

# Custom as a source of law law family essay

Law



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## **Family Law - I**

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## **Table of Contents**

### **Table of Cases**

Balusami v. Balakrishna , AIR 1957 Mad 97. Bhaurao Shankar Lokhande v. State of Maharashtra , AIR 1965 SC 1564. Deivanayaga Padayachi v. Muthu Reddi, (1920) 39 MLJ 525. Gullipilli Sowria Raj v. Bandaru Pavani @ Gullipili Pavani , AIR 2009 SC 1085. Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar, (1872) 14 M. I. A. 570. Surajmani Stella Kujur v. Durga Charan Hansdah, AIR 2001 SC 938.

## **Introduction**

The Merriam Webster dictionary defines Customs as - " Long established practices considered as unwritten law." A country like India, which can still trace the origin of some of its laws to these long established customs, has come a long way from the days when disputes were resolved on the basis of the local customs and traditions prevalent in the society. The reason for this change can be credited to the society itself. Customs are the products of the general and oft repeated practices in the society and these practices

undergo the same gradual change as the society over the passage of time. Hence, customs need to evolve, or the definition of custom, to accommodate these changes in society. The Hindu Marriage Act, 1955 and various other legislations have recognised customary practices as valid for solemnizing a marriage and for other purposes. However, judicial interpretation of the word custom has had a negative impact as the statutes could not contemplate the problems that might arise with including customary ceremonies. This essay briefly discusses the role of custom as a source of law in legal systems around the world. The essay in order to explain the role of custom as a source of law, with relevance to family law, revolves around ' custom' as used in interpreting the Hindu Marriage Act, 1955. It highlights the negative interpretation of the term ' custom' by the courts. The cases discussed show the judicial precedents set by the Supreme Courts that are indicative of the patriarchal elements of these customs. However, recent trends do suggest an increase in the general awareness to women and child rights, and the courts have acknowledged the importance of these rights by delivering what could be called as positive judgements towards their rights. It concludes with a short review of the main aspects of the essay and emphasises the need for a change in substantive law to recognise the rights of women. The author suggests the possibility of a uniform civil code at least to the extent of certain basic provisions across all religions and castes.

## **Custom as a Source of Law**

Law, is and has been for centuries an instrument of social regulation and of social change. It therefore operates fundamentally, within society. Its targets are always individuals and groups of individuals in society. Individuals and

groups of people in society however, over a period of time develop some form of rules and regulations on their own, even before any 'legal system' as such comes into being. These rules are often referred to as customs[1]. Since, society pre-exists a formal legal system, custom too exists prior to the advent of a legal system. The evolution of a legal system, in most cases occurs from within society and not externally. As a result, in the process of evolution of the legal system, certain customs get transformed into or embodied in laws- resulting in the formation of customary law. This process is characteristic of all legal systems, in different parts of the world. Thus, in primitive society, custom and law may have been entirely undifferentiated, however as time went by some of the customs would have developed a form of official social sanction for non-compliance with them, while others would have retained simple social sanction. The first category of these customs gradually develops into law, in the evolution process[2]. Custom therefore played an important role in the development of any legal system. It therefore is essential, while trying to understand a legal system, to comprehend the complex process that led to the evolution of customary law. The Indian legal system that exists today has its origins in the system of Common Law that emerged in England. The Indian legal system, like the Common law system is replete with customary laws and principles and hence it is essential that to comprehend the Indian system, one understand the role of custom as a source of law. Just as custom came to become an important source of law, it too however, over a period of time lost its place of importance to other sources. These other sources were codes, statutes and precedents. If custom has its origins in the behaviour of people in society, then it is necessary for it to be embodied in the legal system at all times.

## Sources of Hindu Law

An understanding of Hindu law begins with the concept of dharma, which refers to one's religious, legal, ethical, and social duties.[3] Within Hindu law, the highest source of dharma is the śruti, which literally translates as " what is heard." [4] The most important śruti literatures are the Vedas, which are of divine origin and serve as the revelatory sources of Hindu law. [5] The Vedas are the oldest sacred texts of Hindu law; however, their importance lies not in the authorship or messenger, but in the message itself. [6] The Vedas consist of four books: Rig-Veda, Yajur-Veda, Sama-Veda, and Atharva-Veda. [7] The Vedas are written poetically as a collection of songs and hymns. However, the Vedas do not represent positive law but are rather considered the " the spirit of the law in Hinduism," giving guidance on the Hindu way of life. [8] The next class of religious texts is the smṛiti, which literally means " what is remembered." [9] The smṛiti began with sutras—ideas and rules derived from the Vedas formed in " maxim-like strings." [10] The smṛiti was then further developed by Hindu legal texts called dharmasastras. [11] These sastras, or law books, have supreme authority in Hindu law. Because the sastras are a direct product of the śruti, they are considered sacred, though not as sacred as the śruti. [12] The most important of the smṛitis is Manu's code, a set of laws compiled by Manu, an ancient lawgiver that should be followed by all. [13] This set of code was attributed to Manu and thus, the name Manu was attributed to this landmark code. The Manu Code is divided into twelve chapters. [14] Subjects include origins of the world, sources of law, marriage, the justice system, and penances. [15] The Manu code of laws is considered to be the most authoritative of all the smṛitis and whenever an inconsistency arises, Manu's code is set to prevail. [16] The commentaries <https://assignbuster.com/custom-as-a-source-of-law-law-family-essay/>

and digests form a part of the third class of Hindu law texts.[17]These academic writings analyzed and interpreted the smriti texts and were written from 700 to 1700 AD.[18]Commentaries, called bhasya, are " linguistic exegesis, hypothetical examples, and theoretical disquisitions on a single Dharmasastra text." [19]The digests, or nibandha, are much like the commentaries but instead of analyzing a single dharmasastras text, they would explore a single topic from a series of smriti texts.[20]Custom forms part of the fourth class of Hindu Law. Local customs, family customs and class customs are the three main kinds of customs that have been recognized by the courts.[21]The courts have laid down certain essential tests in order for a custom to be held as valid, as under, The custom must be ancient - Custom passes on from generation to generation. The fact that a said custom has been passed down through generations means that the said custom has been reinforced over many years. This reinforcement occurs when a lot of time has passed between when the practice of a said custom started and its persistence. Custom which is basically a set of unwritten rules needs age for it to be accepted and approved.[22]The custom must be continuous - this is another important requirement of custom. Continuance implies that a said custom has stood the test of time, i. e. it has not been conveniently adopted and rejected; however, a single instance of a breach of custom would not render the custom invalid.[23]Custom must be uniform - this is related to continuity. A uniform custom would imply that the said practice that was followed or being followed has not deviated/changed from the custom that had been originally conceived. Certainty - A custom must be certain. It should not be a figment of imagination, rather its practice has to be proved by facts and not by opinion, reason or analogy.

[24]Reasonableness and Public Policy - A custom must be reasonable to the parties following the custom and should be in lines with the public policy. The latter takes into account, the aspect of morality. These are the main features of a valid custom. It should be noted that continuity, certainty and uniformity overlap considerably.

### **Judicial Interpretation of " Custom" or " Usage"**

The expression " custom and usage" has been defined under Section 3(a) of the Hindu Marriage Act, 1955 as:" 3. (a) the expression ' custom' and ' usage' signify any rule which, having been continuously and uniformly observed for a long time, has 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; and Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family." Though by virtue of Section 4(a) of the Hindu Marriage Act, 1955 the Act has an overriding effect on any pre-existing statutes, texts or customs for which provisions have been made under this Act." 4. (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act." The Act has several provisions under which customs of communities override the codified conditions. As the Hindu Marriage Act, 1955 is inclusive of all other communities that are not Jewish, Parsi, Muslim or Christian. It is important for the Act to recognize all other customs and ceremonies of different communities for a marriage to be held valid under this Act. However, a careful study of the judicial precedents indicate that the

use of custom as a source of law has in fact affected the rights of the parties concerned and women in particular with respect to validation of marriages and bigamy. In the case of *Surajmani Stella Kujur v. Durga Charan Hansdah*, [25] the issue that arose before the court was the validity of a custom which does not explicitly make the solemnization of a second marriage void. In the case mentioned, the appellant belonged to Oraon and the Respondent to Santhal tribes. The appellant conceded that the parties being tribals, who otherwise professed Hinduism, are not governed by the Hindu Marriage Act but by their Santhal customs and usages. The Supreme Court in its judgement relying on *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* [26] where it was laid down that, "It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." held that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non est. The complaint and the appeal were dismissed as there was no pleading as to the custom annulling the second marriage. Similarly, in *Bhaurao Shankar Lokhande v. State of Maharashtra* [27] treated as a precedent by the Indian courts, a neo-buddhist

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husband appealed against his conviction for bigamy. He had married another woman during the lifetime of his first wife. On appeal to the Supreme Court, it was argued on behalf of the husband that the essential ceremonies for a valid Hindu marriage were not performed when he underwent the second marriage ceremony and therefore it was not a legally valid marriage under Hindu law. The Supreme Court held that, " it was essential for the purpose of Section 17 of the Act, that the marriage should have been celebrated in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not make the ceremonies prescribed by law or approved by any established custom". The Supreme Court further cited Mulla's Hindu Law to state, " There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely -Invocation before the sacred fire, andSaptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire." The Supreme Court stuck to the rigid definition of custom and held that since there was no evidence that the performance of essential marriage ceremonies were completed, the marriage was held to be void allowing the husband to escape prosecution though it is evident that he had committed bigamy. Judicial decisions are replete with such decisions where either party to the marriage, when a suit for maintenance or bigamy is brought use non-performance of customary ceremonies to annul the marriage. There are several instances in which by all other standards, cohabitation, parties living together as wife and husband, children and other requirements or indicators are satisfied but due to the non-performance of a ceremony the marriage has been annulled. One such instance is Gullipilli Sowria Raj v. Bandaru Pavani @ Gullipili Pavani[28]where in the appellant <https://assignbuster.com/custom-as-a-source-of-law-law-family-essay/>

who was a Roman Catholic Christian married the respondent, a Hindu woman under the Hindu marriage act in accordance with Hindu customs. The respondent brought a suit thereafter against the appellant for nullifying the marriage. The main ground for declaring the marriage to be a nullity was mainly misrepresentation by the appellant regarding his social status and that he was a Hindu by religion, although it transpired after the marriage that the appellant and his family members all professed the Christian faith. The trial court dismissed the suit whereupon the respondent appealed to the High Court which upheld the validity of the marriage. The husband appealed the decision to the Supreme Court. Wherein the court referred to the preamble of the Hindu Marriage Act which reads, " An Act to amend and codify the law relating to marriage among Hindus." Further, they held that The usage of the expression `may' in the opening line of the Section 5, in our view, does not make the provision of Section 5 optional. The Supreme Court dismissed the appeal but held the marriage to be a nullity thereby affecting the rights of the woman in the instant case. Further, in *Balusami v. Balakrishna*,<sup>[29]</sup>T. Ramaswami Reddiar died leaving behind him his second wife, his fourth wife, and children by the deceased third wife and the fourth wife. First wife had predeceased him, T. Ramaswami Reddiar married his first wife's daughter's daughter (i. e. his granddaughter) and had three sons with her. It was alleged that the marriage between granddaughter and T. Ramaswami Reddiar is incestuous, also that the sons produced were due to adulterous relations of granddaughter. Whereas they counterclaimed that the custom prevalent in their community allows for such ' incestuous' marriage. The court held that the alleged custom is revolting to all principles of morality, decency and eugenics. No civilized society can accept such

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custom. The marriage between a man and his daughter's daughter comes within the prohibited degrees of relationship (Mitakshara) – seventh degree from father's side, and fifth from mother. As very few cases of such marriage have been reported it is not conclusive that such marriage is custom.

Moreover, it was held that no custom, which is opposed to public policy can be recognised by any Court of law. Nor can immoral usages, however much practised, be countenanced. As to the test of immorality it must be determined by the sense of the community as a whole and not by the sense of a section of the people.[30]Therefore, a custom which is abhorrent to decency or morality, however long practiced and recognized by a particular community can find no kind of enforcement by a court of law. Here the court deferred from strict reading of customary practices and held that such a relationship is void. The appellant S. Nagalingam married respondent Sivagami. Three children were born from that wedlock. The respondent alleged that the appellant started ill-treating her and on many occasions she was physically tortured. As a result of ill-treatment and severe torture inflicted by the appellant as well as his mother, she left her marital home and started staying with her parents. While so, the respondent came to know that the appellant had entered into a marriage with another woman, by the name of Kasturi, and that the marriage was performed in a marriage hall at Thiruthani. The question before the court was whether the second marriage was valid to constitute an offence under Section 494 of the Indian Penal Code, 1860. The Court held that under such circumstances, the provisions of Section 7-A, namely, the Tamil Nadu State amendment inserted in the statute are applicable and there was a valid marriage between the appellant and Kasturi. Moreover, neither the complainant nor the appellant had any

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case that for a valid marriage among the members of the community to which they belong, this ceremony of "saptapadi" was an essential one to make it a valid marriage. "Saptapadi" was held to be an essential ceremony for a valid marriage only in cases where it was admitted by the parties that as per the form of marriage applicable to them that was an essential ceremony. The appellant in the instant case, however, had no such case that "saptapadi" was an essential ceremony for a valid marriage as per the personal law applicable whereas the provisions contained in Section 7-A are applicable to the parties. In any view of the matter, there was a valid marriage between the appellant and Kasturi. Therefore, it was proved that the appellant had committed the offence of bigamy as it was done during the subsistence of his earlier marriage.

## **Conclusion**

Custom in the Hindu Marriage Act had to be included to bring the various ceremonies that constitute marriage under the category of 'Hindu', but what was deemed necessary to validate marriages has turned out to be a ground for nullifying marriages in order to escape marriage or to avoid prosecution for bigamy. The various religious personal laws never contemplated cross-religious marriages or modern domestic relationships. Moreover, with written texts, customs and commentaries based on the patriarchal construction of the society, the use of these sources as valid law is prejudiced towards men. While there are instances where the rights of men have been violated due to the interpretation of the word custom, it is largely women who have suffered. As is evident from various judicial decisions discussed above as well as those that have not found a mention here, there is an immediate need for a

uniform civil code. While the arguments for and against uniform civil code are many, there are at least a few regulations that need to be adopted across all religions and castes regardless of customary law. In the interests of women, who are most of the victims, it is necessary to criminalise polygamy(bigamy), make registration of marriages mandatory and liberally interpret the term ' custom', to include any ceremony, with evidence of such ceremony to be a valid marriage.