
LEGAL RECOGNITION OF CUSTOMARY PRACTICES: CONSTITUTIONAL PERSPECTIVES

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ABSTRACT

This project looks at the importance of customary practices within India's legal system, specifically focusing on how they protect the rights and cultural heritage of native and local groups. The study starts by looking at how the Indian Constitution recognizes customs as a valid legal source, highlighting their coexistence with laws made by the government. It explores the characteristics of customs, how they are categorized, and the standards for their acceptance, showing how they have developed and become officially recognized rules. The research also points out significant court cases that have influenced the interpretation and use of customary laws, showing how they are in line with the constitution's principles of justice, equality, and human rights.

CHAPTER 1: INTRODUCTION

Legal recognition of customary practices is essential for preserving the rights and customs of indigenous and local communities. Customary law, which includes customs, beliefs, and practices, is key in shaping their identity and regulating different facets of their lives. Custom is acknowledged as a significant legal source in India's legal framework. Article 13(1)¹ of the Indian Constitution states that any laws conflicting with the Constitution upon its enactment are deemed void. The Constitution's definition of "law" encompasses "custom or usage that holds legal force within the territory of India."

The Indian Constitution acknowledges traditions and customary practices, affirming that all pre-existing laws remain valid until they are amended or repealed². This ensures that the entire legal framework of India prior to the constitution's enactment is maintained. In addition to statutory laws, tort laws, Hindu laws, Muslim laws, and customs also hold legal significance. In Article 13³ of the Indian Constitution, it states that the definition of "law" encompasses "customs" and "usage" that hold legal weight. Courts are bound by well-established and specific ancient customs just like legislative Acts. Nevertheless, any custom or practice with legal significance must not violate the fundamental rights protected under Part III of the Constitution.

CHAPTER 2: LITERATURE REVIEW

S no.	Nature of Literature	Name of Literature	Review/ Covered	Research Gap	Intended Research
01.	Journal	Indigenous Customary Law in Context. ⁴	This paper seeks to put into context the conventional law of indigenous people, showing that it is ethical	The gap in research is found in exploring the practical implementation and effectiveness of legal recognition and	Look at appraising the effect of legal recognition and regard for indigenous customary laws on community

¹ The Indian Constitution Art.13(1).

² Katrina Cuskelly, 'Customs and Constitutions: State Recognition of Customary Law around the World'.

³ The Indian Constitution Art.13.

⁴ Alfred P. Minei and Sam O. Kaipu, 'Indigenous Customary Law in Context' (2022) 19 US-China Law Review.

			and adequate in a changing legal environment as it respects the rights of native communities and their legal systems.	respect for traditional laws of indigenous people, especially within changing legal systems of countries like Papua New Guinea in light of national and global jurisprudence progressions.	empowerment, cultural preservation, and access to justice.
02.	Research Paper	Legal Systems as cultural rights: A right's based approach to traditional legal systems under the Indian Constitution. ⁵	The paper takes a critical look at how tribal rights and cultures are diminishing in India, suggesting a move towards a rights-based approach to reconcile between state's development agenda and indigenous people's rights within the Indian	The research gap in this topic is focused on finding practical solutions within the Indian constitution to guarantee that tribal communities can access justice and safeguard their rights despite the obstacles they face to their cultural identity	Study how certain laws and policies are helping tribal communities in India protect their rights in today's changing society. Look at how these changes are being seen from the perspectives of local communities and their own initiatives.

⁵ 'CONSTITUTION Shubhankar Dam*'.

			constitutional framework with an emphasis on the basic right of all tribes to get justice.	and self-governance.	
03.	Report	Traditional Customary Laws and Indigenous Peoples in Asia. ⁶	This report explores the varied landscape of traditional legal practices among indigenous communities in Asia. It delves into their legal standing, decline, and interaction with conventional legal frameworks, highlighting the obstacles they encounter in upholding their traditions in the face of societal shifts and government resistance to	Need for more studies to understand how social and cultural changes, as well as government attitudes, are affecting the traditional laws of indigenous peoples in Asia.	Look at how decisions made by indigenous courts are being enforced, and whether or not customary personal laws are being formally documented or written down.

⁶ By Raja Devasish Roy, 'Report Traditional Customary Laws and Indigenous Peoples in Asia'.

			acknowledging or honoring them.		
04.	Research Paper	Customary International Law in Indian Courts. ⁷	The article explores the use of Customary International Law principles in Indian courts, highlighting their role in promoting progressive legal thought and upholding fundamental rights, while also questioning the effectiveness of current approaches.	The research gap pertains to the practical implications and limitations of integrating Customary International Law principles into Indian domestic legal discourse, as well as the effectiveness of alternative methods to improve CIL utilization in the Indian judicial system.	Conduct comparative analyses with other jurisdictions to identify best practices in integrating Customary International Law principles into domestic legal systems, while also exploring stakeholder perspectives to ensure effective implementation in India, contributing to a more inclusive legal framework.
05.	Journal	Protection of Traditional Knowledge: The Need for a	The increasing need to protect traditional knowledge,	Gap in ensuring that the rights and consent of those who hold	Study the socio-economic effects of exploiting traditional

⁷ '(PDF) Customary International Law in Indian Courts' <https://www.researchgate.net/publication/360782859_Customary_International_Law_in_Indian_Courts> accessed 22 April 2024.

		Sui Generis Law in India ⁸	driven by its exploitation through modern technologies like biotechnology, underscores the pressing requirement for both global and local initiatives to create legal structures and legal precedents that can ensure the protection of the rights of those who hold this knowledge, particularly indigenous and local communities.	this knowledge, especially indigenous and local communities, are respected within both international and national legal systems, which currently lack sufficient safeguards.	knowledge on indigenous and local communities, and create fair legal measures that empower knowledge holders and encourage sustainable development.
06.	Journal	The traditional Hindu Law in India: Transformation on from	The traditional Hindu law, based on customs and local traditions, has been undergoing	The research gap is in understanding the social and legal aspects and obstacles related to the current	Further research to explore how changes in Hindu laws, aimed at making them more secular and codified, have

⁸ NS Gopalakrishnan, 'Protection of Traditional Knowledge: The Need for a Sui Generis Law in India' (2002) 5 Journal of World Intellectual Property <<https://heinonline.org/HOL/Page?handle=hein.journals/jwip5&id=706&div=&collection=>> accessed 22 April 2024.

		customary to codified law. ⁹	significant changes as it seeks to become more secular and structured, despite resistance from traditionalists. This reflects the ongoing tension between preserving tradition and embracing modernity in the development of Indian legal systems.	attempts to modernize and establish a system of Hindu law in India, specifically in terms of how to maintain traditional practices while also striving for consistency through legal changes. This will help us grasp the intricacies of the development of Indian law.	affected different aspects of Indian society. This could involve looking at how these reforms have influenced social norms, family dynamics, and individual rights, with the goal of developing legal approaches that are more inclusive and culturally sensitive.
07.	Journal	Customary Law: The Way Things Were, Codified ¹⁰	The changing role of traditional law in Native American tribal courts shows different ways of handling cases and standards of	One area needing further exploration is understanding how Native American tribal courts apply evidentiary standards to	Explore how cultural diversity and historical context influence the interpretation and implementation of traditional laws in different

⁹ 'Law Journal Library - HeinOnline.Org' <<https://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/kitlc16&id=109>> accessed 22 April 2024.

¹⁰ Washington College and Ezra Rosser, '2009-15 CUSTOMARY LAW: THE WAY THINGS WERE, CODIFIED 8 TRIBAL L' (2008) 18 J <<http://ssrn.com/abstract=1378782><http://ssrn.com/abstract=1378782>Electroniccopyavailableat:<https://ssrn.com/abstract=1378782>> accessed 22 April 2024.

			evidence, emphasizing the importance of a detailed grasp of its characteristics and application in the overall legal system.	determine the validity and use of customary law. This research can provide insight into the factors that impact the role of customary law within tribal legal systems.	Native American tribal courts. This study would specifically examine how these factors impact legal decisions and the availability of justice for indigenous groups.
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CHAPTER 3: CUSTOMS AND CUSTOMARY LAWS

3.1. What are customs?

Initially, it is essential to comprehend the definition of custom in order to comprehend customary rules. It is a practice that has gained legal authority due to its widespread use and long-standing habit. A custom is a usage that grants a class of people from a specific section of the community the right to exercise certain rights against certain other people or things in the same community.¹¹

There are two sources of law- (a) legal (b) historical, Customs comes under the legal sources of law. They are the oldest and most important sources of law. It means “Uniformity of conduct of people under like circumstances”. The word ‘custom’ literally, grammatically, or ordinarily means; tradition, practice; usage; observance; way; convention; procedure; ceremony; ritual; ordinance; form; formality; fashion; mode; manner; shibboleth; unwritten rule; way of doing things; formal; praxis; style; etiquette; routine; habit; usual; rite; Solemn; unwritten code; conventional social behaviour; etc.¹² Customs are generally because of Public Faith.

Custom has been described by different legal jurists based on their own ideas, interpretation, beliefs, perspectives, and thoughts¹³.

According to Salmond,

¹¹ ‘State Of Bihar & Ors vs Subodh Gopal Bose & Anr on 22 August, 1967’ <<https://indiankanoon.org/doc/1242365/>> accessed 22 April 2024.

¹² ‘TOPIC: CUSTOM AS A SOURCE OF LAW’.

¹³ ‘LL.M IInd Sem Jurisprudence II (L-2002) Sources of Law Introduction’.

“Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility”.

According to Austin,

“Custom is a rule of conduct which the governed observe spontaneously and not in a pursuance of law set by a political superior”.

In the case of *Harprasad v. Shivdayal*¹⁴ the judicial committee of the Privy Council observed, “Custom as a rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of a law.”

According to Herbert spencer, it is tradition passing on from one generation to another that originally governed human conduct.

Customs played a considerable role in the evolution of early provided material for other law constituting agencies, especially legislation. They are absolute, it is not necessary for the court to recognize them, they are not binding. Ex- Wearing black on funerals. Whereas, certain customs are binding. Ex- a Hindu Marriage should be solemnized with performance of Saptapadi¹⁵ to it to be legally valid.

3.1.1. Reasons for recognition of Customs:

- i. Conviction on Faith
- ii. Constant use
- iii. Sanction of the society

3.2. Types of Customs

There are two categories for Custom:

- Custom with no sanction; and
- Custom with sanction.
 - Legal Custom
 - General custom
 - Local Custom
 - ✓ Geographical
 - ✓ Personal
 - Conventional Custom
 - Local Custom

¹⁴ *Harprasad v Shivdayal*.

¹⁵ ‘Hindu Marriage Act, 1955’ <<http://indiacode.nic.in/handle/123456789/1560>> accessed 22 April 2024.

- General Custom

Custom Without Sanction: These refer to the optional customs. All of them are observed because public opinion is there. Positive morality is the Austinian word for them.

Custom Having Sanction: These are the traditions that the government upholds. There is sanction behind these customs.

These further divided two sorts of customs are as follows:

- Legal Custom: The customs that hold total and unconditional legal power are known as legal customs. These traditions function as enforceable laws. They are now a part of the national legislation after being acknowledged by the courts. The judiciary upholds them.¹⁶
- Conventional Custom- A conventional custom also known as “usage,” is an established practice that is binding on parties only if they accept and incorporate it into their agreement. They should be proved before the court as a question of fact. The court takes judicial notice on them to establish as precedent. The custom is embodied in a statute and takes its final shape. A conventional custom or usage which does not possess absolute authority is clearly distinguishable from a legal custom having a force of law.

The division is further of two types:

- Local customs - that apply to a specific locality, such as a district, town, or area. They can be geographical or personal, and can be valid for a specific locality, set, or family. Local customs are defined by Hasbury as rules that have existed since time immemorial and have the force of law in that locality, even if they contradict or are inconsistent with the common law.
- General customs - laws that prevail throughout the country and constitute one of the sources of the land’s law. They must be reasonable, followed, accepted as binding, not conflict with the country’s statute law, and have existed since ancient times. Keeton argues that a general custom must satisfy certain conditions to be a source of law.

3.3. Tests for valid custom

Legal customs must reflect principles of justice and public utility endorsed by national conscience. It provides a basic for rational expectation of continuity.

¹⁶ ‘TOPIC: CUSTOM AS A SOURCE OF LAW’ (n 12).

- Antiquity: A legitimate custom must be prevalent from time immemorial and not of ongoing origin. Manu argued that immemorial custom is supernatural law, and days of ancient times are inferred in civil law in England. In England, a valid custom must be at the time of Richard I King's rule, which was 1189 AD. However, the English principle of 'immemorial inception' is not followed in India. In *Gokul Chand v. Parvin Kumari*¹⁷, the Supreme Court denied measuring the validity of a custom from 1189 AD but explicitly stated that it must be of ancient and historical times.
- Reasonability: In legal trials, a legitimate custom must be reasonable and not unreasonable. It should benefit the general public and anyone challenging a custom must prove to the court that it is unreasonable. The burden of proof lies on the challenger, and the history of the custom must be considered to determine its reasonableness. An unreasonable custom must cause more harm than good in order to be deemed invalid. The Bombay High Court ruled in *Narayan v. Living*¹⁸ that a custom allowing a woman to marry again without mutual agreement was shameless and arbitrary. The court's standard for reasonability is characterized by the Divisional Court of the King's Bench in *Produce Brokers co. vs Olympia oil and coke co.*, which considered grounds of valid customs as reasonable, legitimate, and impartial.
- Continuity, Certain and Precise: A tradition must be consistently followed from the beginning without any breaks. If a community fails to follow a tradition continuously, a court may have the authority to nullify it. Therefore, traditions must be followed consistently and continuously. In the case of *Hampton v. Hono*, it was determined that if a tradition is not practiced for a significant period of time, it will no longer be considered a valid tradition. A valid and essential custom must be specific and less ambiguous, as it can be declared null and void by the court if it is unclear and incomprehensible by the parties, as ruled by the Privy Council in *Wilson vs. Wilson*.
- Conformity with Statutory Laws: A custom must have a legal basis and pertain to legal relationships. A simple voluntary practice that is not recognized as being bound by any rules or obligations does not qualify as a legal custom.
- Consistency with Morality: A way to determine if a custom is legitimate is to see if it aligns with public policy. This aspect can be considered in the test of reasonableness,

¹⁷ *Gokul Chand v Parvin Kumari*.

¹⁸ *Narayan Bharthi vs Laving Bharthi And Ors*.

which takes into account public policy. In the case of *Buldano vs Fasir*¹⁹, a custom that permitted a woman to remarry while her husband was still alive was deemed invalid by the court because it went against public policy.

3.4. Customary Laws

In India, customary law is a set of traditions and practices that have developed over time within specific communities and have been officially acknowledged due to their widespread acceptance²⁰. These laws cover a range of community matters such as marriage, inheritance, property rights, and conflict resolution. Unlike laws passed by government bodies, customary laws arise naturally from the customs and traditions of a community. They are mainly applicable to specific groups within a community, especially in tribal areas²¹.

3.4.1. Customary laws in tribal areas

Customary laws are crucial for tribal communities and provide fundamental concepts and challenges to understand their interaction with modernity. They are recognized by the Constitution through the Sixth Schedule or constitutional amendments like Article 371A²² in Nagaland and 371G²³ in Mizoram, acting as an interface between their informal system and formal legislation.

3.5. Recognition of Customary Laws

The acknowledgment and formalization of customary rights by judicial systems, with their long history of application, have given rise to customary laws. In 1872, the Indian Evidence Act officially recognized these rights, specifically addressed in Section 13 regarding the proof of customary law. The Indian Constitution, in Article 13, treats customary law on par with other civil laws, affirming that verified customs hold legal status. Additionally, the Indian Evidence Act grants courts the authority to acknowledge and uphold these customary rights under Section 57²⁴. This legal framework recognizes and protects the unique traditions and practices of local communities, reflecting their cultural values and norms. This acknowledgment helps communities preserve their independence and longevity, emphasizing the significance of customary practices in India's contemporary legal system.

¹⁹ *Buldano vs Fasir*.

²⁰ 'Research Guide: Customary Law in India' <https://maint.loc.gov/law/help/customary-law/india.php#_edn3> accessed 22 April 2024.

²¹ 'Customary Laws and Its Constitutional Validity' <https://www.legalserviceindia.com/legal/article-10138-customary-laws-and-its-constitutional-validity.html#google_vignette> accessed 22 April 2024.

²² The Indian Constitution.

²³ The Indian Constitution.

²⁴ The Indian Evidence Act 1872.

3.6. Theories regarding transformation of Custom into Law

- i. Analytical Theory - It says custom gains legal validity through state recognition via statute law or precedent.²⁵ Custom is seen as historical material source of law. Austin sees it as judiciary law build upon preceding customs. Holland and Salmond supported it by saying Custom becomes law when recognized by a law and meets legal validity. There was a critique by Allen which says customs are recognized due to community acceptance and not solely cause of legislative decree.
- ii. Historical Theory – Given by many jurists such as Savigny, Puchta, Blackstone, Maine, etc. It says law originates from common consciousness of People. Savigny notes that customary laws can override statutes and create new laws. Maine regards it as formal legal source. It is fundamental in traditional and tribal settings but may adapt in changing situations.

CHAPTER 4: CASES GIVING VALIDITY TO CUSTOMARY LAWS

- i. The manner in which the Indian legal system views customary laws has been greatly influenced by the Supreme Court's decision on them. A landmark decision in the matter of *Smt. Ass Kaur (Deceased) By L.Rs. vs. Kartar Singh (Dead) By L.Rs. & Ors*²⁶ highlighted the delicate balance between custom and codified law by emphasizing that customary laws would take priority in situations where statutory laws are silent. In addressing concerns about the legality of customs, the court emphasized that those principles should be in line with justice, equality, and good conscience. It distinguished, therefore, between a custom's ethical basis and its pure application, implying that traditions devoid of these core principles might not be upheld even in spite of their long-standing commitment. In addition, the court explained cases dealing with legal statutes, like the *Child Marriage Restraint Act of 1929*²⁷, stating that there needs to be clear legislative intent to override traditional customs.
- ii. The Supreme Court's ruling in the case of *Indian Young Lawyers' Association v. State of Kerala*²⁸ also called the Sabarimala Verdict, a conflict of custom and law, demonstrates the intricate balance between customary practices and statutory laws. By invalidating a traditional restriction prohibiting women of a certain age from entering the Sabarimala

²⁵ The Constitution Of India.

²⁶ *Smt Ass Kaur (Deceased) By LRs vs Kartar Singh (Dead) By LRs & Ors* (2007) SUPREME COURT 2369.

²⁷ *Child Marriage Restraint Act 1929*.

²⁸ *Young Lawyers' Association of India v State of Kerala*.

temple, the Court affirmed the importance of constitutional rights over discriminatory customs. This decision has been praised for upholding the rule of law and promoting fairness in society.

- iii. Furthermore, the Supreme Court's ruling in the Jallikattu case²⁹ expanded the conversation on justice to include animal rights by banning the traditional Jallikattu sport due to its cruelty. This decision was a significant advancement in promoting justice for all living beings, challenging practices that put animals and humans at risk. The court determined that this ritual went against the constitutional rights of animals outlined in Article 51-A (g)(vii) and (h)(viii)³⁰, which are part of the Fundamental Duties that citizens are required to adhere to. It was believed that these norms promoted cruelty and unethical behaviour under the guise of sports.
- iv. In the case of *Sarla Mudgal v. Union of India*³¹, the Supreme Court of India discussed the legality of traditional divorces in Hindu personal law. The court determined that practices like triple talaq, which disadvantage women, go against the constitutional values of fairness and equal treatment.
- v. In the *Kesavananda Bharati v. State of Kerala*³² case of 1973, a significant doctrine known as the basic structure of the Indian Constitution was established. This ruling ensures that all laws, including traditional customs, must align with the core principles outlined in the Constitution, even if they are not directly connected to customary laws.

CHAPTER 5: CONCLUSION

In conclusion, it is crucial to legally acknowledge and protect traditional customs to ensure the rights and cultural traditions of indigenous and local groups. This study highlights the diverse range of customary laws within India's legal system, recognizing their importance in today's world. By examining literature, studies, reports, and key court decisions, it is clear that while customary laws are important legal sources, they must also comply with constitutional values of fairness, equality, and human rights. This project contributes to a deeper understanding of the intricate relationship between customary laws, constitutional principles, and contemporary legal systems. It calls for continued efforts to promote inclusivity, cultural sensitivity, and social

²⁹ *Animal Welfare Board Of India vs A Nagaraja & Ors.*

³⁰ 'Article 51A: Fundamental Duties - Constitution of India' <<https://www.constitutionofindia.net/articles/article-51a-fundamental-duties/>> accessed 22 April 2024.

³¹ *Sarla Mudgal v Union of India* .

³² *Kesavananda Bharati v State of Kerala* .

justice within the legal framework, ensuring that traditional practices are respected, protected, and upheld in the ever-changing landscape of law and society. The goal is to ensure that customary practices are valued and maintained in the evolving world of law and society.

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