
Customs: Their Importance and a Source of Indian Laws

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Abstract: The principles highlighted by this concept of Law, Morals and religion are regarding the relationship that exists between the three concepts. The most important questions to be considered is how they all are related to customs in common and how customs drive morality and laws in India. Law, morals and religion gives birth to customary laws and acceptance of custom as a law. With study of these concepts in relation to a country with second largest population, the largest democracy and a culturally diverse nation, India, that too with a focus on her largest religion, Hinduism and with example of The Hindu Marriage Act, 1955 will solve the question relating to the customary law, its origin and its present form.

Keywords: custom, morale, religion, jurisprudence, sources of law

INTRODUCTION

Custom and its usage is one of the antique sources of law. When there was no state, the people faced problem. They reacted to them in different ways. Slowly and gradually there emerged a kind of uniformity in these reactions. These were called customs and traditions. For example, there are still certain customs, which are observed by the people so far as their marriage, family relations, and inheritance are concerned.

After the emergence of the state such customs and traditions were formally adopted and these were given the name of laws. From Law, Morals and Religion to Customs, these laws which are derived from customs are called customary laws. English Common law is the accurate relation over here.

- **Religion:** "A cause, principle, or system of beliefs held to with ardour and faith."¹
- **Morals:** "It is a person's standards of behavior concerning what is and is not acceptable for them to do."²
It is observed that, when religion and morals come together, they give birth to customs.
- **Custom:** "It is an established pattern of faithful behavior and a uniform conduct, observed by the people living in a society or a particular area for a long period of time."³

IMPORTANCE OF RELIGION IN INDIA

India is a place that is known for religious assorted varieties. All the real religions of the world, viz.: Hinduism, Christianity, Islam, Sikhism, Buddhism and Jainism are found in India. The organization of religion has its own particular effect on Indian culture which can be outlined as takes after⁴:

- **Solidarity:** Individuals having a place with a specific religion intently recognize themselves with the religious gathering.
- **Moral Esteems:** Religion helps in the improvement of moral esteems, e.g.: Care for the guardians, assurance of kids, helping poor people, genuineness are sure esteems, lectured by religion.
- **Social Control:** Religion goes about as a successful instrument of social control. By soaking up certain moral esteems, religion empowers to control the lead of people.

¹ Definition of Religion - <https://www.merriam-webster.com/dictionary/religion>.

² "Moral." The Oxford Pocket Dictionary of Current English. Encyclopedia.com. (February 2, 2019). <https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/moral-1>.

³ Nomita Aggarwal, Jurisprudence (legal theory) (10th ed. 2016).

⁴ *Supra* note 3.

- **Premise of Law:** Over some stretch of time, religious traditions and conventions transforms into law e.g.: According to ethical quality, support of spouse and kids is the bounden obligation of the husband. So as to maintain this guideline, arrangements for granting support is made generally speaking in Hindu Marriage Act and Sec. 125 CRPC.

Types of Religious Customs⁵

- **Customs without Binding Obligation:** No man is under a flat out impulse to give a feast at the season of marriage or wear white attire during the cremation of a deceased and so on. Every one of these traditions is taken after because of the dread that non-recognition of such traditions may lead them to be socially outcaste. Such traditions are non-authoritative as in they are not compulsory to take after.
- **Customs with Definite Binding Obligation:** Traditions canvassed in this classification are supported by authority which is surer in its operation than whatever other social traditions. Such traditions, if fulfil certain gauges or tests, obtain lawful character, and their infringement is met by regular actions utilized by the lawful request. It is further divided into Legal and General Customs.
- **Legal Custom:** If a particular custom is not followed, the marriage will not be considered as valid; the desired consequences of becoming a couple will not be brought about. Offspring out of such marriage will not be treated as legit ones. Law, back by the opinion at the earlier stage and by the tribunals of the community, will forbid those relationships to be in effect. Standard guidelines are "lawful" as in they are official and compulsory principles of direct and the break of them is a rupture of positive obligation.
- **General Customs:** General custom is what wins all through the nation and constitutes one of the wellsprings of the rule that everyone must follow. It wins all through the region of the state and is seen by every one of the individuals from the general public. Some time ago, precedent-based law was thought to be the same as the general custom of the land.
- **Local Customs:** A localized custom is an interestingly kept to a particular region and constitute a wellspring of law for that zone. As per Salmond, "The term custom in its smaller sense implies local custom only."
- **Conventional Customs:** A custom which is lawfully binded because it's expressed or implied in a contract incorporated, between people, business or other terms.

HOW CUSTOMS ARE TRANSFORMED INTO LAWS?

For custom to be viewed as law, more than straightforward use is required, regardless of the possibility that the use is general and has since quite a while ago thrived. Reliable and continuous conduct as per specific ways and guidelines does not emphasize that individuals should so act, or on the other hand ought to be liable for times when they don't. The principle issue for any hypothesis of standard law is deciding the idea of the extra factor required to change custom into a law.

For a custom to transform into a valid law, it should hold certain essential qualities. The essentials of a valid custom are:⁶

- **Old and Gold:** A custom must be in presence from time immemorial. As per English law, the year 1189 has been incorporated as the benchmark to point out that it can represent the thoughts of its pointers. As per Hindu law. Immemorial traditions are considered to be supernatural laws. However, we in India do not have a particular date as a benchmark to test the antiquity of the custom.
- **Continuity:** A custom must be observed without any hindrance. Congruity does not imply that it ought to be in practice throughout. At times when the custom turns out to be difficult to be applied or enforced, during that period, it will cease to be a conventional custom.

⁵ N.V. Paranjape, Studies in jurisprudence and legal theory (2015).

⁶ Takemura, Matsugu, "The Law of Customs and Usages" (1891). Historical Theses and Dissertations Collection. 283, https://scholarship.law.cornell.edu/historical_theses/283.

- **Peaceable Enjoyment:** It is required that a custom ought to have been enjoyed peacefully by the public over a period of time.
- **Freedom to be Observed:** Custom should be enjoyed as a matter of right. This right ought to be enjoyed without hindrance. If a practice is observed not as a matter of right but a courtesy then it can't be termed as a "custom" in legal aura.
- **Certainty:** A custom cannot be called a legitimate one if it fails to prove that it's certain. Custom begin from general assent, decision can't be made on something that is not certain.
- **Conformity with Statute:** A custom ought to be in compliance with a statute. A legislative power may strike down a custom, if it violates any statute. In case of a dispute, the statutory provisions will always enjoy the upper hand.

Example of the Hindu Marriage Act, 1955

Transformation of a Hindu custom into a law most antiquated social orders required; a safe surrounding for the clan, an arrangement of guidelines to deal with the giving of property rights, and the security of bloodlines. The organization of marriage took care of these necessities. The Hindu Marriage Act 1955 accommodates different standards with respect to relational unions and the majority of the arrangements think about that there still exist the traditions and conventions a Hindu takes after.

The arrangements like solemnization have been joined in the Act from the traditions and customs those are seen by the Hindus however the arrangement of enlistment of marriage and furthermore that of separation is new and was never trailed by the Hindus. Be that as it may, with the modernization and globalization, the general population of the new era themselves don't put stock in following the out of date conventions and subsequently they are in truth for more uniform laws instead of the traditions and consequently customs were transformed into a law.

MORALITY OF LAW IN INDIA

In Legislative point of view, morality has never been an element to be considered while judging the constitutional validity of a statute in The Republic of India. In Dr. B.R. Ambedkar's perspective, Constitutional morality would mean an effective coordination between conflicting interests of different people and the administrative cooperation to resolve the amicably without any confrontation amongst the various groups working for the realization of their ends at any cost a critique of the decision of the Supreme Court of India, in the case of *R.K. Garg v. Union of India*⁷. In this case, the constitutional validity of Special Bearer Bonds (Immunities and Exception) Act, 1981 was under challenge.

The legislation was enacted by the Indian Parliament, with the object of putting to productive use, the unaccounted money held by citizens. The Act was challenged inter alia on the ground that it made an unreasonable classification between persons who illegally evaded payment of tax as against those who abided by the law. It was argued that such a provision in the law was against morality as it afforded tax evaders, immunities and exemptions, and placed them at an advantageous position in comparison to those who abided by the law.

Unfortunately, by a majority of four against one, the Bench brushed aside this contention, and held that morality was not an element to be considered while judging the constitutional validity of a statute. Hence, Morality of laws in India can't be decided, like a coin, it will always hold two sides.

REVIEWS AND SUGGESTIONS

Custom since ages have been an important part of any person's life, it is 'pratha' as called in Hindi, became more of a way of life than just being a social act. With constant and tough use, it was time to incorporate them into the legal system, while preparing this project, the literature I went through, gave me tremendous amount of data and information about the topic of law, morality and religion

⁷ [1982] 1 SCR 947.

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and their transformation to customs and then finally to a law. Knowledge about types of customs, the criterion required for them to be converted into a law was acquired.

This research project gave me a broad idea about the Law, Morals, Religion and Customs, the usage of Customs as a source of law. It also helped me in getting the knowledge about what are the conditions associated with the usage of Customs as a source of law.

Similar types of conditions that are to be checked before accepting customs as modern law was also included in many sources used during the research phase. Proceeding in the direction where we can work upon is the question of how can the custom be prevented from getting faded with time, and also how new types of customs be incorporated in the society, keeping in mind its transformation to laws in future.

Mr. Aayush D. Desai. "Customs: Their Importance and a Source of Indian Laws". International Journal of Innovative and Informative Multidisciplinary Research. Vol. 1 Issue 3, Feb. 2019, pp. 36-39.