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CUSTOMS AS A SOURCE OF HINDU LAW

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ABSTRACT

India is a diverse land, which is full of numerous customs, which are followed with great zeal. And such customs, apart from the Constitution, statutes, and regulations, are considered to be a source of the laws. Customs, which were once thought to be the highest 'Dharma', are placed next to 'Shruti' and 'Smritis' and are regarded as the main source. According to the Hindu Code, custom and usage refer to any rule that has been consistently followed for a long time and has been practiced as law in any local region, tribe, community, group, or family if it is certain and not unreasonable or against public policy. Under the velarium of Indian Legal System, custom is also recognized as a significant source of law. According to Article 13(1) of the Constitution, all earlier statutes that conflicted with it were deemed invalid at the time the Constitution went into effect. The most persuasive force that has assisted us in convincing the ancient laws to take control of the state and regulate society to only embody those customs that were considered to be right for the sake of laws taking over command of what custom was in society is custom. However, there are some customs and practices that may be harmful and discriminatory in nature. For instance, the practise of not allowing female members of a family near crematorium is discriminatory in nature on the grounds of gender. This practise denies women to participate in the final rites and perpetuates gender inequality. It also reinforces gender stereotypes and contribute to marginalization of women in the society.

KEYWORDS: Customs, Hindu Law, Practices, Women.

INTRODUCTION

Sir William Jones transcribed the Manu Smriti, the first written account of Hinduism, in 1794. It depicts the societal and spiritual customs of the early Hindus. Manu claimed that Hindus were divided into four castes, or Brahmanas, Kshatriyas, Vaisyas, and Sudras, and subsequently into four colours. In that arrangement, the other castes respected the relationship between kings and Brahmanas. The Grihyasutras, faith, and the status of women in society are all explained. A specific designation applied to Vaisyas and Sudras. In other words, One of Hinduism's innumerable Dharma sastras is the Manu Smriti, a prehistoric law manual. One of the first Sanskrit texts to be translated by Sir William Jones during the British occupation of India in 1794 was used to create the Hindu law by the colonial administration. Hindu law stands out from other historical and contemporary legal systems due to a few salient characteristics. It was not precisely positive law in the sense that term is used in contemporary jurisprudence, particularly in the Analytical school of the West. Hindu law has undergone numerous revolutionary changes, both legislative and otherwise, and now practically needs to be rewritten for the contemporary world. Hindu law was not enacted at the behest of any earthly monarch or by any governmental power. Hindu law was once thought to have a divine foundation. However, this was just a hypothesis that was unique to early human thought and was used to conveniently explain away a lot of things that could not otherwise be explained. This theory attributed everything to God or religion, just like other theories from previous eras did. Like how laws are made today by human lawmakers, ancient Hindu law was created by human actors like sages and philosophers. And many of these old laws became obsolete, but are still practiced as customs and traditions.

A custom is a particular principle that has been practiced in a particular area since the beginning of time, either in reality or hypothetically, even if it is inconsistent with or contrary to the general precedent-based law of the community. The traditions of a group of people are a reflection of the values and beliefs that its members have upheld over many years. Every social group in the world has its own distinctive practices and beliefs, some of which benefit all members while others have developed to be harmful to a specific group.

RESEARCH QUESTIONS

1. How do customs embedded in normative practices become a part of the law?
2. What are some customary practices that promote patriarchal stereotypes?

RESEARCH OBJECTIVES

The objectives of this research are:

1. To find out how do customs become a source of laws.
2. To shed light on some customary norms that are prevalent in India.

RESEARCH METHODOLOGY

The research for this paper has been done through various articles, journals, and books. The citation has been done in Blue Book 20th edition.

REVIEW OF LITERATURE

Keshav Jha (2019) in his paper talks about Shruti, Smriti, Sadachar, Swatah Prajna and modern day legislations as sources of the Hindu Law. It has always been open to changes to accommodate the desired necessities. The author highlights the importance of the Vedas, namely the Rigveda, Samaveda, Yajurveda and Atharvaveda, as the main source of origin of the Hindu laws since time immemorial. In fact, it is even mentioned in texts that “Vedas, Smritis, Customs and own’s consciousness determine the fourfold means of defining the sacred law.” *Satarupa Sarkar (2022)* critically analyses the Manu Smriti and talks about the origins of the laws in it. His focus is on women’s rights and casteism that was prevalent and is still prevalent in the society to some extent. He criticises and appreciates the Many Smriti. He points out that Dr. BR Ambedkar was one of the leading critics, as according to him the book was responsible for the prevalence of caste system, which is true to some extent.

Gerald J. Postemat states that legally required custom is typically examined in terms of two independent variables: the regularity of the behaviour and the beliefs of the people participating in the behaviour. This idea of law as additive is seriously flawed. He believes in the addition of meaningful conduct and norms into a web a legally accepted reason. *Kheera Daly-Novoa* talks about Hindu funerary rights (Antyeshti Samskara), which is mainly performed by male relatives, under the guidance of a Hindu priest. In fact, many Hindu texts prefer a male presence over female presence during the last rites. When women perform such rites, it is considered as age old boundaries being broken since previously women were not allowed to perform the rites.

ORIGIN OF CUSTOMS

Hindu Law is one of the oldest laws in the world, according to which law is the same as Dharma. In the contemporary world, laws originate from legislations and policies, but in the past laws originated from customs. The traditional customs or practices of a specific culture or society can have many different originations. Many traditions have their roots in historical customs that have been handed down through the generations. For instance, religious observances or ancient traditions may have served as the foundation for cultural festivals and celebrations. Social norms, which are the unspoken guidelines for behaviour in a specific society or group, can also give rise to customs. For instance, in many societies, shaking hands when meeting someone for the first time is considered polite. Environmental variables like geography, climate, and the availability of resources can also influence customs. For instance, the local temperature and materials are frequently factors in the housing and clothing choices of indigenous peoples around the globe. Contact with other societies can also lead to the development or modification of customs. For instance, over time, a society's traditions may adopt foods, fashions, or musical genres from other countries.

ELEMENTS OF A VALID CUSTOM

For a practice to become a custom, the following are the requirements:

- *Ancient*- The term "ancient" denotes that the practice must be at least somewhat old. Ancient is synonymous with the phrase from time ago. According to Blackstone, a custom must have existed for a very long time for it to be considered lawful and binding. If a custom was created within the last ten to twenty years, it can be considered long, very long if it extends back thirty years, and ancient if it goes back forty years. In the case of *Urminath Chaudhari v. Goureenath*, the court held that a tradition that has been followed for a hundred years establishes enough antiquity to draw attention to itself as being old. In order to be accepted by society, a legitimate custom must satisfy the fundamental characteristics. In *Rajothi v. Selliah*, the High Court ruled that no one is required to make any rules in the contemporary era because that is the responsibility of the Legislature.
- *Continuity*- The practice is, de facto, very old. It must comply with the specified uniformity and continuity rule, as these are the factors that support its foundation and long-standing use. The above claim of being uniform and continuous is void if there has been any change in the cultivated practice since the time-honored use, which defeats the

goal of stability. A custom that dates back to the ancient era must be observed constantly and without interruption. A custom is said to have deserted if it is not practiced for even a brief period due to an unintentional or deliberate belief or for any other cause.

- *Certainty*- A custom must be certain and clear in order to acquire validity. The traditions should be explicit in terms of what they imply or assume. Any degree of obscurity or uncertainty will cause confusion, which will negate one of a legitimate custom's key components. The degree of clarity with which a custom is practiced to its fullest potential gives it power. It is void if there is any non-confirmation or non-compliance with the same.

Before being included in regulations, customs must appear to be reasonable and should not cause more harm than good. If it violates the aforementioned requirements, it must be thrown out. Traditions shouldn't be up for discussion in the presence of rudeness and unreasonableness. For instance, a tradition permitting marriage with the daughter's daughter or the practice of Sati should not exist because they were created in an unreasonable manner and should never be allowed to exist. However, it is not necessary or required for traditions to have logical underpinnings. A valid custom must adhere to legislative enactments and be justified by morality, public policy, or an explicit law. There is no prescriptive formula given anywhere that would allow us to describe or assess immorality. The determination of immorality for the benefit of the general public rests with the judges. The longevity of a practice is not an assurance that a custom is righteous or reasonable. Consequently, it cannot be guaranteed that it will be upheld in judgment. Marriage with the daughter's daughter was deemed immoral in the landmark case of *Balusamy Reddiar v. Balkrishna Reddiar*, despite the presence and practice of such a custom in the Reddiar community of Tirunelveli district.

TYPES OF CUSTOMS

Customs can be classified into the following categories:

1. *Unsanctioned Custom*- This theme shields customs that deal with less significant aspects of our social lives. As a result, they are also known as customs without legal duties. For instance, it is customary in India to avoid wearing black clothes to any auspicious or festive events, such as wedding ceremonies, or from wearing brightly coloured clothing to funeral services as a sign of respect for the deceased. No man is

compelled or under any duty to carry them out. However, people in a community often engage in these behaviours out of a fear of social rejection rather than a desire. Individuals have adhered to these because of the peer pressure of the general public and their opinions, which discourage them from failing to execute them because failing to do so will result in their extinction. Consequently, they are also known as societal customs.

2. Sanctioned Customs- This category segregates customs that are clearer and demanding in nature and are viewed as the responsibilities and duties. These practices may modify the responsibilities of marriage and childrearing, the transfer of property upon death, or the methods of concluding and carrying out deals. Such practices interfere with the serious pursuits of life, the work that must be done to create and ensure sufficient conditions for communal life, rather than the realm of social formalities, external decorum, or aesthetics. Due to the approval or acquisition of certain standards or qualifications by these traditions, they now possess the legal status. The same will have legal repercussions if it is violated because they are enforceable or mandatory in nature.

CONTROVERSIAL CUSTOMS IN HINDU LAWS

As mentioned above, India is a land of customs. Every culture, every tribe, every district, has its own customs that it follows, which are passed from one generation to another through practice and word of mouth. And these customs are known by people all over the country, but there are some customs that are not known to everyone, and many of these lesser known customs are controversial as they result in moral harm to the people. Some of these customs are as follows:

1. The Travancorean Nambudiri tribe practiced a revolting tradition. This caste's female members typically get married before they reach puberty. However, according to tradition, if a girl who has never been married begins to show signs of puberty and passes away before engaging in intercourse with a man, her parents must pay a man money and gifts to complete such a form of marriage because failing to do so would bring shame to the family.
2. When a family's eldest girl marries, the Morsa-Okkala-Makkalu caste in eastern Mysore has a tradition that requires the mother to submit to the amputation of two joints from the

right hand's middle finger and ring finger. Additionally, the bridegroom's mother or, in her absence, the mother of the closest cousin, must agree to this heinous mutilation if the bride's mother is deceased.

3. In some places in India, there is a custom where an uncle can wed his niece, a widower can remarry his late wife's sister, a first cousin can wed his first cousin. People who are related in this way have the exclusive right to intermarry based on their relationship. If they so choose, they can also forbid any other unions and impose their own preferential right, regardless of how old, unfit, weak, or poor they may be. However, several odd and absurd differences are made in this context. An uncle is permitted to wed the daughter of his sister but not the daughter of his sibling. The children of one brother and one sister may intermarry, but the children of two brothers and two sisters may not. The male line always has the option to enter a marriage contract with the female line among descendants of the same stock, but the offspring of the same line are never allowed to intermarry. The justification for this tradition is that male and female lineage children continue to refer to one another as siblings and sisters for as long as it is acknowledged in public that they are descended from the same stock. If the children of either the male or the female line intermarried, it would be said that a man was marrying his sister. However, the children of the male line do not refer to the children of the female line as brothers and sisters, and vice versa; instead, they refer to each other by special names that express their relationship. So, a man can and even must marry his sister's daughter, but never his brother's daughter. The daughter of a male first cousin's maternal aunt is the only female first cousin he may marry; he is not permitted to wed the niece of his paternal uncle.
4. One of the customs practised in Karnataka is baby throwing. People engage in the centuries-old rite. In a 2009 ritual captured on video, robed priests shake terrified infants before lowering them to the earth below, where neighbours are waiting with blankets to catch the traumatised infants. The audience erupts in jubilation as the kids land safely and passes each baby around before handing them back to their mothers. Local activists were successful in having the practise outlawed in 2011, but it has now reappeared to the Nagrala village's Digambeshwara temple.

5. Another age-old custom that has been followed by people is the practice of not allowing the female members of a family to be present at the last rights of their family members. Even though nowadays people have adopted a new mindset, there are still numerous families who practice this. In fact, most of the people in India practice this. This custom is not as physically harmful as the ones mentioned above, but it promotes gender bias in the society. The Antyeshthi Samskara is mainly performed by the male members of the family. In fact, most Hindu sacred texts promote this. And even though the scriptures allow females to perform the last rites in exceptional cases, this occurs when there is no male member present to perform the act.

There are so many more customs that are prevalent among different tribes in the country, in different districts. Many of them should be discontinued by law due to the harm they cause in the society.

CONCLUSION

In the early stages of society's development, customs were regarded as the only basis of law. They serve as the framework for all legal systems. They came into existence in order to regulate human behaviour and bind individuals to a set of norms within a community. Traditions are routine behaviours followed by the general public since the dawn of time that are logical and incorporated into the law. Customs have a long past dating back to the dawn of humankind. Only when a custom satisfies the requirements is it recognized as legitimate, and only then is it given legal sanction and the status of being a legally binding obligation in society.

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