

## Custom as a Source of Law with Special Reference to the Customs Prevailing in the State of Bihar

Aryaman Sinha

Dr. B.R. Ambedkar National Law University, Sonapat, Haryana

### Article Info

Received: 5<sup>th</sup> June 2023

Revised: 30<sup>th</sup> December 2023

Published: 31<sup>th</sup> December 2024

### \*Corresponding author

Email:

madhuker.sharma@dbranlu.ac.in

### Open Access

### DOI:

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.



<https://pub.dhe.org.in/>

ISSN: 2278-1757

Copyright © DHE

### 1.Introduction

“India, that is Bharat, shall be a Union of States”, states Article 1 of The Constitution of India, drafted by The Constituent Assembly in 1948. But what responsibility does be a Union of States constitute? The government is responsible for governing each of these states, with distinct practices and histories of their own, further divided into districts which could be different in their manner of practising their practices. This brings with it the burden of integrating these practices, customs, into the government’s rule. And with this arises the concept of Custom as a Source of Law. This paper will expand on the idea being presented in this Introduction and further take up reference to the customs prevailing in the state of Bihar.

### 2. Custom as a Source of Law

#### 2.1 Custom

According to Herbert Spencer, “before any definite agency for social control is developed there exists a control arising partly from the public opinion of the living, and more largely from the public opinion of the dead.” From this we gather custom is a tradition passed on from generation to generation that governs human conduct. Further on we have Salmond, who states that, “custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.”

So, from the above definitions we can come to the conclusion that Custom may be defined as a set of unwritten but established practices recognized not by law but by a community, arising out of a need of social control, transmitted through generations. It embodies principles that have been accepted by the national conscience as just and of public utility.

#### 2.2 Custom as a Source of Law

Customs reflect the behaviors and values of a community. A state in its codification of laws must also align itself with the culture and expectations of those it governs, for which it takes support from customs. To qualify as law, customs generally must be ancient, continuous, certain, and reasonable, ensuring that only well-established and widely accepted practices hold legal authority. In English common law and other jurisdictions influenced by it, including India, courts recognize customs to fill gaps in statutory law, providing flexibility and cultural relevance in areas like family law, property rights, and community practices. However, the validity of customs is carefully evaluated to ensure they do not conflict with constitutional principles or statutory mandates. This balance allows customs to serve as a historically grounded source of law, enabling legal systems to adapt to local traditions while maintaining a commitment to fairness and justice.

Earlier we had established that a secular state must integrate the necessary customs of each section into the basis for its governance. In our own legal history, we find several instances where the Courts have given recognition to customs in their rulings which, in turn, have also given us certain prerequisites for a custom to be recognised as a source of law. This is essential as it separates from general customs a custom that is appropriate for governance of a society.

#### 2.2.1 Deivanai Achi vs. Chidambaram Chettiar (1953)

Where it was established that the essential requisite for recognition of a custom is that it must be sufficiently ancient and definite and that its recognition must be obligatory. It should not be left to the followers to alter them at their will and pleasure, for the essence of custom or usage is that it is an ancient one recognised and adopted by the caste and has certainty about it.

## 2.2.2 Laxmibai vs. Bhagwanthbuva

Where it was established that:

- a. Custom is a rule that has been in use in a particular community and has now obtained the force of law. It cannot override statutory law but it does have the effect of changing a personal law.
- b. A custom has to be ancient, it must be uniform, must be certain and compulsory. It cannot be valid if it violates public policy.
- c. A custom must be proved to be reasonable. The proof must absolutely justify the custom, which means it cannot be conflicting. Once a custom has judicially recognised, the need for proof becomes unnecessary.

Other cases that support these principles are *Narayan v. Living*, *Wilson v. Willes*, *Mathura Naikon v. Esu Naekin*, *Gokul Chand v. Parvin Kumari*, *Produce Brokers Co., Ltd v. Olympia oil and Cake Co.*, *Hampton v. Hono*, among many.

## 3. Customs Prevailing in the State of Bihar

### 3.1 On Bihar

Bihar, one of India's oldest regions, has also been one of the most historically important, with a rich culture that spans millennia. It has seen the rise of various religions such as Hinduism, Buddhism, Jainism, numerous dynasties, empires, each contributing to its vast cultural diversity. This diversity is reflected in the multitude of customs practiced across different communities in Bihar, though not all customs qualify for judicial recognition and codification under law.

### 3.2 Historic Evolution of Customary Laws in Bihar

In pre-colonial Bihar, society was primarily agrarian, organized along the lines of caste and community. Customary practices governed much of social and economic life, including marriage, inheritance, landholding, and religious observances. These customs often held more power than formal law, serving as a “de facto” legal system among local communities. Village elders or kangaroo courts, as we would call them in the present context, resolved disputes, and community-based customs determined rights and responsibilities within families and the larger social framework. Customary norms in pre-colonial Bihar varied by caste and village, but they consistently held the authority to regulate behavior and address grievances.

After India gained independence in 1947, The Constitution of India brought along reforms aimed at democratizing society and addressing social injustices which also impacted Bihar’s customary laws. While several pre-existing customs received recognition, many practices, particularly those seen as discriminatory or regressive, were re-evaluated or modified. Laws such as the Hindu Marriage Act, 1955, and the Hindu Succession Act, 1956, reformed customs around marriage and inheritance, especially those that disadvantaged women. Nonetheless, certain regional customs—such as those tied to inheritance in Bihar’s Bhojpuri-speaking areas—have persisted despite formal legislation.

### 3.3 Landholding and Agricultural Customs

In pre-independence Bihar, the zamindari system was prevalent where a class of land revenue collectors called Zamindars were responsible for collecting taxes from peasants who worked on the land. The Zamindars were considered the owners of the

land, while the peasants were tenants. This system had its roots in the customary practices of Bihar, where a hierarchy based on wealth was followed. This was then curbed through The Bihar Land Reforms Act, 1950 which legally abolished the interests of zamindars and tenure-holders and vested these interests in the state. The Act was then challenged in *The State of Bihar Vs. Kameshwar Singh and Ors.* but was also overruled.

### 3.4 Marriage and Inheritance

Even though there are laws set by the lawmakers to curb these practices, a lot of backward regions in Bihar and Jharkhand still follow very regressive customary practices. According to these customs, a newly married woman, when she enters her in-laws’ house for the first time, is to wash her husband’s feet and drink the water with which she washed his feet. This is a very regressive custom still followed in backward villages. There are also marriage customs in Bihar where just the putting of sindoor on the parting of a woman’s hair declares her as the wife of the person who put the sindoor. Such a marriage, however, will not be recognised by law because only those marriages are solemnized which are done through the procedure set by The Hindu Marriage Act, 1955. Examples of Marriage customs being used in law are in cases such as *Dolly Rani Vs. Manish Kumar Chanchal* where a marriage was declared void because proper customs weren’t followed.

Inheritance laws are also such that properties do not go to the women in the family. If A, who has 3 daughters and 2 sons, passes away, the division of property will only be between the 2 sons; the daughters are automatically assumed to have foregone the inheritance as an act of respect towards their father. The law, however brought reforms to redress the same. Cases where we see such occurrences are *Sita Sahu v State of Bihar*, *Madhu Kishwar vs State of Bihar* among others.

### 3.5 Current state of Customs

Today, customary laws in Bihar exist in a complex relationship with formal legal systems. While the Indian legal framework recognizes certain customs, others are either disregarded or deemed contrary to public policy. In rural areas, particularly among tribal and agrarian communities, where the reach of law isn’t as prominent as it is in the city, customary laws still significantly influence daily life, and play a role in affairs of marriage, inheritance, land ownership, et cetera. However, urbanization, education, and legal reforms have led to a gradual erosion of some customs. In recent years, social reform movements and government policies promoting gender equality and secularism have challenged discriminatory practices, urging communities to reassess customs that contradict constitutional values. At the same time, the caste system still prevails and as a result, discriminatory practices such as untouchability is still practiced in various regions throughout Bihar.

## 4. Conclusion

While customs are integral to India's heritage, we have established that their incorporation into the law requires careful evaluation. Many customs such as *saptapadi* have been incorporated but at the same time we have customs like *sati* (now abolished), child marriage, untouchability that are not only a blight on our history but, if not curbed completely, will also hinder our growth as a society. Change must indeed be

constant, change that is aligned with social welfare and justice, change that elevates the underprivileged. As India progresses, balancing our traditions with modern legal principles is important to safeguard our identity as a sovereign socialist secular democratic republic.

## References

1. *The Constitution of India*, art. 1.
2. <https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf>
3. <https://www.legalserviceindia.com/legal/article-8657-analysis-of-customs-as-a-source-of-law-india.html>
4. AIR1954MAD657
5. (2013) 4 SCC 97
6. ILR 2 Bom 140
7. 404 So. 2d 529
8. (1880) ILR4BOM545
9. AIR 1952 SC 231
10. [1916] 1 AC 314
11. [1952] ISCR889
12. *Dolly Rani vs. Manish Kumar Chanchal* (19.04.2024 - SC) : MANU/SC/0412/2024
13. [2006(4) JCR140(JHR)]
14. 1996 SCC (5) 125

## Journals

1. Gupta, Dipankar. "Caste and Politics: Identity over System." *Annual Review of Anthropology* 34 (2005): 409-427
2. Maharatna, Arup, and Rasika Chikte. "Demography of Tribal Population in Jharkhand 1951-1991." *Economic and Political Weekly* 39, no. 46/47 (Nov. 20-26, 2004): 5053-5062.
3. Corbridge, Stuart. "The Ideology of Tribal Economy and Society: Politics in the Jharkhand, 1950-1980." *Modern Asian Studies* 22, no. 1 (1988): 1-42.

## Websites

1. "Customs as a Source of Law," iPleaders, available at: <https://blog.ipleaders.in/customs-source-law/> (last visited on November 2, 2024)
2. "Customary Law," University of Kashmir, available at: <https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf> (last visited on November 2, 2024)
3. "Customary Law," University of Lucknow, available at: [https://udrc.lkouniv.ac.in/Content/DepartmentContent/SM\\_4c1bee9c-cb81-4e0f-b9aa-ef256ae4290b\\_30.pdf](https://udrc.lkouniv.ac.in/Content/DepartmentContent/SM_4c1bee9c-cb81-4e0f-b9aa-ef256ae4290b_30.pdf) (last visited on November 2, 2024)
4. "Analysis of Customs as a Source of Law in India," Legal Service India, available at: <https://www.legalserviceindia.com/legal/article-8657-analysis-of-customs-as-a-source-of-law-india.html> (last visited on November 2, 2024)

## Case Laws

1. *Deivanai Achi v. Chidambaram Chettiar*, AIR1954MAD657
2. *Laxmibai v. Bhagwantbuva*, (2013) 4 SCC 97
3. *Narayan Bharti v. Laving Bharti*, ILR 2 Bom 140
4. *Wilson v. Willis*, 404 So. 2d 529
5. *Mathura Naikon v. Esu Naikin* (1880)ILR4BOM545
6. *Thakur Gokulchand v. Parvin Kumari*, AIR 1952 SC 231
7. *Produce Brokers Co., Ltd v. Olympia oil and Cake Co.* [1916] 1 AC 314
8. *The State of Bihar vs. Kameshwar Singh and Ors*, [1952] ISCR889
9. *Dolly Rani vs. Manish Kumar Chanchal* (19.04.2024 - SC) : MANU/SC/0412/2024
10. *Sita Ram Narsaria and Ors. vs. The State of Bihar and Ors.*, [2006(4)JCR140(JHR)]
11. *Madhu Kishwar and Ors. vs. State of Bihar and Ors.*, 1996 SCC (5) 125