sanctioned formal rights to be relevant. Law ‘in’ society (including customary laws) has to somehow be seen as part of today’s law ‘for’

278 Mr. PoIjen D. Sangma, supra, n. 246.
society (formal laws laid down by statutes and courts) for them to find ready acceptance from policy and law-makers.\textsuperscript{279}

Another argument in favour of codification of customary law is to make them rigorous and systematic. Mr. Livingston Momin, argues that codification will update and modernize customary laws.

Well, it is necessary. It is because customary laws are too primitive and too crude. They are not comprehensive in order to meet the complex requirements of the present day society. See...According to Sir Henry Maine customary laws have an inbuilt mechanism by which they automatically adapt to the changing nature of society. But the change in society is going in such a terrific speed the customary laws have not kept pace this change. In order to meet the present need of civilization, the customary laws have to be modernized. The State or GDC has to intervene to modify them and modernize them. Unless and until codification of customary law is made they will not scientific and rigorous. Secondly the laws as they are will not serve the needs of people at all. They will get annihilated sooner or later. Therefore codification will save them from natural death and extinction. With ratification in the GDC these laws would get scientific touch and legal backing. Otherwise people will say that they are telltales for ancestors.\textsuperscript{280}

Supporting Mr. Momin, an interviewee among the Angami community, Mr. Kezhokhotuo Savi, too pitches in his voice in favour of codification of Angami customary law on the ground of making them systematic.

We have many tribal communities in Nagaland with different set of customary laws and even within a tribe there is good bit of variation. So it will very difficult to come with common customary laws that will be acceptable to all communities. I think what is commonly practiced by the Nagas can be codified. Secondly, it is true that as soon as we put them in writing the very nature of customary laws is destroyed. But still I feel that we need to systematize the native system. We do not keep record of our cases and judgments. Whatever our forefathers say we follow it. Sometimes even misinterpretation of customary law also takes place. To avoid all these loopholes I feel that we need to go ahead with codification however minimum it may be.\textsuperscript{281}

\textsuperscript{280} Mr. Livingston Momin, supra, n. 134.
\textsuperscript{281} The interview with Mr. Kezhokhotuo Savi took place in his chamber in Kohima on 15 September 2006.
Mr. Savi is aware of the immense difficulties involved in bringing about uniform customary laws in the context of the presence of many tribal communities in Nagaland. Even then he holds that customary laws have to be systematized and made rigorous and some form of codification, however minimum it might be, is needed to make them effective.

Demand for codification of customary law comes from a vocal group of activists of women rights. According to them many tribal communities deny inheritance rights to women. Customary laws also do not allow women to be members of self-governing institutions of the village. Then there are discriminations related to matrimonial matters and divorce related practices. “Yes, codification of customary laws is a huge step. You know what I see may be 10 or 15 years from now I think Nagaland will have codified customary laws. Already politicians are working on it and it is being discussed. From the point of view of gender rights, codification is a step in right direction. Women groups will welcome this step. Most women will look at this step positively.”

Codification of customary laws is argued in the context of changing times and from the point of view of growth and development in Nagaland. Mr. Makritsü thinks that Naga society has to move forward on the ladder of progress.

To my understanding codification of the customary law is a necessity. Some people are taking interest to codify these laws. But to make it a uniform law will be difficult due to the existence different communities with varied customary laws in Nagaland. Customary laws are unique to a village, region and tribe. But we cannot remain where we are. Nagaland state has to grow and develop. Therefore in the spirit of give and take we should choose the best laws and codify them. I am of the opinion that we should have a codified customary law.\textsuperscript{283}

\textsuperscript{282} Mrs. Rosemary Dzüvichü, supra, n. 158.
\textsuperscript{283} Mr. M. Z. Makritsü, supra, n. 193.
It is true that uniformity will lead to efficiency in administration — but at a considerable cost. Allott (1981: 66) points out that the moment a customary law or usage is codified, its bonding with people is cut. It no longer remains a custom, which is shaped and moulded by the community. In truth it becomes a statutory law. Allott’s point about statutorization of customary law is echoed by Mr. Veneizo Tsurho.

...codification leads to rigidity in the application of law. For example, right now we are free to increase or decrease penalty while settling a dispute. But with codification of customary laws the reduction or increase in penalty will not be possible. Secondly till now customary laws have been laws of the people. But once they are codified they attain the status of statutory law and only the legislative assembly will have the prerogative of amending them. Should we hand over people’s power on a platter to the legislative assembly? I do not think so.

There are two important points made by Allott and Mr. Tsurho. One is about the rigidity setting in because of converting customary laws into codes. Second is about law which has deep roots in the lives of people distancing itself from its originators. Once the laws are ratified by legislature its bond with the people is cut. It cannot be changed by its creators any more. Any change and adaptation can take place only at the behest of legislators and not people any more.

A fierce multipronged attack on codification of Garo customary law came from a member of district council. In a biting critique of codification project he lampoons the effort made by Garo district council to codify customary law.

I am one of the members of district council who said this step is absurd. One cannot codify a law which has a basis in customs. Apart from this, there are so many sub groups that it is literally impossible to have one single law for all the Garos. When one codifies laws, there will be imposition of one set of laws that result in the wiping off of the centuries old laws of sub groups. In what way is this step justified? The customary laws are flexible. For example let us take the inheritance law. Now as for the custom it goes to the youngest daughter. But now things are changing in a sense that there again another law which says that if the eldest daughter is the one who takes care of the aged mother and father is it she who should inherit the land. The youngest daughter should go out and the eldest
daughter takes care of the property. In such kind of situations what is this codified law going to say. The customary laws are very flexible because there are no readymade answers for certain things which will evolve uniquely with a family. I don’t think in such a situation codified law can be applied. We are flexible. The chra and the mahari decides according to the context on the spot and their word is final. So as a Member of District Council of Tura I feel that this should not take place. It should never take place. 284

Mr. Sangma refutes the codification project on the basis of plurality of customary laws among the subgroups. He observes that is unfair to have one Garo customary law at the cost of wiping out the centuries old customary laws of sub-groups. Secondly, he notes that customs are unwritten and hence amenable to change and adaptability. This flexibility is sacrificed for the ‘virtue’ of uniformity.

Many Angami interviewees argued against the codification of customary laws because of their village specific origin. In chapter three, place specific origin of customary law was described. When laws are tied to the foundational moments of a village they have something sacrosanct about them. They do not lend themselves for change imposed from above. According to Mr. Vileo Rutsa, “...it is better that we leave the customary laws as they are. Why should we slap uniformity on villages as far as the customary law go? The customary laws had their unique origin and evolution in a particular place. They are area specific and time specific. One should not try to bring about superficial uniformity on them. It is best that each and every village is allowed to follow its own unique set of customary laws.”285

Among the Garo such an argument was applied in the context of the presence of many sub-groups. The sub-groups of Achiks are tied to particular geographical areas and have developed their own unique customary laws. “There are 12 sub groups with varied

284 The interview with Mr. John Leslee K. Sangma took place in his house in Tura on 6 November 2006.
285 Mr. Vileo Rutsa, supra, n. 129.

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set of customs and practices. No doubt there are lots of commonalities; otherwise we all would not be known as Achiks. Amidst these commonalities there are differences and this has to be appreciated and preserved. I do not understand why we should go for uniform customary laws for all Achiks. The differences give special flavour to each subgroups of Achiks. So I feel we should leave the system as it is."

Statement 6.1 shows 16 interviewees opting for recognition of customary laws by the state government. "For me codification means recognising the law as it is practised in the grass root level. I am against codifying in the sense of transforming laws into IPC or CrPC." Many among the 30 Angami interviewees who said no to codification of customary laws meant that they can be documented at various level. Most of them endorsed the present package of Art 371 A of the Constitution of India which recognizes the Naga customary laws as they are practised in the villages.

I am interested in compiling customary laws of each village. I am definitely not thinking in terms of imposing one law on all villages. There is variation in customary laws from village to village. But I do realize that we need to keep them in writing so as to preserve them and avoid misinterpreting them. The best package for customary law is the constitutional recognition given to it in Art 371A of the constitution. This package guarantees that customary laws of the villages are safeguarded and applied in the resolution of conflicts. Recognition has the best of advantages for the preservation of customary law as can be noted from the experience of Nagaland and Mizoram, though much needs to be done to purge the unwanted elements in the customary law of these two states. Typical to the spirit of customary law, recognition gives scope to these laws to remain as people's laws to be moulded and shaped by them as and when required. Far from being rigid, they remain pliant, fluid and flexible, to be interpreted according to the specificity of each

286 Mr. Salison R. Marak, supra, n.142.
287 Mr. Julius L. R. Marak, supra, n. 163.
288 Mrs. Rosemary Dziivichü, supra, n. 158.
case. Further, there is minimum intervention from state in the case of this approach, giving it autonomy to do its work of administration of justice.

Majority of the interviewees opted for some sort of documentation of customary law so as to record them and preserve them for the future. Documentation refers to a comprehensive collection of the customs and practices that a tribe has revered and practiced for centuries. It can be done either by the tribe concerned or by an external agency. For example the Law Research Institute, Guwahati, has been documenting the customary laws of many tribes since 1980s while the Mizo customary law was documented by their own community.

Each village has a unique set of customary laws which is specific to them. Though there are a lot of similarities in them, they vary from village to village. Therefore the question arises about the geographical limit of documentation. Should the documentation be limited to the village as a unit? Or should it be at the larger level of traditionally recognized group of villages or subgroups? Or should it be at the level of tribe as a whole? If each village documents its customary law, its uniqueness is preserved and the variety is upheld but at the cost of uniformity. The documentation process can take place at the level of range, region or subgroup since each range, region or subgroups have lots of similarities that lead to a unique set of customary law. And finally, documentation can take place at the highest level of tribe, which leads to uniformity but at the cost of leveling down the differences and variety at village and region level. A key benefit of documentation is that customary law is recorded for posterity. Because the elders, who are the transmitters and keepers of the ancestral laws, are passing away, it is
necessary that steps are taken to record these laws. This record then becomes a ready
digest to customary law officials to refer in case of doubt.

Mr. Pukron Kiki suggested standardization of customary law at the level of the
tribe. He suggests standardization in order to deal with disputes relating inter-village
marriages and inter-villages land disputes.

I suggest standardization of customary laws. In earlier days, when we were
restricted to mostly one village only, it made sense to preserve and protect the
customary laws of the village. But these days we have inter village marriages
taking place. And when we encounter inter village conflicts, it is difficult to settle
the dispute if we do not have common customary law. So when we standardize
the customary laws then things will be smoother and we can have amicable
solutions to disputes.289

Mr. M. R. Marak echoed similar stand in context of the Garo customary law. "I
think common customary law is a good idea. Maintaining differences will lead to
confusion in the present scenario where people move from place to place. Suppose people
from Atong area come to Ambeng area then confusion will arise regarding the
application of customary laws. If we maintain the same customary laws across regions
this chaos can be avoided. If people accept the uniform set of laws then is better."

Consideration has to be given to two crucial factors in the process of
documentation, namely, the composition of the documentation committee and the
geographical limit of documentation. The composition of the documentation committee is
vital because it can decide on the particular slant a specific customary law takes. For
instance, if the committee is comprised only of elders, they may endorse stringent
measures on youth. Therefore it is important that while forming a documentation
committee effort be made to give representation to men and women of all age-groups.

289 Mr. Pukron Kiki, supra, n. 118.
290 Mr. M. R. Marak, supra, n. 205.
There were others who nuanced their stance to make space both for uniqueness of customary law and some form of uniformity. They tried to hit a delicate balance preserving the specificity of village customary law and trying for an all embracing set of laws at higher level.

Each set of laws have their unique origin in a particular village. I feel this has to be safeguarded and here each village has to collect their customary law and keep them in writing. So if I go to Phesama village I will have to follow the Phesama laws and if a Phesama person comes to Badabasti, he has to follow our laws here. This is important to preserve the uniqueness of each village. This apart, I feel at a higher level we should also have some common laws which will be applicable to all Angami villages. When we have inter-village conflicts these laws will come as a great help. Further there may be times when some cases and disputes cannot be settled within a village, then they can be referred to these higher level courts. Organizations like APO etc can do this work of standardization of customary laws.291

Mr. Dzüvichū argues for the uniqueness of village customary laws as well as for some sort of standardization of customary laws at higher level. He values the uniqueness of customary laws of the villages and respects the importance of the foundational moments of these laws. He also is aware of the place rooted origin of customary laws which gives them specificity and argues that at village level customary laws of the village should apply. However, he also realizes the need of common customary laws to deal with inter-village conflict. What happens if two people from two different villages are involved in a conflict? There will be confusion as to whose customary should be applied to the conflict. In these situations, Mr. Dzüvichū holds that standardization of customary law will help solve inter-village conflicts.

To sum up, there is a lot of uneasiness about codification amidst the limited support it is enjoying among the practitioners of customary law. As in the larger debate in the context of codification of Hindu laws, the main objectives for codification in

\footnote{Mr Ketshukietuo Dzüvichū, supra, n.138.}
Northeast India is also bringing about uniformity in customary laws amidst the diverse systems of law, bringing about equality of the sexes and relooking at them from the point of view of fundamental rights.

Proponents of codification of customary laws among the tribal communities under study think that codification makes customary laws available to a larger constituency of people. Some think this is the last generation which is orally acquainted with customary law. So codifying them would preserve the laws for future generation. Then there is the argument of written law getting more respect vis-à-vis the oral law in the state law institutions.

On the other hand, reasons against codification of customary laws are grounded on the adverse effects statutorization of which results in rigidity in the application of law. They lose their flexibility and adaptability once they are put into codes. Secondly, codification results in surrendering of law making function of the local community and people. The concept of community and people as bearer of customary laws is done away with and a top-down approach to law enforcement begin to be implemented. Thirdly village specific origin and the richness of foundational moments of customary laws is too is brought up as an argument to rebut the uniformity argument of proponents of codification.

Thus the debate on the project of codification is rich and varied among the tribal communities of Northeast India. There are strong and robust arguments in favour and against codification of customary laws. In the context of codification of Hindu Law in Indian context, there is caution for those who pitch their hope on codification to bring
about growth and development that sometimes codification does more harm than good to the indigenous laws of a people (Kishwar 1994).

Conclusion

This chapter explored the possible modes of accommodation for customary laws in Northeast India from the point of view of the Garo and the Angami community. First part of the chapter discussed three broad modes of accommodation of customary laws articulated by Levi, namely, common law mode, customary law mode and self-government mode. The second section gathered the opinions of the Angami and the Garo participants in interview schedule and in-depth interviews about modes of customary law accommodation in their communities.

Most Angami preferred only customary law administration in their area of inhabitation. This option has features of both self-government and customary law mode of accommodation. Such a mode of accommodation retains the powers of making laws and enforcing laws within the jurisdiction of the community. State law distances itself completely in the administration of justice of justice of the state. It might lend its services when called upon to help in moments of complexity. Further, on the issue of codification of customary laws, most of the interviewees were circumspect. Only 2 Angami interviewees supported a full blown codification of customary laws, thus refusing to transfer power of law making and enforcing to state law institutions.

On the other hand, among the Garo there was support for the co-existence of customary as well as state law institutions. This would have elements of common law and customary law mode of accommodation. The need for the presence of state law institutions as an alternative mechanism of conflict resolution was articulated by a
majority of the interviewees. The presence of ADC has also encouraged the gradual introduction of state laws in the Garo Hills District. On the issue of codification, 10 out of 50 interviewees strongly endorsed such a move. This again is an indication of acceptability enjoyed by the state law institutions.

The second hypothesis gets sufficiently tested in the discussions that take place on the issues surrounding modes of accommodation and codification of customary laws. In the case of Angami, the creative fusion envisaged between customary law and liberal democratic institutions begins at the behest of stakeholders. The primacy of position is given to customary laws and according to its terms the encounter with state laws institutions takes place.

On the other hand, among the Garo, the state law institutions have already established themselves well. Some Garos have noted the benefits that flow from the encounter with state law institutions. They foresee an encounter between customary and state law institutions on an equal footing. This is in keeping with the provisions of the Sixth Schedule of the constitution.