

APPLICABILITY OF CUSTOMS IN INDIAN LAWS

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Abstract

An age-old practice whose inception is unknown yet accepted and acknowledged by one and all is known as a custom. It is a rule that has gained significance owing to its continuous use from times immemorial, giving it the force of law amongst people who follow it.¹ According to Blackstone: "A custom in order that it may be considered legal and binding must have been used for so long that the memory of man runneth not to the contrary."²

Applicability of customs in laws arise from the fact that people who are subjects to this law follow such customs since the dawn of time. Hence, eradicating all the age-old practices passed down in generations would not be fair. Therefore, customs and usages find a special place amongst statutory laws.

From an Indian legal perspective, we find varying degrees of customs in more or less all kinds of Indian Laws. For example, when it comes to personal laws, like Hindu Laws, Muslim Laws, Christian Laws, etc., we find that different customs prevail owing to the fact that India is a cosmopolitan country with diverse faith and culture. Hence, the prevalence of a wide array of customs in these laws is only very prudent.

In the present paper on Applicability of Customs in Indian Laws, the researcher will mainly lay emphasis on the types, prevalence, and validity of such customs in Indian Laws, the historical development of this concept with illustrations and important case laws over the years that define a foundation for this concept under Indian Law. This paper aims to achieve an in-depth analysis of the concept of Applicability of Customs in Indian Laws.

Keywords: Custom, Hindu Law, Muslim Law, Christian Law, Public Policy, Customary Law in India

¹Section 3(a) of The Hindu Marriage Act, 1955

² Mahajan, DR VD, "Jurisprudence and Legal Theory," (2020), Eastern Book Company, Lucknow, p.238

Introduction

India is a land of myriad cultures, a unique array of traditions, many usages, and uncountable beliefs. When we look at India from a legal perspective, we often get mesmerized as we witness the perfect blend of tradition and modern tenets. When we endeavour to study such an old civilization, we are bound to find several age-old practices that are followed with genuine respect to date. These age-old practices are known as 'Customs.' It is pertinent to understand that as India is a land of diverse cultures, values, traditions, and practices, we cannot make single legislation and expect everyone to abide by it as it might end up hurting religious sentiments of specific segments of the society. The need to have a law is principal to ensure societal peace and harmony. Without a doubt, the primary purpose of a law is to ensure justice, but at the same time, it must focus on the welfare of the people.

Several jurists worldwide have put forth their views and opinions regarding customs and have also defined the same. According to Salmond, "Custom is the embodiment of those principles that have commended themselves to the national conscience as true principles of justice and public utility."³ According to Holland, "Custom is a generally observed course of conduct."⁴ According to Carter, "The simplest definition of custom is that it is the uniformity of all persons' conduct under like circumstances."⁵

Essential Elements of a Valid Custom

For customs to be valid, there are specific requisites that are to be satisfied. Upon fulfilling these criteria, a custom obtains power and authority over the people and transforms from a mere usage to binding law.

i) Antiquity

The view of Salmond was that general Custom must be immemorial to give it the force of law. According to Blackstone, "A custom, in order that it may be considered legal and binding, must have been used for so long that the memory of man runneth not to the contrary."⁶In the case of *Baba Narayan v. Saboosa*⁷, it was stated by the Court that " In

³ V.D. Mahajan, Jurisprudence, and Legal Theory 225 (2020).

⁴ Ibid

⁵ Ibid

⁶ Supra note 1

India, while a custom need not be immemorial, but the requirement of long usage is essential."⁸ In *Gokul Chand v. Parvin Kumari*⁹ The Supreme Court explicitly stated that it must be of ancient and historical times. In the case of *Subhani v. Nawab*, the Privy Council opined that a custom to be considered binding must be ancient but need not always be beyond man's memory. Nonetheless, it ought to be ancient in the English technical sense. It would always vary from case to case, but practice must be established to consider it binding for an extended period.¹⁰

ii) Reasonability

The Custom needs to be reasonable and rational in order to obtain the authority of law. It must be useful and in synchronization with the needs of the ever-evolving society. In the Court of law, the onus lies on the party, denying the validity of such Custom to prove that it is unreasonable. When we look at Indian society, we see that practice of 'Sati' was relevant in the olden days, wherein a widow was forced immolation along with her husband in the latter's pyre. However, over time, it dawned upon men that it is irrational and gravely inhuman. Hence, such a brutal custom failed to prevail. In the case of *Bhau Ram v B. Baijnath Singh*, the Supreme Court held that the reasonableness of Custom is not a constant factor, and reasonableness at one stage of the progress of a society may not be the same at another stage. The yardstick to measure the reasonableness of Custom would be in the light of fundamental rights enshrined in The Constitution of India.¹¹

iii) Continuous Observance

A custom must practically be observed continuously from its origin to date to be accepted valid. There must not be any interruption in its compliance. Without this, it shall be presumed that it never existed at all.¹²

iv) Certainty

⁷ *Baba Narayan v. Saboosa* (1943) 2 MLJ 186

⁸ Supra note 5

⁹ *Gokul Chand v. Parvin Kumari* AIR 1952 SC 231

¹⁰ *Subhani v. Nawab* ILR (1941) Lah 154 (PC)

¹¹ *Bhau Ram v B. Baijnath Singh* 1962 AIR 1476

¹² Supra note 1

There shall not be vagueness in a custom that is to be considered law. It certainly needs to be definite. In the case of *Shakuntalabai and Anr. V. L.V. Kulkarni And Anr.*, the Supreme Court stated that to consider a custom valid, it is essential that they should be established to be so, by clear and unambiguous evidence.¹³

v) In Compliance with Public Policy

The customs need to be as per public policy, and its crux should be based on moral principles. In the case of *Raja Varma v. Ravi Varma*, The Privy Council opined that if a custom is not based on morality and public policy, it can be considered bad in law.¹⁴

Position of Customary Law in India

When we look at Indian legislation like the Hindu Marriage Act, 1955, Hindu Adoption and Maintenance Act, 1956, Muslim Laws are based on age-old customs. Even when we look at The Negotiable Instruments Act, 1881, we find that 'Hundi,' a custom, is still considered a negotiable instrument.

i) Applicability in Hindu Law

Being an ancient religion, the soul of Hindu Law is reigned by Custom or "*Sadachara*." However, these *Sadacharas* could not be contrary to *Dharma*. These were laid down in Shrutis, Smritis and other religious manuscripts executed by priests or sadhus who were religious heads. According to Manu, when there was no prescription in the Smritis, the Custom was considered a source of law. This can be construed with the maxim "*via trita via tuta*"¹⁵ People followed them with fervent devotion. Some of these customs exist even today and have been accepted by the abodes of justice.

In the landmark case of *Collector of Mathura v. Mootoo Ramalinga*, it was held by the Privy Council, "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law."¹⁶ However, in the recent case of *Indian Young Lawyers Association vs. The State Of Kerala*¹⁷, which is popularly known as the Sabarimala Judgment, the Supreme Court

¹³*Shakuntalabai and Anr. V. L.V. Kulkarni And Anr.* AIR 1989 SC 1359

¹⁴*Raja Varma v. Ravi Varma* ILR 1 Mad 235 (PC)

¹⁵SRA Rosedar, Family Law – I 8 (2014)

¹⁶*Mathura v. Mootoo Ramalinga*[1868 12 M.I.A. 327]

¹⁷*Indian Young Lawyers Association vs. The State Of Kerala* 2018 S.C.C. OnLine S.C. 1690.

gave a milestone judgment wherein an age-old practice of not allowing women between the ages of 10 to 50 to enter the Sabarimala shrine was held an unconstitutional custom by a 4:1 majority. Similarly, in the case of *Animal Welfare Board of India v. A. Nagaraja*¹⁸, also known as the famous Jallikattu Judgment, the age-old practice of bull-fighting was banned by Supreme Court in this landmark Judgment, which shows that laws in place care about the welfare of not only humans but of animals as well and those that are contrary to this, would fail to prevail.

ii) Applicability in Muslim Law

Age-old customs and practices deeply influence Islam, which is an ancient religion like Hinduism. The primary source of law is the Holy text of the Quran, which epitomizes the Almighty's Will. Certain pre-Islamic customs that were most prevalent in Arab societies were unreasonable, indiscriminate, and against the rules of equity and justice. However, post-emergence of the Islamic faith, new canons were promulgated by the prophet's Quran and related traditions. In this process, the pre-Islamic customs were retained but were transformed to maintain equality and Justice.¹⁹

Customs or *adats* are now considered a legitimate source of Muslim Law but are considered inferior to *the Quran, Hadiths, and Ijmas*; however, are considered superior to *Qiyas*.²⁰

In the recent landmark case of *Shayara Bano v. Union of India*²¹, popularly known as the 'Triple Talaq Case,' the Supreme Court gave a historical Judgment wherein the age-old Custom of triple talaq was proscribed due to its irrational and capricious nature. This Judgment was given considering the plight of thousands of Muslim women who were arbitrarily given talaq by their husbands. This Judgment emphasized the importance of the Fundamental Right to Equality before the law as enshrined in Article 14 of the Indian Constitution. This is a path-breaking decision that shows that women are equally entitled to lead a dignified life abreast of their male counterparts in today's society.

Conclusion

¹⁸ *Animal Welfare Board of India v. A. Nagaraja* (2014) 7 S.C.C. 547.

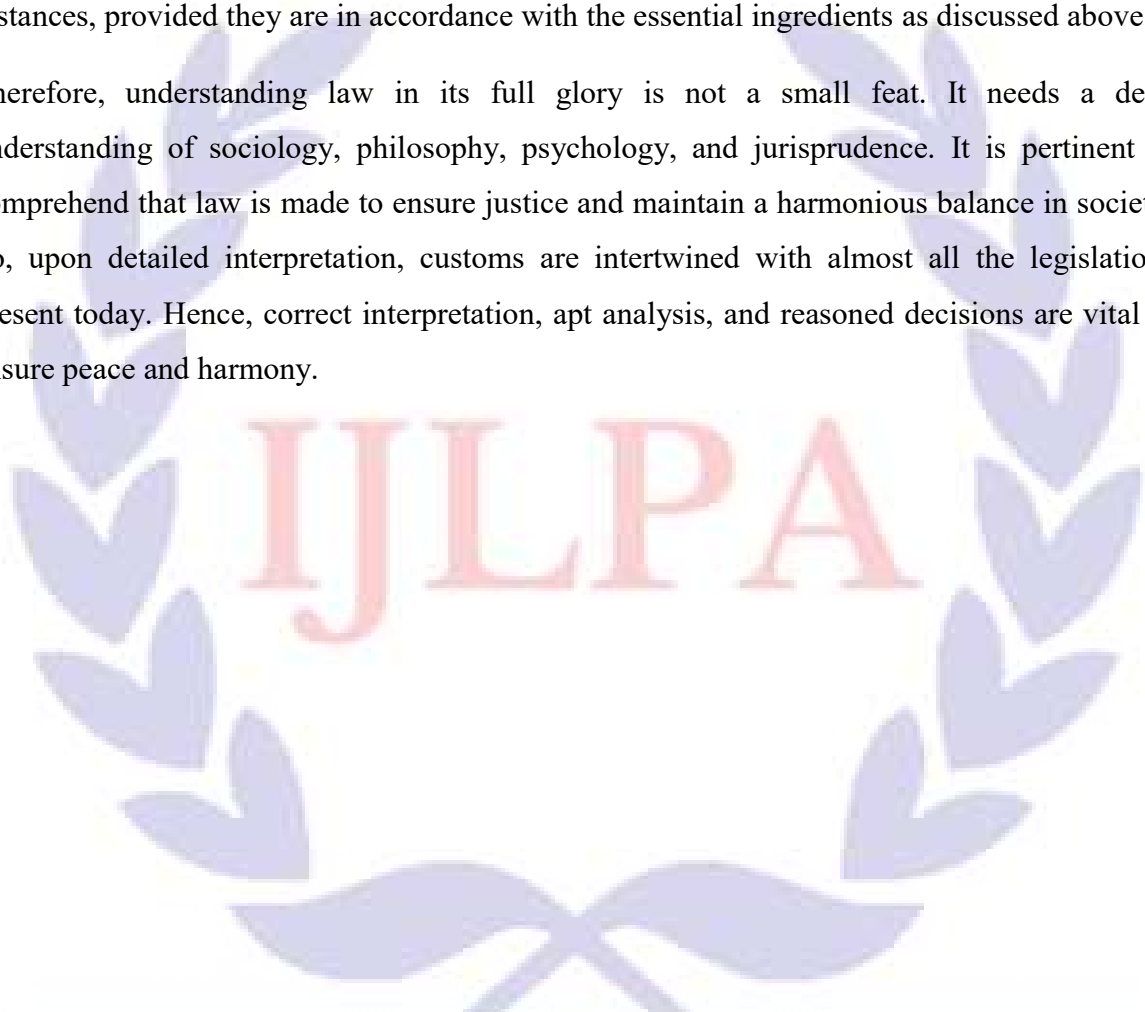
¹⁹ SRA Rosedar, Family Law – II 64 (2016)

²⁰ Arman Das, Role of Customs in Islamic Law, (Available at <http://www.legalservicesindia.com/article/521/Role-of-Customs-in-Islamic-Law.html>), Accessed on October 2, 2020

²¹ *Shayara Bano v. Union of India* 2017 S.C.C. OnLine S.C. 963.

It is right that human beings are deeply connected to their roots and would continue to follow customs as legacies left by their forefathers. It is imperative to follow the same in order to preserve one's culture and ethnicity. Practicing and following customs would make us appreciate our heritage and help us pass it down the generations. Hence, we see that in India, in the current legal scenario, we respect customs and accept it as binding law in some instances, provided they are in accordance with the essential ingredients as discussed above.

Therefore, understanding law in its full glory is not a small feat. It needs a deep understanding of sociology, philosophy, psychology, and jurisprudence. It is pertinent to comprehend that law is made to ensure justice and maintain a harmonious balance in society. So, upon detailed interpretation, customs are intertwined with almost all the legislations present today. Hence, correct interpretation, apt analysis, and reasoned decisions are vital to ensure peace and harmony.

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