

## RELEVANCE OF CUSTOMS UNDER MODERN HINDU LAW

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### Abstract:-

*Customs under Jurisprudence have an effective role as a source of law. They are relevant for understanding the behavior of the humans in a society and in determining the actions of the peoples as valid. So it is necessary to study the customs and traditions of a society. Customary Laws play a pivotal role as a source under Hindu law. Even after the codification of the law by the time, various customary Hindu practices are being performed by the peoples and are being governed under the Hindu law. This article is the assessment of the evolution and significance of custom under Hindu law. In post-colonial era customary laws are regarded as obscure and are being replaced by the statutory laws. Despite the elimination of various customary practices, they are prevailing under the Hindu Law and are validated by the formal utterance of the legislative authority. But these customs are only being declared as legitimate when they are antique, certain, consistent and in conformity with statutory law. But can a custom be practiced without recognized by any statute or without the fulfillment of these requisites? If practiced, then up to what extent? Are customs still relevant in a modern Hindu society? This article establishes the fact that custom as a source of law is still important under Hindu law and hold a strong position in functioning of legislation with respect to Hindu law. Even though the importance of customs is constantly receding with the growing power of the state and with the development of the judicial process, the role of customs in the development of law cannot be denied.*

**Keywords:** Customs, Hindu Law, Codified Hindu Laws, legislation, Personal Laws.

### INTRODUCTION:-

One of the major questions which arise concerning the law is how it came to be, or what are the sources of law? Different writers have interpreted the term sources of law differently and have used it in different senses. Like the material from which the judge obtains rules for deciding cases<sup>1</sup>, Holy books containing divine law given by God<sup>2</sup>, the ultimate authority

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<sup>1</sup> L. Fuller, *Anatomy of the Law* (Greenwood Press, California, reprint, 1977).

which gives law its binding force that is the state, or the causes, like religion, equity, custom, etc., which were responsible for evolving rules which eventually acquired the force of law<sup>3</sup>.

There are many sources of law custom being the oldest source. In India since time immemorial, customs have played a significant role in the functioning of society. Even though the importance of customs is constantly receding with the growing power of the state and with the development of the judicial process, the role of customs in the development of law cannot be denied.

Customary laws which prevailed under societies in Europe to regulate human conduct is now the common law in England, these customary laws gradually developed by the decisions of the travelling judges, who went to different places and decide according to the prevailing customs in that society and gradually developed a set of principles which is now the common law in England.<sup>4</sup> The laws relating to the succession of inheritance, property, contract, sale of goods, negotiable instrument, etc., are all evolved from early customary law.

Customs are recognised as a major source of law under the Indian legal system. Article 13 of the constitution of India defines law to include customs and usages.<sup>5</sup> The personal law of Hindus codified in 1955-56 is nothing but customary law that had been recognised by courts and embodied in judicial decisions from time to time.

In this project, we will be discussing the role of customs in evolving Hindu Law and the role played by them under modern Hindu Law. Some aspects which will be looking into are, what customs really are? What position do they hold under Hindu Law? What position do they hold under Hindu Law? Explicitly after Hindu personal laws were codified with the purpose of reformation. Are customs still valid as a source of law for Hindus in their personal matters, and if yes then how? How to prove that a particular custom applies to a person in a court of law? What will happen if there is a conflict between the statute and customs on a particular matter, which will prevail as a valid source, and how? These are a few questions which this project will try to answer.

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<sup>2</sup> Dr. N. V. Paranjape, *Studies in Jurisprudence & Legal Theory* 305 (Central Law Agency, Allahabad, 9<sup>th</sup> edn. 2019).

<sup>3</sup> T.E. Holland, *Elements of jurisprudence* (The lawBook exchange, Ltd., New Jersey, reprint 2008).

<sup>4</sup> V.D Mahajan, *Jurisprudence & Legal Theory* 227-228 (EBC Publishing (P) Ltd., Lucknow, 5<sup>th</sup> edn. Reprinted, 2018).

<sup>5</sup> The Constitution of India, art. 13(3).

## What are Customs?

Custom is the oldest source of law and finds support in the Historical School of Law. In primitive societies when there was no legislation or precedents to decide cases, the lives of people were regulated by customs that developed spontaneously according to different situations and circumstances, like the most convenient way of doing a particular thing.<sup>6</sup> The same thing done again and again in a particular way at first assumes the form of habit, and when it continues to be in practice over a long period of time, it becomes a custom.

Custom is how a member of a particular community is supposed to act in a given situation based on the standards set by how other members did the same thing in those situations or the generations before them. For example, the origin of contracts go back to the custom of barter, the concept of the property began with occupation and possession, succession has its root in the necessary arrangements of a household on the death of its manager, 'Karta' in ancient Hindu law<sup>7</sup>.

Salmond observed that "custom is to society what law is to state, these are the principles approved by acknowledgement from society rather than state."<sup>8</sup> He stated that "they are the expression of those principles which have advanced themselves to the nationalistic principles of justice and public utility."<sup>9</sup>

Hindu Marriage Act defines custom as any rule which has been observed for a long time continuously and uniformly, obtained the force of law among Hindus in any local area, tribe, community, group, or family, provided that the rule is certain and not unreasonable or opposed to public policy.<sup>10</sup>

Thus a custom is a continuing course of conduct regarded as a fixed standard of behaviour, concerning a particular situation, for the members of the society because of the passive or the express approval of the community observing it.

Customs can be categorised into two categories, one with legal obligations and one without any legal obligations. Customs which are not of much importance to the public at large or law

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<sup>6</sup> V.D Mahajan, *Jurisprudence & Legal Theory* 226 (EBC Publishing (P) Ltd., Lucknow, 5<sup>th</sup> edn. Reprinted, 2018).

<sup>7</sup> P. Vinogradoff, *Outlines of Historical Jurisprudence*.

<sup>8</sup> *Supra* note 2 at 311.

<sup>9</sup> P.J. Fithzgerald, *Salmond on Jurisprudence* (Universal Law Publishing Co. Pvt. Ltd., 12<sup>th</sup> edn. 2010)

<sup>10</sup> The Hindu Marriage Act, 1955(Act 25 of 1955), s. 3(a).

does not bind a person legally. This category may include customs like getting bald at the death of a father, wearing white dresses at a funeral. Customs can also be legally binding, consisting of specific duties and obligations<sup>11</sup>, which are important from a legal point of view. For example, ceremonies essential for solemnization of marriage, the transmission of property on death, etc. The latter category of customs will be discussed in this project.

## **Customs under Hindu law:-**

In India since time immemorial, customs have played a significant role in the functioning of society. Under ancient the Indian legal system, customs were predominant for achieving the administration of justice. Laws in India were particularly the customs and traditions which the society practiced and handed down to its posterity. They were meaningful to the people as they had developed them by the cultivation of their surroundings drawing up the rationale behind them and thus, recognizing them as the rule of law. In the absence of any rule-making body, customary laws were the only rules of conduct to maintain social order.

To the Hindu jurist, a law was nothing but a collection of human practices or customs based upon principles of morality and natural justice accepted by the consensus of society at a particular time.<sup>12</sup> Most of the rules and regulations under the Hindu religious text are nothing but the collection of usages in the form of duties that an ideal man would perform in a given situation. These were not the kingly commands. The king was himself bound to them.

But customary rules had a major drawback of being indistinct in nature. These were often vague and uncertain and did not go into detail.<sup>13</sup> To make it more precise, books were written by the Sanskrit Scholars having a thorough knowledge of worldly affairs, to sort out the uncertainty of traditions.<sup>14</sup>

As a matter of fact, it is intelligible to say that Hindu law is truly originated from their ancient texts and Smritis written by the sages like Manusmriti and Smritis of Yajnavalkya, Narad, Vishnu, Vashisht, Gautam, Parashar, etc. According to Mayne "Hindu law is the law of the

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<sup>11</sup> Customary Law in India: Jurisprudential and Legal Aspects 80-81, available at: [https://shodhganga.inflibnet.ac.in/bitstream/10603/74298/9/09\\_chapter%203.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/74298/9/09_chapter%203.pdf) (last visited 19/10/2020)

<sup>12</sup> P.K. Menon, "Hindu jurisprudence" Vol. 9, Issue No. 1, *The International Lawyer* 209 (1975)

<sup>13</sup> Justice Markandey Katju, Speech "Ancient Indian jurisprudence vis-à-vis Modern Jurisprudence" 6<sup>th</sup> Justa Causa National Law Festival, held on 23<sup>rd</sup> Feb 2008 at Dr. Babasaheb Ambedkar College of Law, Nagpur, available at [www.outlookindia.com](http://www.outlookindia.com) (last visited on 19/10/2020).

<sup>14</sup> Ibid.

Smritis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the courts.”<sup>15</sup>

Customs were evolved according to the changing needs of society. The writers and commentators of different periods of time had incorporated many customs of their era into their works in a formal way. With the incorporation of customs into various written works, they were assimilated as rules which were conformed to the philosophy of that period.<sup>16</sup> In instances of customs contradicting written laws, the custom was accepted as a ground of valid law<sup>17</sup>. Even the king had the duty while solving matters put before, to inquire into customs and usages of parties to the disputes or customs of the area if any.<sup>18</sup> Thus, unlike the modern jurisprudence resting entirely upon positive and sociological jurisprudence, the ancient Hindu law was based on historical jurisprudence.

Even though in modern societies, legislation and precedent are considered as an important source of law but regardless of it, the customary practices have the essence of our cultural identity that relates peoples to their ethnicity. Therefore, they hold an important position in lawmaking. Most of the Hindu laws are still based on the customary practices established for a long time.<sup>19</sup>

### **Position of Customs under Modern Hindu Law (Post Legislation era (1955-56)) -**

Customs can be traced in Indian laws, even under the codified Hindu law. A series of codification after independence lead to the formation of acts such as the Hindu Marriage Act (1955), the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956), etc. to eliminate a variety of then prevailing customs<sup>20</sup>, many of which were obscure. It was done to make Hindu personal law more precise, clear, and unified with rare exceptions.

Though there is a common belief that now after codification, all Hindus are governed by the common codified law contained in various legislations, it is not true. The personal law of Hindus codified in 1955-56 is nothing but customary law which had been recognised by courts and embodied in judicial decisions, and, even in this codified law, various provisions

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<sup>15</sup> Dr. Vijender Kumar (ed.), *Mayne's Treatise on Hindu Law and Usage* (Bharat Law Publications, New Delhi, 17<sup>th</sup> edn. 2014).

<sup>16</sup> Dr. Paras Diwan, *Modern Hindu Law* 46 (Allahabad Law Agency, Haryana, 24<sup>th</sup> edn. 2019).

<sup>17</sup> Ananta Kumar Giri, *Rule of Law and Indian Society* available at <https://www.juragentium.org/> (last visited on 20/10/2020).

<sup>18</sup> Supra note 15 at 50

<sup>19</sup> Supra note 12

<sup>20</sup> Supra note 11 at 211

had been made to make room for customs governing various communities from different parts of India.

Many Hindu tribal customs concerning personal status and inheritance have been recognized even after the codification. Section 2 of Hindu Marriage Act<sup>21</sup>, Hindu Succession Act<sup>22</sup>, Section 3 of the Hindu Minority and Guardianship Act<sup>23</sup> states that these acts do not apply to Scheduled tribes defined in Article 366 of the Constitution of India unless the Central Government directs through Official Gazette. This has left the door open for the recognition of tribal customary laws and various practices of Scheduled Tribes.

Even for the people governed by these Acts, various customs have been given room to govern people as against the codified law. Customs can be drawn upon in a matter in which parties are not in contrast with justice, equity, and a good conscience and should be consistent with other enactments.<sup>24</sup>

Customary Hindu practices in marriage<sup>25</sup> and divorce<sup>26</sup> outside traditional norms and provisions of the act have also been recognized. Section 7 of the Hindu Marriage Act states that customary rites and ceremonies of the parties may solemnize the marriage, and, if a ceremony includes *saptapadi*, it is the most essential<sup>27</sup>. Without it, there would be no valid marriage.

However, if the customs of parties to the marriage allow marriage with some other ceremonies or with no ceremonies at all, the marriage would be valid. For example, in *chadar andazi* marriage among Jats no ceremony is necessary, in *karewa* marriage prevalent among some Hindus if parties live together as husband and wife intending to live as such it is enough for a valid marriage not requiring any ceremony. The only thing that the parties have to prove is that they are governed by customs<sup>28</sup> that allow such marriages.

Section 29 of the Hindu Marriage Act retains the customary grounds or mode of divorce that were there before the enforcement of the Hindu Marriage Act. Thus if a custom allows for parties to obtain a divorce, it will be valid even if it does not come under any of the grounds

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<sup>21</sup> Supra note 9, s. 2(2).

<sup>22</sup> The Hindu Succession Act, 1956(Act 30 of 1956), s. 2(2).

<sup>23</sup> The Hindu Minority and Guardianship Act, 1956(Act 32 of 1956), s. 3(2).

<sup>24</sup> *Smt. Ass Kaur(deceased) By L.Rs v. Kartar Singh (dead) by L.Rs* 2007

<sup>25</sup> Supra note 9, s. 7.

<sup>26</sup> Id., s. 29(2)

<sup>27</sup> Id., s. 7(2)

<sup>28</sup> Supra note 15 at 90.

that are available to parties for obtaining a divorce under section 13 provided, that such custom must fulfill the tests of validity.

In *Shakuntalabai v. kulkarni*<sup>29</sup>, the Supreme Court held that an unbroken custom of divorce would be recognized under the law. Thus, a valid marriage could be dissolved by a customary mode of divorce. Besides no provision of Hindu Marriage Act like one year's bar to divorce (the fair trial rule) under Section 14, bars laid to divorce under section 24, or any ancillary relief under section 24 or 25 would apply to such customary forms of divorce<sup>30</sup>.

**The Conflict between a statute and customs** – In the past, the smritikars declared that while deciding a matter, the king should apply customs. It was the duty of the king to decide a dispute according to principles drawn from local usages and customs along with the sacred law. A distinction was made between the custom on the civil law and customs related to sacred law. Though a custom was not recognized if it was in contravention of religious matters, in civil matters, a custom contrary to written law was considered valid<sup>31</sup>. Thus any condemnation of a custom in Smritis was not to affect the validity of customs as to matters of civil law.

The Privy Council in *Collector of Madura v. Mooto Ramalinga*<sup>32</sup> observed: "Under the Hindu system of law, clear proof of custom will outweigh the written text of the law." Accordingly, customs play a pivotal role in the development of Hindu laws in the present-day legal system.

In modern-day, if a conflict arises between a custom and a codified law, the written law prevails. For a custom to prevail in such a situation, it must have a legal sanction and must be mentioned in the legislation itself. Under Hindu personal law, in case of conflict between a general codified law, and a contrary custom, governing a certain community, the custom will prevail, and this power to customs is given in the codified law itself.

For example, section 5 of the Hindu Marriage Act contains some conditions which are essential for a valid marriage. Two conditions under this section mention that the parties to the marriage must not be within a prohibited degree of relationship<sup>33</sup> with each other and

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<sup>29</sup> 1989 SC 1309

<sup>30</sup> Supra note 15 at 186.

<sup>31</sup> Id. at 50

<sup>32</sup> (1868) 12 MIA 397

<sup>33</sup> Supra note 9, s. 5(iv).

should not be sapindas to each other<sup>34</sup>. However, if there is a custom in the community, to which the parties to marriage belong, that allows such marriages in contravention of general laws, it will be valid. Similarly, Section 7 allows for customary rites of different communities to solemnize marriages that are a deviation from general norms. Section 29(2) allows a party to obtain customary forms of divorce not covered in any of the grounds available to parties to obtain a divorce under the Hindu Marriage Act.

**How to prove a custom in a court of law** - The existence of a custom must be proved in a court of law to establish it as a binding law upon the Hindus. The *onus probandi* is on the party who is claiming the custom<sup>35</sup>. If such a party fails to establish its existence, he or she would be governed by codified Hindu law as the presumption is against the existence of a custom governing the party.

Customs are to be proved like any other fact; generally, they are proved by instances<sup>36</sup>. Previous judgments on customs are not judgment in rem. They are only relevant as judicial instances recognized under section 13 of the Indian Evidence Act, 1872. However, one instance cannot prove a custom. There are no hard and fast rules as to how many instances need to be proved to establish a custom. A party claiming a custom has to show that it is consistently followed by the people of a community.

Contrary to the general rule, if a custom is repeatedly brought to the notice of court through various cases, the court takes judicial notice of such custom. The Court may hold them proved without requiring any further fresh proof in individual cases<sup>37</sup>. It passes into the law of the land, not requiring proof provided that the previous decisions were based on concrete pieces of evidence.

Another exception to the general rule is provided in the Indian Evidence Act<sup>38</sup>, 1872. Customs may also be proved through the opinions of persons. Such persons must be living under and governed by these customs and, they most likely know their existence, or have special means of knowledge about them. Such opinions can only be appreciated as an evidentiary value if they are based on facts, observations, and research.

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<sup>34</sup> Id., s. 5(v)

<sup>35</sup> Supra note 15 at 49

<sup>36</sup> *Prakash v. Parmeshari*, 1987 P&H 37

<sup>37</sup> *Kalimma v. Janarthana*, 1973 SC 1134

<sup>38</sup> The Indian Evidence Act, 1872 (Act 1 of 1872) ss. 48, 49

For proving a custom, records such as riwaz-i-am could also be used. It is a public document containing entries prepared by officers in the discharge of their public duty under government rules<sup>39</sup>. Such entries are relevant under the Indian Evidence Act<sup>40</sup> but, they are subject to rebuttal. Certain books and manuals can also be used as a record of custom, like Rattigan's Digest on the customary law of Punjab that throws light on various customs in Punjab<sup>41</sup>, Sant Ram Dogra's Code of tribal Custom, Tupper's Punjab customary law<sup>42</sup>, etc. but such proofs have to be used with caution.

The courts, while deciding a case of custom, should not draw any analogy or guess what the custom is or how it should be. They should instead go by the evidence to see if a custom is proved to have existed or not. A court cannot also deduce the existence of one custom from another.

Besides, to be established as binding law in a court of law, customs must meet certain requirements of a valid custom. According to Hindu Marriage Act<sup>43</sup>, a custom to be established as a binding law must be observed for a long time continuously and uniformly and must also be certain, reasonable, and should not be opposed to public policy.

In India, unlike English law, customs need not be immemorial. How it could be said for customs to be observed for a long period of time is not fixed either. What is necessary is that they have been practiced for a long period of time as a governing rule to show its acceptance by people in general<sup>44</sup>. Also, a person alleging a custom must assert exactly what a custom is and how far it applies to parties to the case. It is not a matter of theory but fact and cannot be established by theoretical generalization. Thus, it must be proved with a reasonable amount of certainty that the alleged custom exists and applies to parties to the dispute.<sup>45</sup>

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<sup>39</sup> Supra note 15 at 49.

<sup>40</sup> Supra note 32, s. 35.

<sup>41</sup> Supra note 15 at 49.

<sup>42</sup> Supra note 10 at 106

<sup>43</sup> Supra note 9, s. 3(a).

<sup>44</sup> *Mt. Subhani v. Nawab*, (1941) Lah 134

<sup>45</sup> Supra note 15 at 48.

**Conclusion-** The fact that customs were an essential part of social control in ancient India cannot be disputed. Laws in India were particularly the customs and traditions which the society practiced and passed on from generation to generation. Even the King, the sovereign authority, had a duty to inquire into the customs of the parties while disposing of the matters put before.

After independence, the Hindu law was amended and codified eliminating a variety of the prevailing customs with the aim of uniform law and to abolish many obscure practices that were in force in the name of customary law. However, even after the codification of personal laws, sufficient room was left for the people to be governed by their own customs. This power of customs is given in the legislation itself.

The Scheduled tribes have been kept out of the reach of the codified law. Application clauses of the legislations of the codified Hindu law like the Hindu Marriage Act, the Hindu Succession Act, etc. itself mention that the acts do not apply to any member of the Scheduled Tribes, thus giving them the liberty to carry on their customary practices irrespective of any codified law.

Customary Hindu practices in marriage and divorce outside traditional norms and provisions of the act have been recognized even for the people governed by these acts. Parties are free to marry following the customs prevailing in their community, even if it does not include the

essential ceremonial Sastric rites like saptpadi. Besides the common grounds provided under the Hindu Marriage Act, a separate provision is made for divorce through customary rites without any bars that arise on obtaining a decree divorce under any other ground given in the act. A person only needs to prove in a court of law that he is governed by a certain custom in contravention to the general law, and if he succeeds, the custom will prevail over the general codified law.

All these points show how much importance customs have under Hindu law jurisprudence from ancient times to the current codified law era. Even in important matters of marriage and divorce, customs are allowed to take precedence over the general provisions of the law is the existence of custom is established.

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