

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

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# **CUSTOMARY PRACTICES IN CONSTITUTIONAL LAW AND THEIR SCRUTINY FOR LEGITIMACY AS A LEGAL SOURCE**

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## **Abstract**

This analysis critically examines the constitutional validity of customs as a source of law in contemporary legal systems, with a primary focus on India. It explores the definition, nature, and evolution of customary law, its interplay with codified legal norms, and the constitutional boundaries it must respect in a modern constitutional democracy. Through a detailed examination of judicial precedents and constitutional doctrines, this paper investigates whether customs, as an unwritten source of law, can be upheld in the face of constitutional principles such as equality, justice, and fundamental rights. Key legal maxims and principles of judicial interpretation are explored to assess the delicate balance between the recognition of customs and the protection of individual rights under constitutional law.

## **Keywords**

Custom, Social Custom, Legal Custom, Conventional Custom, Judicial Precedent, Constitutional Law, Personal Law, Tribal Law, Immemorial Custom, Public Policy, Fundamental Rights.

## **Introduction: Understanding Customary Law in the Modern Legal Order**

Customary law, also known as *jus non scriptum* (unwritten law), has historically served as an integral part of the legal fabric of many societies. Unlike statutory law, which is codified and written, customary law arises from the practices, traditions, and habits of communities, developing organically over time. These customs are observed with a sense of legal obligation and are recognized as a source of law by the members of the community. *Consuetudo est lex* (Custom is law) encapsulates the essence of customary law, indicating its force as a binding rule when it gains widespread acceptance and is perpetuated by continuous adherence.

However, with the establishment of modern nation-states and the development of constitutional supremacy, the status of customs as a source of law has been increasingly questioned. The codification of laws, the separation of powers, and the protection of individual rights under constitutional frameworks raise important concerns about the compatibility of customary law with modern legal systems. In particular, the challenge lies in reconciling customary practices with the fundamental rights enshrined in national constitutions, especially in areas involving gender equality, justice, and the non-discrimination of marginalized groups<sup>1</sup>.

In this paper, we explore the constitutional validity of customs in the Indian legal context, providing a comprehensive analysis of how customary law is treated in India's legal system, as well as examining relevant judicial precedents and constitutional principles. We will delve into the central legal concepts that govern the relationship between customary law and constitutional law, utilizing key legal maxims and doctrines of statutory interpretation to evaluate whether customary practices can withstand the constitutional scrutiny of fundamental rights.

### **Defining Customary Law and its Legal Significance**

Custom is the unwritten law of a nation, arising from the general practices of the people. (Blackstone, *Commentaries on the Laws of England*). This definition highlights the informal yet binding nature of customs, which evolve from consistent and widespread practices in a society. Customary law stands in contrast to written or statutory law (*lex scripta*), yet it is no less significant in the legal hierarchy, especially when codified law is silent or ambiguous on a particular matter<sup>2</sup>.

### **Essentials of Customary Law: Conditions for Recognition**

For a custom to attain legal validity, several conditions must be satisfied. These conditions align with the legal maxim *Consuetudo certissima est lex* (Custom is the surest law), which suggests that a custom, once established, holds the same force as statutory law. The requirements for recognizing a valid custom include:

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<sup>1</sup> <https://blog.ipleaders.in/customs-source-law/>

<sup>2</sup> V.D. Mahajan's Jurisprudence & Legal Theory by VB Coutinho, EBC, 6<sup>th</sup> edition, 2023

1. **Immemorial Usage:** The custom must have been in continuous practice for such a long period that its origin is lost to history. It must not be a recent innovation but rather a long-standing practice, gaining legal force by virtue of its time-honored nature.
2. **Reasonableness and Fairness:** A custom must be reasonable and should not contradict contemporary principles of justice, equity, or fairness. The maxim *Ex iniuria jus non oritur* (Law does not arise from injustice) reflects that a custom which is inherently oppressive or unjust cannot be recognized as a valid legal norm.
3. **Public Policy Consistency:** The custom must not conflict with public policy or the larger legal framework established by the state. This is encapsulated in the principle *Lex posterior derogat priori* (A later law derogates an earlier law). If a custom is in conflict with statutory law or constitutional provisions, the latter will prevail.
4. **Recognition by Judicial Authorities:** For a custom to become legally enforceable, it must have the approval and recognition of the courts. In India, this principle is recognized by judicial decisions that evaluate the applicability of customs, ensuring they conform to constitutional values.

In India, the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 codified personal laws but also preserved the role of customs within the Hindu community, subject to the condition that these customs do not contradict the Constitution's guarantees of equality and justice.

The maxim *nemo debet esse judex in propria causa* (no one should be a judge in their own cause) applies to judicial determinations of customs, where judges are required to assess customs impartially, in accordance with principles of justice.

The principle *testis unus testis nullus* (one witness is no witness) applies to customary practices as well: evidence of widespread practice is paramount to validating the existence of a custom. As noted in Justice James W. Colvile's judgment in *Collector of Madura v. Muthoo Ramalinga Seupathy*, clear proof of usage can often outweigh written statutes<sup>3</sup>.

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<sup>3</sup> Collector of Madura Vs Muthoo Ramalinga Seupathy, 1868 SCC OnLine PC 3: (1867-69) 12 Moo IA 397

## The Evolution of Customary Law in the Common Law Tradition

### Customary Law in the Precedent-Based Legal Systems

In the Common Law tradition, customs played a pivotal role in the development of legal principles. Custom, as the unwritten law of the land, was the cornerstone of legal practices before the establishment of written statutes. Historically, customary law was seen as binding because it was consistent with the norms and practices of a community.

Customs in early societies were observed as *lex loci* (law of the place), indicating that legal practices were shaped by the region's long-established customs. Over time, however, as statutory laws were introduced, customary law began to be subjected to greater judicial scrutiny to ensure that it did not violate emerging principles of justice and equality.

In England, the Magna Carta (1215) formally recognized the significance of local customs and practices, marking the intersection of customary law and state power. However, over time, statutory laws began to supersede many aspects of customary law, particularly when such customs conflicted with emerging legal principles or human rights.

### Custom as a Source of Law in England and India: A Comparative Legal Analysis

#### Custom as a Source of Law in England

The common law system of England, a hallmark of the Anglo-Saxon legal tradition, has its roots in customs that were recognized and gradually incorporated into law by courts. In England, customary law evolved from the practices followed by various local communities during the medieval period. These customs, considered as unwritten rules, were acknowledged by the courts as a valid source of law when they met specific criteria, such as being immemorial (long-established) and widely accepted by the local community. The doctrine of *Ex longo tempore consuetudo fit jus* (from long time, custom becomes law) serves as the foundational principle in this respect<sup>4</sup>.

**Common Law and Custom:** In England, common law developed primarily through judicial decisions. Judges, in interpreting the law, often relied on customs followed within specific communities or regions of the country. Common law, therefore, is deeply intertwined with

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<sup>4</sup> <https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/>

customs, as it not only reflects the decisions of judges but also the customs that formed the bedrock of those decisions. Customs that were widespread, accepted, and consistent with existing legal principles were absorbed into the corpus of common law, thus becoming binding and enforceable.

### **Key Features of Customary Law in England:**

1. **Binding Nature of Local Customs:** Historically, customs that were long-established and widely practiced could be recognized by courts as having the force of law. Such customs could relate to land tenure, marriage, or property rights, as long as they did not conflict with statutory law or public policy. For example, rights of tenants or local marriage customs could be enforced, provided they did not contravene broader national laws.
2. **Judicial Recognition of Custom:** Courts played a pivotal role in recognizing whether a custom could be considered binding. The custom had to meet the following requirements:
  - It had to be **immemorial**: The custom must have been in existence for a long period, with no evidence of its origin being within the recent past.
  - It had to be **reasonable**: The custom must not be unreasonable or inconsistent with the broader public policy.
  - It had to be **peaceable**: It must not lead to social unrest or conflict.
3. **Examples of Customary Law in England:**
  - **Rights of Commons:** The right to common land use, such as grazing animals, was governed by customs specific to particular regions.
  - **Customary Land Tenure:** Local customs governed how land was inherited and transferred, particularly in rural areas.
  - **Marriage and Inheritance:** Certain marriage customs and inheritance practices continued to be regulated by customary law in specific regions<sup>5</sup>.

The role of custom as a primary source of law in England was vital during the formative stages of common law, as it allowed the law to evolve organically from the practices of the people. However, as England's legal system became more structured and codified, the significance of customs as a source of law diminished, though they continue to play a role in the development of legal norms, particularly in property and family law.

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<sup>5</sup> [https://eprints.lse.ac.uk/70258/8/Duxbury\\_Custom%20as%20law\\_author\\_2017%20LSERO.pdf](https://eprints.lse.ac.uk/70258/8/Duxbury_Custom%20as%20law_author_2017%20LSERO.pdf)

## Custom as a Source of Law in India

India's legal system is distinctively pluralistic, reflecting its diverse cultural, religious, and social fabric. Customary law in India has played an integral role in shaping personal laws and the governance of tribal communities. Unlike England, where common law emerged as the dominant system, India's legal history reflects a complex interplay of customary law with statutory and religious laws, such as Hindu law, Muslim law, and tribal customary law.

The introduction of colonial rule by the British significantly altered the nature of customary law in India. While the British sought to standardize and codify legal practices, many customary laws continued to thrive, particularly in rural areas and among tribal populations. Over time, customary law became an essential source of law, particularly in matters of marriage, inheritance, succession, and property<sup>6</sup>.

### Key Features of Customary Law in India:

- Hindu Customary Law:** Hindu customary law governs aspects of personal law, such as marriage, divorce, and inheritance. Despite the enactment of legislative frameworks like the Hindu Marriage Act (1955) and Hindu Succession Act (1956), certain customary practices continue to be recognized, provided they align with the public policy and do not contravene statutory law. The principle of *lex non scripta* (unwritten law) underpins the enduring influence of Hindu customs, which are seen as legitimate when they reflect the cultural practices of the community<sup>7</sup>.
- Muslim Customary Law:** Muslim personal law in India has also been influenced by customary practices rooted in Sharia (Islamic law), which governs areas such as marriage, divorce, and inheritance. The Muslim Personal Law (Shariat) Application Act (1937) recognizes the role of custom in governing personal relations among Muslims. The customary law of Muslims in India often operates alongside religious texts, and courts frequently interpret such customs within the framework of modern constitutional guarantees, especially when addressing issues of gender equality.
- Tribal Customary Law:** India's tribal communities have historically followed their own system of customary laws, particularly in land rights, marriage practices, and community governance. In regions like Nagaland, Meghalaya, and Mizoram, tribal customary laws enjoy constitutional recognition under Articles 371A and 371G of the

<sup>6</sup> <https://blog.ipleaders.in/customs-as-a-source-of-law/>

<sup>7</sup> <https://lawbhoomi.com/customary-law-in-india/>

Indian Constitution. These provisions allow tribal areas to follow their traditional practices, provided they do not conflict with national laws. The principle of *ubi jus ibi remedium* (where there is a right, there is a remedy) reinforces the need to ensure that customary rights are protected within the legal framework of India.

4. **Judicial Recognition of Customary Law:** Indian courts have often been called upon to interpret and apply customary law, particularly in cases where such laws intersect with constitutional principles like equality and justice. A significant example is the Shah Bano case (1985), where the Supreme Court ruled on a Muslim woman's right to maintenance under customary law. This case sparked widespread debate regarding the balance between customary law and gender equality, leading to the Muslim Women (Protection of Rights on Divorce) Act, 1986, which sought to address the court's concerns about gender justice<sup>8</sup>.

### Colonial Influence on Customary Law in India

In India, during the colonial period, British judges often recognized and upheld the customary practices of indigenous communities, especially in areas such as inheritance and property rights. British colonial courts allowed customs to govern personal and family matters, especially when there were no codified laws governing these issues. However, the colonial legal system also sought to reform practices that were seen as unjust or oppressive, often disregarding customs that violated principles of equality or fairness.

### Challenges in Implementing Customary Law: A Legal Analysis

#### 1. Uncertainty of Customs: The Formation and Clarity of Customary Law

The uncertainty surrounding the recognition of customs as law presents a fundamental challenge. Customary law arises from consistent societal practices, but determining its legal validity requires a clear and established *Noscitur a sociis* (a word is known by the company it keeps). The vagueness of customs, especially those unwritten, can lead to inconsistencies in enforcement. For a custom to be legally binding, it must satisfy criteria such as immemorial usage and reasonableness under the maxim *Ex longo tempore consuetudo fit jus* (from long time, custom becomes law).

#### 2. Theoretical Underpinnings: The Inductive Nature of Customary Law

Customary law develops inductively, arising from societal norms rather than deduced

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<sup>8</sup> <https://www.legalserviceindia.com/legal/article-8657-analysis-of-customs-as-a-source-of-law-india.html>

from abstract principles. The maxim *Ex nihilo nihil fit* (nothing comes from nothing) underlines the necessity for a historical foundation. Unlike codified law, customary law reflects social consensus rather than legislative decree, but this inductive nature can result in conflicts with modern legal principles and human rights standards, creating tension between traditional and contemporary legal norms.

### **3. Continuity: The Requirement for Long-Term Practice**

For a custom to be recognized as a valid source of law, it must demonstrate continuity - a long-standing and uninterrupted practice within a community. The maxim *Consuetudo est quae semper ab omnibus observatur* (custom is that which has always been observed by all) emphasizes the need for a custom to be universally and continuously acknowledged. However, the challenge arises when practices become disused, leading to the doctrine of abandonment where outdated customs lose their legal relevance, as reflected in the maxim *Lex non scripta* (unwritten law).

### **4. Opinio Juris: The Belief in Legal Obligation**

A critical aspect of customary law is *opinio juris* - the belief that a practice is legally obligatory. *Opinio juris et necessitatis* (the opinion of law and necessity) underscores that for a custom to be recognized, it must be seen as a legal duty by the community. Without this perception of legal obligation, a custom risks being regarded as merely a social practice rather than a binding legal norm.

### **5. Abandonment: Customary Practices Losing Legitimacy**

The abandonment of customs that no longer align with modern values presents another legal challenge. The maxim *Fiat justitia ruat caelum* (let justice be done though the heavens fall) highlights the need for legal reforms that may lead to the repeal of unjust customs, even if they have historically been widely practiced. Disuse and rejection over time gradually strip customs of their legal authority, especially when they conflict with fundamental human rights or public policy.

### **6. Morality: Ethical Considerations in Customary Law**

The alignment of customary law with moral principles is paramount. Customs that contradict public morals or human rights cannot stand. The maxim *Fiat justitia ruat caelum* (let justice be done though the heavens fall) suggests that customs inconsistent with modern ethical standards, such as child marriage or discriminatory practices, must yield to justice and equality. Judicial review plays a vital role in testing whether customary law aligns with contemporary moral and legal standards.

### 7. Resistance to Change: Cultural and Legal Inertia

Resistance to change in entrenched customs is a major challenge, particularly in communities where such customs are deeply ingrained. The maxim *Stare decisis et non quieta movere* (to stand by decisions and not disturb settled matters) reflects the difficulty in challenging long-standing practices. Legal reforms to address harmful customs, like gender-based discrimination, often face resistance, as such customs are deeply rooted in cultural identity and social structure<sup>9</sup>.

### 8. Lack of Codification: Ambiguity in Customary Practices

The lack of codification in customary law leads to ambiguity and inconsistency in its application. The maxim *Ubi jus ibi remedium* (where there is a right, there is a remedy) stresses the need for clarity in law, and the absence of formal codification makes customary law difficult to enforce. Unwritten and unstandardized customs can lead to confusion, as they are susceptible to different interpretations and regional variations.

## The Constitutional Framework and Customary Law in India

The Constitution of India, which came into force in 1950, marked a new era of legal governance, where constitutional supremacy became paramount. While recognizing the historical importance of customary law, the Constitution established a legal framework that safeguarded fundamental rights and ensured that no law, including customary law, could violate the basic principles of justice, equity, and liberty.

### Constitutional Provisions Relating to Customary Law

Several provisions of the Indian Constitution have a direct impact on the application and validity of customary law:

1. **Article 13(1)** of the Constitution declares that all laws, including customary law, that are inconsistent with the fundamental rights guaranteed under Part III of the Constitution, are void. Therefore, any custom that conflicts with the constitutional rights of an individual or group is not enforceable.
2. **Article 15** prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Customs that discriminate based on these grounds are therefore invalid. This provision aligns with the maxim *Hominum causa omne jus constitutum est* (The law is

<sup>9</sup> <https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf>

established for the benefit of mankind), reinforcing the principle that customary practices should promote equality and fairness.

3. **Article 25** guarantees the right to religious freedom, allowing individuals to practice and propagate their religion and its customs. However, this right is not absolute and is subject to public order, morality, and health, as stipulated in Article 25(2). Thus, religious customs that violate the constitutional principles of justice and equality are not protected under the guise of religious freedom.
4. **Article 371A** and **Article 371G** provide special protections for the customs of the tribal communities in states like Nagaland and Mizoram, allowing for the continued applicability of tribal customary laws, provided they do not violate constitutional guarantees of equality and justice.

### **Personal Law and Customary Law**

In the Indian context, personal laws governing marriage, inheritance, and property continue to be influenced by religious customs. The Hindu Marriage Act, 1955, the Muslim Personal Law (Shariat) Application Act, 1937, and other community-based laws recognize and regulate personal matters according to religious and customary practices. However, these laws also uphold the constitutional guarantees of equality and justice. Judicial interventions have often played a role in ensuring that such customs do not violate fundamental rights, particularly the rights of women and marginalized communities.

For example, the practice of polygamy in certain Muslim communities was challenged in the courts and eventually deemed inconsistent with constitutional norms of equality in *Sarla Mudgal v. Union of India* (1995). Similarly, the customary practice of untouchability in certain Hindu communities was struck down by the Supreme Court as a violation of Article 17, which abolishes untouchability.

### **Judicial Review of Customary Law: A Balancing Act**

The Indian judiciary plays a crucial role in determining whether customs should be upheld or struck down. The judicial review of customary law ensures that such customs do not conflict with the constitutional values of justice, equality, and fundamental rights.

## Landmark Cases in the Judicial Review of Customary Law

1. **Brij Mohan Lal v. Union of India** (2011) – The Supreme Court invalidated the customary practice of untouchability, affirming that such customs violate the constitutional guarantee of equality under Article 15<sup>10</sup>.
2. **S.R. Bommai v. Union of India** (1994) – This case reinforced the constitutional supremacy principle and clarified that no customary political practice, even in states, could override the Constitution's provisions<sup>11</sup>.
3. **Sarla Mudgal v. Union of India** (1995) – The Court held that polygamy, as a customary practice among certain Muslim communities, was inconsistent with the constitutional principle of equality, as enshrined in Article 14<sup>12</sup>.

## The Future of Customary Law in the Constitutional Framework

### Conclusion

Customary law remains an important source of law in India, especially for personal matters related to marriage, inheritance, and family affairs. However, as constitutional democracy evolves, the role of customary law must be subjected to rigorous scrutiny to ensure that it does not infringe upon fundamental rights or perpetuate practices that are discriminatory or unjust. The courts must continue to play a vigilant role in balancing tradition with constitutional values, and ensuring that any custom that conflicts with the principles of equality, justice, and human dignity is reformed or struck down.

The legal maxim *Summum jus, summa injuria* (Extreme law is extreme injustice) serves as a cautionary reminder that laws, whether customary or statutory, must be applied with due consideration for fairness and justice. Customary law, while it may hold historical and cultural significance, must evolve to ensure that it aligns with the overarching principles of modern constitutional democracy.

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<sup>10</sup> Brij Mohan Lal Vs Union of India (2011) 6 SCC 502

<sup>11</sup> S. R. Bommai Vs Union of India (1994) 3 SCC 1

<sup>12</sup> Sarla Mudgal Vs Union of India (1995) 3 SCC 635