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"A CRITICAL STUDY OF CUSTOMS AND USAGES IN HINDU LAW: ITS COLONIAL TREATMENT AND CONSEQUENCES"

AUTHORED BY - ALIND GUPTA

Abstract

The article analyses the importance of customs and usages within the Indian context and its role in law making in the British India and subsequently in independent India. The first part deals with the historical school of jurisprudence which is centered around customary law. It also covers the crucial differences between the historical school and analytical school. The second part highlights the essential characteristics of a valid custom before focusing on the colonial treatment of customs and usages by the Britishers. It delineates the complex choices faced by the British when they encountered the diversity within India. The final part points out how the codification exercise ossified personal laws and robbed it of its core element of diversity. This attitude was inherited by the English educated leaders of independent India and made its presence felt in the post-constitutional personal laws.

INTRODUCTION

Customs and usages represent those practices that have attained the force of law due to its general observance in a community. It can be defined as the unwritten law sanctioned by immemorial usage.[1] All law originally was customary as there was no law making body to legislate. Even after the advent of smritis and various commentaries, the customs maintained their potency. The customs formed the basis of such smritis and commentaries and in case of conflict between the text and the customs, the customs were given priority. The fact can be gauged by the judgement of Sir James Colville when he states that 'clear proof of usage will outweigh the written text of law'.[2] The Britishers also recognized the significance of customs in the Indian society and too tried to give due emphasis to customs and usages ingrained in the society through their regulations. The Punjab Laws Act of 1872 stipulates that, in relation to a wide range of subjects,

[1] S R Myneni, Family Laws in India (1st edn, Asia Law House 2009) 9
[2] Collector of Madurai v Mootoo Ramalinga Sethupathy (1868) 12 MIA 397

ISSN: 2582-6433

the primary principle of determination shall be 'any custom applicable to the parties concerned'.[3] Religious scholars like Manu too realized the supremacy of the customs when he proclaimed immemorial custom as transcendent law.[4] Narada echoed Manu and exclaimed, 'custom is powerful and overrides sacred law'.[5] Thus, we can see how customs were regarded as sacrosanct by various religious thinkers and this thinking trickled down to the British, at least initially, who gave due emphasis to customs and usages practiced by the Indians.[6]

PART 1- HISTORICAL SCHOOL OF JURISPRUDENCE

The study of ancient Indian jurisprudence belongs to the historical school of jurisprudence.[7]It is important to understand this school of jurisprudence to appreciate the value of customary law. This school of thought emerged contemporaneously with the Analytical positivism at the beginning of 19th century. Despite sharing their genesis, both the schools (Analytical positivism and Historical school) have adopted starkly contrasting approaches to the study of law with the former heavily emphasizing the importance of legislature and the latter, making customs as the focal point.

Friedrich Carl von Savigny, a German jurist and historian is widely considered as the founder of the historical school of jurisprudence. The prominence he gave to historicity of laws is reflected in his monumental work, *Das Recht des Besitzes* (The Law of Possessions). His subsequent work covering the history of Roman law speaks volumes about his interest in the history of legal conceptions and developments.[8] Savigny was disillusioned with the French revolution and the concomitant brutalities induced him to rebel against codification.

Savigny was strong advocate of customary law and firmly believed that law is the product of common consciousness of people. According to him, law is not an artificial collection of verbal formula but a part of people's experience. He coined the term 'volksgeist' to represent the spirit

[3] Lindesay Robertson, 'Judicial Recognition of Customs' (1922) 4 Journal of Comparative Legislation and International Law, http://www.jstor.org/stable/753149 accessed 18 December 2023
[4] Myneni (n1) 10
[5] ibid
[6] W H Rattigan, 'Customary Law in India' (1884) Law Magazine and Review, http://heinonline.org/HOL/Page?handle=hein.journals/lmagc10&collection=journals&id=5&startid=&endid=22 accessed 18 December 2023
[7] M Katju, 'Ancient Indian Jurisprudence' (Bharat Hindu University 2010) 14 https://www.academia.edu/16833641/Ancient_Indian_Jurisprudence_by_Justice_Markanday_Katju accessed 18 December 2023
[8] Autar Krishen Koul, A Textbook of Jurisprudence (1st edn Satyam Law International 2009) 84

ISSN: 2582-6433

of people i.e., their general consciousness. He additionally asserted that law formulated without due regard for the historical culture and tradition of a society is prone to generate greater perplexity, as law is not a mere "artificial lifeless mechanical device," but rather emerges from the collective spirit of the people, also referred to as volksgeist.[9]

Savigny drew an analogy between law and language, and stated that law, like language, develops and gains its strength from the society itself. It is not universal in nature and differs from people to people just like language. To Savigny they seemed almost a part of the blood and bone of people. Just as people desperately cling to their language and feel no oppression so bitter as that of being forced to speak an alien tongue, so, in Savigny's view, people ought to hold on with tenacity to the laws which have come down to them from their remote ancestors.[10]

He heavily relies on customary law and propounds that all law originally develops impulsively and then after reaching certain stage of civilization the jurists mould the law with respect to the customs. Thus, he introduced the element of dualism in law and called the part of law representing the common consciousness of people as 'political element' and the part developed by jurists as 'technical element'. Despite this dualism of law, Savigny concentrated on the common consciousness of people and expressed that customary laws carry the real nature of law. One cannot understand the development of law without going through the spirit of people that created the law. Law is not written in stone but is a living fact, living in people's consciousness.[11]

As the consciousness of people is an ever-going process, the development of law is also continuous and unbreakable, bound by common beliefs and cultural traditions of the people. This also provides Savigny a ground to call for prevention of codification of law as writing down the law would betray its continuity and would no longer represent the consciousness of people.[12] Savigny concedes the fact that legal professionals are required for mature law and realizes that jurists, legal scholars and judges are needed to shape the technical aspect of the law to supplement

[9] Avtar (n8) 28
[10] F P Walton, 'The Historical School of Jurisprudence and Transplantations of Law' (1927) 9 Journal of Comparative Legislation and International Law < http://www.jstor.org/stable/753569> accessed 18 December 2023
[11] W H Rattigan, 'Customary Law in India' (1884) Law Magazine and Review, http://heinonline.org/HOL/Page?handle=hein.journals/lmagc10&collection=journals&id=5&startid=&endid=22 accessed 18 December 2023
[12] Walton (n11)

ISSN: 2582-6433

the common consciousness of people.[13] This fact in no way undermines the importance given to customs over the arbitrary will of the legislator as Savigny clarifies that these legal functionaries remain only as mouthpieces of the popular consciousness and are there to supplement the volksgeist not supplant it.[14]

COMPARISON WITH ANALYTICAL SCHOOL OF JURISPRUDENCE

In order to clearly outline the boundaries of historical school of jurisprudence in context to customary law, it becomes imperative to differentiate it from the other dominant school of thought i.e. the analytical school of positivism, developed by legal scholars like Austin and Jeremy Bentham in 18th and 19th century. The analytical school takes a different take-off point as it pre-supposes the existence of a well-developed legal system. They are neither concerned with the future of law nor with its past but law as it exists i.e. positus. They study law in relation to State and consider law as the command given by a sovereign authority (the State) backed by legal sanctions.

In analytical school, law is the product of state while in historical school, law is the product of people's consciousness i.e. law is found, not made. Analytical school of thought pre-supposes the existence of state for the purposes of framing the law but the historical school argues that not only is the customary law superior to the written law or legislation, it also precedes it. Analytical school revolves around legislature- oriented statutes while historical school treats customs as its focal point. In this context, the analytical school states that for custom to become a law, it has to be ratified by the legislature or its validity must be upheld by a judicial decision. In absence of above two requisite conditions, custom would merely remain a persuasive source of law. The historical school treats custom as the formal source of law. All other legal creations supplement the custom as custom is transcendent law and other instruments derive their validity through customs. The sanctions imposed in case of non-compliance with the law are artificially imposed by the state in analytical jurisprudence while the sanction is imposed by the society through social ostracization.[15]

[13] Autar (n9) 87
[14] Avtar (n8) 29
[15] Rattigan (n6) 6

ISSN: 2582-6433

Thus, we can figure out the stark differences between the two schools of jurisprudence with one of them focusing on the state in the existing context while the other one revolving around the people's consciousness and subsequent importance of history. Both of the schools offer important insights into sources of law be it the state-oriented legislation or the people-oriented custom.

PART 2- TRACING CUSTOMS AND USAGES IN COLONIAL INDIA

Customs and usages were considered sacrosanct in ancient India. The entire ancient Indian jurisprudence was based on customary laws.[16]The foundation of Hindu law i.e. the Smritis heavily relied upon the prevailing customs. This can be gauged by the fact that smritis and commentaries repeatedly stated that customs would override the text.

Custom can be defined as the mode of life adopted by a group of people. It is considered transcendent law due to its sheer importance and general approval among the people practicing it. The Sanskrit term for custom is "sadachara," which denotes an accepted and established practice. Various commentaries and smritis have laid down the importance of customs. Yajnavalkya smritis states, 'one should not practice that which, though ordained by the Smriti, is condemned by the people'.[17] Religious scholars like Manu too realized the supremacy of the customs when he proclaimed immemorial custom as transcendent law.[18] Narada echoed Manu and exclaimed, 'custom is powerful and overrides sacred law'.[19] The importance given to customs can be ascertained by such overwhelming response by legal scholars and smritis in favour of the customs.

Customs were of various kinds. **Local customs** were limited to a particular locality like a town or village and was binding on all the people living within that area. **Class customs** were the customs of a caste or a set of community or set of people practicing a particular profession such as trade, agriculture, etc. These customs were class or community specific. **Family customs** were family centric and covered all members of the family practicing such custom. These customs did not apply to any other member who was not part of the specific family. The Privy Council upheld

[16] Katju (n7)
[17] Mayne, Hindu Law and Usage (16th edn, Bharat Law House 2008) 46
[18] S R Myneni, Family Laws in India (1st edn, Asia Law House 2009) 10
[19] ibid

ISSN: 2582-6433

family custom when it ruled in favour of inheritance practiced in a particular family.[20] The Privy council further said, 'Custom binding inheritance in a particular family has long been recognized in India'.[21]

ESSENTIALS OF A VALID CUSTOM

All customs do not have the force of law. Only those customs that are in practice for a long time, uniform, certain and not opposed to public policy are considered as a legal custom. Various conditions that must be satisfied by a custom in order to attain the force of law are enumerated below.

1. Ancient

Antiquity of a custom is an essential element for it to obtain legality. In Hindu law, immemorial custom has *'propio vigore'* efficacy of law.[22] The Latin term '*propio vigore'* means 'by its own force'. This signifies that the custom must be practised for a long time, so as to imply its common acceptance. There is no yardstick to establish the long use of a custom. Some of the cases have held that the customs must have existed as far as the living testimony can establish. However, in *Babu Narain Lakras v Saboosa,*[23] the Privy Council clarified that a custom maybe not necessarily be immemorial but its long usage is essential for it to become a valid custom.

2. Clear and reasonable

A custom must be certain and free from vagueness. A distorted or ambiguous custom makes it difficult to trace its lineage and establish its long usage. Ambiguity also leads to multiple applications of the same custom which subsequently reduces its strength and thereby, precludes it from becoming a valid custom. A custom is legally recognized only if its clear usage is proved. Custom must also conform to the public policy prevailing at that time. An unreasonable custom i.e. against the public policy is considered void. The reasonability is society-specific and must be determined according to norms of the society in which the custom is practiced. In *Rajah Verma v. Ravi Verma*, [24] the Privy Council determined that a custom allowing the trustee of a religious endowment to sell the trust was invalid and against to public welfare.

[20] Soorendranath Roy v Heeramonee Burmoneah (1868) 12 MIA 91
[21] Myneni (n19) 11
[22] ibid
[23] Babu Narain Lakras v Saboosa (1949) ALJ 360
[24] (1876) 4 IA 76

ISSN: 2582-6433

3. Continuity and uniformity

The observance of a custom must be continuous. Erratic and infrequent usage of a custom takes away its legal force. Continuity of a custom is also essential to prove its antiquity. If there exists a single incident where the custom was given up or suspended, it negatives the legality of a custom. There should not be in any break in the usage of custom in order to establish its continuity. Uniformity also adds credence to a custom. A uniform and continuous adherence to a custom proves its indispensability.

4. Not immoral

Morality is a subjective term and must be outlined with respect to the facts and circumstances of a particular case. It is to be tested on the basis of common consensus of the entire society, not a part of it. Morality of a custom is extremely important as an immoral custom lacks enforceability even if it is longstanding. In *Hira v. Radha,*[25] the court held that allowing a temple girl to adopt a girl with the intention of training her for an immoral profession is invalid.

COLONIAL TREATMENT OF CUSTOMS AND USAGES

As we entered the colonial era, the ingrained significance of customary laws trickled down to the British, at least initially. The British, bewildered with the diversity and the vast spectrum of beliefs decided to play safe and adopted the policy of non-interference in the personal laws of India. The British Raj demonstrated great care to avoid interfering with, or neglecting to acknowledge, the rituals and practices that had become integral to the traditions of the communities in which they were practiced.[26] This has been reflected in many of their legislations and regulations during that period. It may be best illustrated with the help of two regulations. In a Bombay Regulation of 1827 it was laid down that 'the law to be observed in the trial of suits shall be . . . Acts of Parliament, and Regulations of Government applicable to the parties. In the absence of such Acts and Regulations, the usage of the country in which the suit arose'. In the Punjab Laws Act of 1872, it was enunciated that the first rule of decision be 'any custom applicable to the parties concerned'.[27]

The policy of non-interference was conspicuous in Warren Hastings' plan of 1772, where a

[25] ILR 37 Bom 177
[26] Lindesay Robertson, 'Judicial Recognition of Customs' (1922) 4 Journal of Comparative Legislation and International Law, http://www.jstor.org/stable/753149 accessed 18 December 2023
[27] ibid

ISSN: 2582-6433

hierarchy of courts was established to implement the personal laws governing different communities. Since the East India Company was not familiar with such complexities and diversity, they relied on a range of indigenous personnel like *pandits*, *maulvis* and *muftis*- who were tasked with interpreting and aiding the courts in the administration of Hindus and Muslims through *shastras* and *sharia* respectively. The judiciary also sought to create a body of 'Christian' family law, based on English laws of marriage and inheritance.[28]

Due to dearth of knowledge about customs and usages practiced in the society, the courts were very flexible. They allowed the parties to produce evidence to substantiate their claims to the custom. Judges called for ethnographic evidence from the parties and assumed the role of legal ethnographers in the process. The shift in ethnographic attention resulted in a proliferation of gazetteers, district manuals, legal commentaries, and other published works concerning the castes of India and their distinctive characteristics. This approach of the colonial courts can be gauged by the case of *Collector of Madura v. Mootoo Ramalinga,*[29] in which the Privy Council held that 'clear proof of custom will outweigh written text of law'.

As the courts gained access to this ethnographic evidence relating to the communities, they became reluctant to accept the evidence produced by the parties. The judiciary became more comfortable relying on state-sponsored sources rather than parties' own evidence regarded their customs. The litigants continued to battle the imposition of colonial identity by pushing for their customs. Unlike the information amassed by state through gazetteers, district manuals and other sources, litigants in proof-of-custom cases produced knowledge to maintain their own identity, which is contrast to the state's approach of assigning identities in their quest of legal clarity. Their voices were progressively muted as the state acquired information from 'official' sources. Starting from the 1860s, one can witness a noticeable decrease in the frequency of cases where litigants were able to present their personal law by providing evidence of customary practices. The colonial state progressively allocated legal identities to litigants, displaying minimal willingness to listen to their concerns.[30]

[28] Chandra Mallampalli, 'Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness' (2010) Law and History Review < http://heinonline.org/HOL/Page?handle=hein.journals/lawhst28&collection=journals&id=1075&startid=1075&endid=1098> accessed 18 December 2023
[29] (1868)12 MIA 397
[30] Mallampalli (n29) 1046

ISSN: 2582-6433

Thus, the identity of the people practicing customs and usages was distorted due to the colonial intrusiveness via the codified laws. Codified laws stood at odds with the customs and the initial approach of the colonial courts to uphold the latter soon transpired into the contrary, where the codification of laws heralded by the first law commission and Macaulay supplanted long standing customs to a large extent. This has been illustrated by Menski, when he adjudges the British Hindu law as a distortion and upheld the law practiced through customs by thousands of families as the real law.[31] The desperate attempts by the litigants to prove their customs highlighted the fact that the litigants did not give in to legal identities imposed on them by the colonial judiciary. It also helps to ascertain the colonial intrusiveness in the matters of personal laws through the judiciary.

The case of *Abraham v. Abraham*[32] sums up the entire change in the approach of the colonial rulers with respect to customs. The case involved a woman of Anglo-Portuguese descent, Charlotte Fox, who was raised as an Anglican. She married a Tamilian, Matthew Abraham, who came from a Roman Catholic family of *paraiyar* community, originally from Madras. After the death of Matthew, the issue arose as to who was entitled to his property considering he died intestate. Under Christian law, Charlotte and her sons were legally entitled to have their respective shares while under the Hindu law, Matthew's brother was required to have his share. Both the parties (Charlotte and Matthew's brother) produced enormous amount of ethnographic evidence to push for the application of their respective personal laws.[33] The 9-year long legal battle ended with the Privy Council ruling in Charlotte's favour due to the overwhelming evidence on ground portraying the endorsement of Christian law by the Abrahams. Thus, the practices and customs followed played a vital role in deciding which law was applicable in this case. However, a mere two years later, the Indian Succession Act of 1865 was enacted, which essentially extended the application of English law on linear inheritance in cases of intestate succession to all Christian families, regardless of their customs or traditions. The Succession Act, when applied in a top-down manner, established a monolithic Christian society, which contrasted with the *Abraham* ruling that acknowledged the diverse Christian population in British India.[34] This approach adopted by the colonial rulers extended to all the communities i.e., the selective disintegration of customs through codification of laws.

[31] Werner Menski, Hindu Law: Beyond Tradition and Modernity (Oxford University Press 2003) 39-40
[32] [1863] 9 MIA 199
[33] Charlotte deposed 101 witnesses while Francis (Matthew's brother) produced 150 witnesses. These commented extensively on issues of dress, rules of association, caste, and cultural dimensions of Christian identity.
[34] Mallampalli (n29) 1053

ISSN: 2582-6433

BLURRING THE DIFFERENCE BETWEEN CUSTOMS AND USAGES

In their quest of bringing uniformity and convenience in the administration of justice, the Britishers failed to observe the difference between customs and usages. These terms were used synonymously and interchangeably in most of the British regulations and judgements.

Much needed clarity is brought by going through the definitions of customs and usages in the Halsbury's Laws of England. 'Custom' is defined as 'a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to, or not consistent with, the general common law of the realm'. However, 'usage' may be broadly defined as 'a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life'.
'A custom must be local while a usage may extend beyond the limits of the realm or within a local area, however small or it may extend throughout all engaged in a particular business'.[35] [36]
This laxity and variance in the use of terms is by no means without its dangers and inconveniences. 'Immemorial local customs are clearly distinguishable from particular trade or local usages, although in practice frequently confused with them . . . they lack three of the distinguishing features of customs properly so called.'[37] 'First: they (i.e. usages) need not have existed from time immemorial. Second: they need not be confined to a particular locality. Third: usages however extensive, if contrary to positive law, will not be sanctioned by the Courts, while customs may be inconsistent with the general law of the land. There is, also, no requirement for immemorial practice in cases of usages.'[38]

However, one cannot place all the blame for this anomaly on the British as the translators of the ancient Hindu codes suffered from the same defect. This could be understood through one of the most quoted lines from the Manusmriti: 'Immemorial usage is transcendent law'. Still, this does not vindicate the Britishers' approach of bringing uniformity at the cost of certain values and principles considered indispensable by the communities.

[35] Halsbury, Laws of England (vol 10, Lexis Nexis Butterworths) 250
[36] Robertson (n27) 219
[37] ibid
[38] ibid

ISSN: 2582-6433

PART 3- IMPACT OF CODIFICATION

The process to codify the Hindu law commenced in the late 18th century because the colonial rulers wanted to bring the social and political life of diverse communities under their judicial purview. The advent of British rule signified an unparalleled departure from previous circumstances. Previously, no ruler had attempted to interfere in the internal affairs of the 'jat' or 'biradari' organizations of different villages, regardless of the significant reforms implemented at the highest level. During the Mughal period, the Islamic law expressly acknowledged the traditional community-based institutions for resolving conflicts.[39]

During Warren Hastings' tenure, the groups were allowed to be governed by their personal laws; *'shastras'* in case of Hindus and *'sharia'* in case of Muslims. This emanated from the assumption of the colonial rulers that similar to the European laws, the Indians were also governed by biblical tenets. This presumption led them to follow a similar trajectory in India. The inherent flaw in this approach, however, was that unlike Europe where the pope or the church represented their religion and declared laws, there was no uniform body of Hindu which declared laws applicable to all the Hindus.

Although initially puzzled and bewildered by the amount of diversity and heterogeneity prevailing in case of personal laws, the Britishers gradually tried to gain control over the people practicing self-professed laws through codification of laws. However, this flawed attempt to codify the laws did not take into account the wide-ranging customs. The codified laws took interests of only a part of the population, excluding the majority. This colonial Hindu law was Hindu only in its name and did not represent the laws governing most of the Hindus.

This myth, that the Hindus are governed by colonial Hindu law perpetuated post-independence, and was reflected in the subsequent legislations. In an attempt to modernize and codify the Hindu law, the law-makers were depriving the Hindus of its core element of diversity. The diversity ingrained in this unique religion was conspicuous in the case of *Sastri Yagnapurushadji v. Muldas Bhudaras Vaishya,*[40]where the court was deciding as to who is a Hindu. The multitude of beliefs makes it impossible to forge a concrete definition of Hinduism. The court's observation was on the same lines when it remarked that Hindu religion does not claim one prophet; it does not

[39] Madhu Kishwar, 'Hindu law: myth and reality' (1994) 29 Economic and Political Weekly 4 < http://www.jstor.org/stable/4401625> accessed 18 December 2023
[40] AIR 1966 SC 1119

ISSN: 2582-6433

worship one God; it does not subscribe to one dogma; it does not satisfy the narrow traditional features of any religion or creed.[41] The Hindu intellectuals observed the notable fact that individuals residing in India belonged to distinct communities, worshipped diverse deities, and engaged in varied rituals.[42]It was realized by the Hindu religion from the very beginning that truth was not objective and different views expressed various facets of truth which no one could fully express.[43]

'The diversity perceptible in different parts of the country goes a great way in establishing the fact that popular acceptance and not imposition from any central political authority has been the sanction behind the personal law of the Hindus. We should not take the seeming diversity as an evil which must be instantaneously removed.'[44]

The British were flummoxed by the multitude of beliefs and since they were accustomed to the homogeneous societies of Britain, they imported the homogeneity to a place intrinsically heterogeneous. In their quest to homogenize Indian society, its practices and norms, they eliminated all those diversities they could not comprehend. This attitude was inherited by the English-educated rulers of independent India along with the entire machinery of the colonial government that had fully internalized it.[45]

The codification of Hindu law in the 1950s by the legislature ossified most of the Hindu law but gave little scope for customs and usages. Hindu Marriage Act, 1955 specifically recognizes the custom and usages practiced by the communities. In this context Section 3 of the Hindu Marriage Act states, 'the expressions 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'.[46]

[41] ibid para 29
[42] ibid para 30
[43] ibid para 41
[44] Madhu (n38) 2147
[45] ibid
[46] Hindu Marriage Act 1955, s3(a)

ISSN: 2582-6433

Despite overthrowing most of the customs and usages, the code gave some leeway to the parties in cases of customs and usages. In certain specific cases, like dissolution of marriage, adoption of a child and *sapinda* relationship the legislators have allowed the parties to be governed by their customs if the custom satisfies all the conditions required to obtain the force of law. In the case of *M. Govinraju v. Munisami Gounder,*[47] the court upheld the custom of *Shudras* in which it was considered that when a wife is abandoned by the husband or she leaves her husband and there is no attempt of reconciliation by either of the parties, it is to be considered as divorcee. In the case of *Savitri Devi v. Manorama Bai,*[48]the court recognized the importance of customary divorcee under Section 29(2) of the Hindu Marriage Act,1955. It observed:

'Section 29(2) of the Hindu Marriage Act, 1955 protects customary divorce. But the party relying on custom must prove the existence of custom and that it is ancient, certain, reasonable and is not opposed to public policy. He must further prove that the divorce has in fact taken place in conformity with that custom.'[49]

In another case involving adoption of a child according to customary practices, the court relied on Section 10 of the Hindu Adoptions and Maintenance Act, 1956 which created the room for customs and usage in cases of adoption. The court said, 'Ordinarily a child is to be adopted before 15 years of age. But an exception has been carved out under clause (iv) of Section 10 of the Act which protects certain customs and usages. If a boy who is more than 15 years of age the adoption can be sustained only on proof of special customs or usages governing the parties'.[50]

Notwithstanding the limited recognition of customs and usages as source of Hindu law, the courts' approach of giving preference to uniformity over customs and usages precluded majority of the communities from their customs. Great many customs were eliminated from the ambit of law because the standard of proof was very strict.[51] The legislature never intended that the customs had their independent identity; they kept customs and usages under the shadow of codified laws. This approach was conspicuous in many cases including the case of *Bhaurao Shankar Lokhande v. State of Maharashtra,*[52]in which the appellant married a woman during the lifetime of his first wife. The appellant was prosecuted for the offence of bigamy as the first

[47] 1996 SCALE (6)13
[48] AIR 1998 MP 114
[49] ibid
[50] Uma Prasad v Padmavati 1999 (2) MPLJ 502
[51] Flavia Agnes, Law, Justice, and Gender: Family Law and Constitutional Provisions in India (OUP India 2011)
[52] AIR 1965 SC 1564

ISSN: 2582-6433

marriage was subsisting when he married again. The court said that under Section 17 of the Hindu Marriage Act, in order to commit the offence of bigamy, the second marriage must be valid and the validity was to be ascertained with reference to the essential ceremonies or the customary rites. Due to the high standard of proof with respect to the customs and the rigid approach, the second marriage was held to be invalid despite the fact that both were considered married by the community and lived as husband and wife. This led to the appellant escaping the clutches of law despite clearly committing the offence of bigamy. In a similar case, where the parties governed by customs and usages pushed to prove a custom that mandated monogamy as a rule and called for prosecution of the party who married again. The court, while rejecting the application of such custom, said, 'It may be emphasised 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 being 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'.[53]

5. CONCLUSION

The customs and usages practiced by the diverse communities were initially considered sacrosanct and were not only considered superior to the written text but were also considered the main source of law in cases of family matters. The British, inspired by the push for uniformity and under the presumption of homogeneous society similar to the European ones, initiated the codification of laws. This codification, initially programmed to supplement the customs later supplanted them. [54]

As the courts gained access to this ethnographic evidence relating to the communities, they became reluctant to accept the evidence produced by the parties. The judiciary became more comfortable relying on state-sponsored sources rather than parties' own evidence regarded their customs. The litigants continued to battle the imposition of colonial identity by pushing for their customs. Unlike the information amassed by state through gazetteers, district manuals and other sources, litigants in proof-of-custom cases produced knowledge to maintain their own identity, which is contrast to the state's approach of assigning identities in their quest of legal clarity.

[53] Surajmani Stella Kujar v Durga Charan (2001)3SC C 13
[54] Collector (n2)

ISSN: 2582-6433

In their quest of codification based on a flawed premise, the Britishers pushed for uniformity in the land of diversity and steam rolled most of the customary law. The codification was based on Hindu textures like Manusmriti which itself explicitly considered customs as the transcendent law.[55] However, this aspect was ignored during the process of codification and gradually codified laws transcended customs and usage which was in direct contrast with the texts constituting the codified laws.

This thinking trickled down to the post-independence era and there was just a little scope left for customs and usages under the Hindu legislations. The standard of proof coupled with the judiciary's reticence towards a non-uniform approach ensured that the communities were deprived of their 'living fact' or customs. Through codification these communities were forced to be governed by super-imposed laws completely foreign to their culture and beliefs.

The notion that the state should act as a tool for implementing social change without first establishing a shared agreement among the people is primarily rooted in the operational principles and beliefs of colonial ideology.[56] The overall impact of stamping out diversity in the name of uniformity was negative. It brought laws completely alien to the communities. The laws were also not suited to the conditions prevalent in that particular community. The cover-up by the way of creating exceptions in favour of customs was self-contradictory as that highlighted that the codified law has no teeth at all.[57]

BIBLIOGRAPHY

Legislations

- Hindu Marriage Act 1955
- Hindu Adoptions and Maintenance Act 1956

Books

Agnes F, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP India 2011)

Koul AK, *A Textbook of Jurisprudence* (1st edn Satyam Law International 2009)

[55] Myneni (n19)
[56] Madhu (n38)
[57] ibid

ISSN: 2582-6433

Mayne, *Hindu Law and Usage* (16th edn, Bharat Law House 2008)

Menski W, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press 2003)

Myneni S, *Family Laws in India* (1st edn, Asia Law House 2009)

Singh A, *Introduction to Jurisprudence* (3rd edn, Lexis Nexis Butterworths 2009)

Articles

- F P Walton, 'The Historical School of Jurisprudence and Transplantations of Law' (1927) 9 Journal of Comparative Legislation and International Law<http://www.jstor.org/stable/753569> accessed 18 December 2023
- Kishwar M, 'Hindu law: myth and reality' (1994) 29 Economic and Political Weekly 4 < http://www.jstor.org/stable/4401625> accessed 18 December 2023
- Mallampali C, 'Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness' (2010) Law and History Review < http://heinonline.org/HOL/Page?handle=hein.journals/lawhst28&collection=journals&id=1075&startid=1075&endid=1098> accessed 18 December 2023
- Rattigan W H, 'Customary Law in India' (1884) Law Magazine and Review, http://heinonline.org/HOL/Page?handle=hein.journals/lmagc10&collection=journals&id=5&startid=&endid=22 accessed 18 December 2023
- Robertson L, 'Judicial Recognition of Customs' (1922) 4 Journal of Comparative Legislation and International Law, http://www.jstor.org/stable/753149 accessed 18 December 2023

Cases

- Abraham v Abraham [1863] 9 MIA 199
- Babu Narain Lakras v Saboosa (1949) ALJ 360
- Bhaurao Shankar Lokhande v State of Maharashtra AIR 1965 SC 1564
- Collector of Madurai v Mootoo Ramalinga Sethupathy (1868) 12 MIA 397
- Sastri Yagnapurushadji v Muldas Bhudaras Vaishya AIR 1966 SC 1119
- Soorendranath Roy v Heeramonee Burmoneah (1868) 12 MIA 91
- Surajmani Stella Kujar v Durga Charan (2001)3SC C 13
- Uma Prasad v Padmavati 1999 (2) MPLJ 502

ISSN: 2582-6433

Others

- Halsbury, *Laws of England* (vol 10, Lexis Nexis Butterworths)
- Katju M, 'Ancient Indian Jurisprudence' (Bharat Hindu University 2010) 14 https://www.academia.edu/16833641/Ancient_Indian_Jurisprudence_by_Justice_Markanday_Katju accessed 18 December 2023