



## **CUSTOMARY RIGHTS VS CONSTITUTIONAL RIGHTS: WHAT DOES THE COURT SAY?**

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### **INTRODUCTION**

Custom has always been a fundamental source of law, deriving authority from long-standing social practices rather than codified statutes. Defined as the unwritten law of a community, customs evolve through continuous usage and become binding when they are reasonable, consistent with public policy, and recognised by judicial authorities. In India, customs play a crucial role in shaping personal laws governing marriage, divorce, inheritance, and succession, often reflecting the unique traditions of diverse religious and tribal groups. While matrilineal systems in Meghalaya, clan exogamy in Nagaland, and the plural practices of Tripura illustrate the regional richness of custom, religious communities such as Hindus, Muslims, and Christians also rely heavily on customary norms within their personal laws. However, these practices frequently reveal deep-rooted patriarchal structures that restrict women's rights despite constitutional ideals of equality. Against this backdrop, the debate on the Uniform Civil Code (UCC) brings forth critical questions on the reconciliation of cultural pluralism with constitutional morality. Judicial interventions have increasingly emphasised that customs and personal laws must yield to fundamental rights, situating the discussion at the heart of India's evolving legal and social order.

### **WHAT IS CUSTOM?**

Custom is the unwritten law of a nation, arising from the general practices of the people. (Blackstone, Commentaries on the Laws of England). The informal yet binding nature of customs, which evolve from consistent and widespread practices in a society. Customary law

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stands in contrast to written or statutory law, yet it is no less significant in the legal hierarchy, especially when codified law is silent or ambiguous on a particular matter.

Customary law is considered to be a primary source. To gain legal significance, a custom has to meet several conditions, which are:

**Immemorial Usage:** The custom must have been followed for a long time in continuation without a break. Its origin must not be traced from history, and it shouldn't be any innovation of the present time.

**Reasonableness and Fairness:** A custom, no matter how much significance, should abide by the present principles of equity, justice and liberty. For example, Sati and Johar cannot be considered it to be a custom.

**Public Policy Consistency:** It must resonate with the public's view and ambitions and must not conflict with present statutes. For example, Talaq-e-, though a longstanding practice, was struck down as it contradicts the constitution.

**Recognition by Judicial Authorities:** For a custom to be in force. It must have the backing of some statute. For example, Saptpadi is recognised by the Hindu Marriage Act, 1955.

In India, various customs are followed with respect to their religious faith and ethnicities, which, in short, are termed as personal laws. They are civil law that governs marital, succession, inheritance and adoption rights. Every society shares its own uniqueness.

### **Customary practices across communities**

Every region and religion has its own language when it comes to customary practices and personal laws. A few northeastern customs are highlighted below:

**Meghalaya:** Meghalaya has various matrilineal societies where kha Ing (female kinship) is followed by clans. Generally, the maternal uncle plays a pivotal role in family matters and holds authority in family decisions. The youngest daughters (khatduh) become custodians of ancestral property, but still cannot sell it without maternal uncle approval, while self-acquired property is often shared equally among siblings.

Marriage is used as a mechanism to unite clans, and exogamy is preferred. Marriage within the same clan (ka snongsang) is strictly prohibited. Divorce is uncommon but permitted with mutual consent before community elders (Kseangs), and violations of it invite penalties.

**Nagaland:** In Nagaland, the Ao, Phom, and Lotha tribes each follow distinct customary practices regarding marriage and divorce, reflecting their close-knit clan-based societies.

**Ao Nagas:** Marriage is strictly regulated by clan exogamy, where intra-clan marriages are taboo. Bigamy is prohibited. Marriages blend Christian solemnization and customary law, with women retaining their maiden clan names. Divorce is extremely rare, with reconciliation strongly encouraged. Severe cases involve fines or social deterrents, but women leaving a marriage lose rights to property, while men retain theirs through male heirs. Ancestral property is controlled by male clan members. Divorce carries social stigma, especially for women.

**Phom Nagas:** Like the Aos, they practice clan exogamy and monogamy. Inter-tribal or inter-religious marriages are allowed but uncommon. Marriage requires church registration and family recognition, without bride price. Divorce can be sought by either spouse for adultery, broken vows, or family conflicts; mutual consent is rare. Husbands divorcing without cause face penalties; wives leaving without cause receive nothing. Remarriage is permitted, ideally after a one-year gap.

**Lotha Nagas:** The Lothas also follow exogamy and monogamy, with both arranged and love marriages. Girls may marry at 15 under customary and church recognition, though contemporary practices discourage early marriage due to potential divorce consequences. Divorce practices favour men: fathers usually retain custody of children, and women have little recourse. The party at fault pays a token fine and may surrender half their property, but maintenance is not provided. Customary rules often disadvantage women and can perpetuate social stigma.

Across these tribes, customary law emphasises clan ties, patriarchal structures, reconciliation over divorce, and limited property rights for women, highlighting the communal and social dimensions of marriage rather than individual rights.

**Tripura:** Tripura is home to a diverse population of Hindus, Muslims, Christians, Buddhists, Jains, Bengalis, and 19 tribal sub-groups, each with distinct cultural practices. Marriage and divorce are governed largely by customary laws, which also influence inheritance and property

rights. Tribal women generally lack rights to own or inherit land, though they historically had economic roles through communal land and agriculture.

Marriage forms vary widely, including negotiation, exchange, elopement, purchase, capture, love, insistence, service, and widow remarriage. Divorce, known as *Kaklaimani*, is permitted on multiple grounds, with both spouses allowed to seek it, and penalties involve repayment of marriage expenses. While customs often reflect gender hierarchies, many provide some degree of equality and respect social diversity. Consultants emphasised that codifying these laws should preserve cultural diversity and protect traditional practices while seeking reasonable uniformity. A few religious personal laws are explained below:

**Islam:** In Islam, marriage is considered to be a social contract. *Nikahnamma* is signed, coupled with proposal (*ijma*) and acceptance (*kabul*). In the Islamic culture, free consent is crucial and utmost important. Here, polygyny is followed, where men can have four wives. *Mehr* is provided by the husband to the wife in the form of consideration. For the divorce, men have more control compared to wives. But, with reforms, women also get many rights for divorce. After a divorce, women have to observe *iddat* for 4 months.

In inheritance, Sons get twice as many shares as daughters, reflecting social norms and responsibilities. In the Quran, it was laid down that the husband has responsibilities for the whole family, while the woman's assets are only considered to be hers. Lots of variations could be seen between Shia and Sunni.

**Christian:** Marriage is considered to be a sacred union solemnised by priests. Monogamy is practised. Dowry is largely cultural rather than religious. In inheritance, custom prevails more than religion, and local customary law decides the rights.

**Hindu:** In Hindu traditions, too, marriage is sacrosanct. In Hindu traditions, marriage plays a significant role as it completes an individual. Customs like in front of holy fire are followed to solemnise a marriage. Divorce, though not appreciated, is still considered to be a last resort to the irretrievable breakdown of marriages. In inheritance, two schools discuss it, which are the *mitskara* and *dayabhaga*. Before 2005, women were not considered coparceners. But now, they have equal rights and property shared equally among successors.

## CUSTOMS AND WOMEN

As observed from these texts, one thing is very common and rooted in every personal law, i.e., patriarchy. Even in matrilineal societies, major control is with the maternal uncle. Due to this, many women are being deprived of equal rights and their status. The reason behind this patriarchy originates from the Stone Age, when a woman had to be dependent on a man to stabilise her life. During their pregnancy, they were bound to follow and rely on men. It's not like that from the outset; religion hated women.

In ancient times, women enjoyed rights like education and freedom. They were treated as goddesses and well respected. Many religious philosophers like Gargi and Maitreyi were well known in the Rigvedic period. But in later periods, the gaps between the rights of both genders widened. In Manusmriti, they were stated as slaves and compared to. Women were not considered as a coparcener then, but stridhan was given in the form of jewels and cloths.

Similarly, in Islam, it was considered to be very progressive for a woman as it mentions equal rights of women in the Quran. Their marriage had a contractual nature, promoted free consideration and Mehr as a consideration. Mehr was not merely a bride price. It aimed to provide stability for a woman after the divorce or abandonment. Women had full control over their assets and did not need to be spent on household obligations, as it was considered to be a male duty. Before times, many female scholars like Aisha were mentioned. Likewise, Hindu culture, dilution and menace manipulation changed the interpretation over time.

India suffered a lot of cultural shifts and innovations, which became an invitation to various customs and beliefs. While some strengthen our identity, others turn out to be a plague. The system of Sati and the conditions of the widow deteriorated the society's backbone. Major reformers like Raja Ram Mohan Roy and Jyotibai Phule understood these situations and decided to take an initiative on them. After its independence, India finally began to aim at a just and equitable society and decided to build it through each step.

Although there has been a lot of progress that was done but, it is still yet to achieve its full goal. Nikah halala, bride price, dowry, polygamy, child marriage, there are still a lot of issues that are yet to be solved. Those who favour a uniform civil code have this as their main issue. Many customs reflect deep-rooted gender discrimination.

## **PLAUSIBILITY OF THE UNIFORM CIVIL CODE**

The UCC, mentioned under Article 44 of the Indian Constitution, carried the vision and wisdom of our ancestors and freedom fighters. They seek to establish a common set of civil laws governing marriage, divorce, inheritance, and succession, irrespective of religion or community, which will be uniform, just and predictable. But its applicability is considered to be a utopian dream rather than an actual goal. India, which is considered to be the land of diversity, will be highly disputable as to which principle to be considered paramount. It could risk eroding India's uniqueness and its essence. Especially for a tribal community and minorities, certain procedures might sound foreign and contradictory to their integrity. This could amount to the forceful imposition of majority habits over minority, leading to years of social resistance, ethnic erosion and abrupt riots and violence. Those who favour it consider promoting national integrity and patriotism by providing a single identity. It simplified the legal framework, which can be comprehensible and predictable for a layman, too. It is indeed a step towards modernisation and constitutional morality, as it could lead to many discriminatory practices which are justified in personal laws.

There will be two types of people who will be discussing this issue: those who undeniably support it and those who undeniably oppose it. But the suggestion that has to be suggested is that reforms in personal laws, with public support, legislation cannot alone make the nation progress. Society as a whole needs to move a step forward towards rationalisation and justice. Therefore, reforms and amendments have to be made so we all can. A citizen equally progresses with a new time and celebrates our equal rights without cancelling the joy of enjoying our ethnicity. If the problem of various customs could be one, then why can it not be a solution?

### **CAN A CUSTOM BE REFORMED?**

The simple answer is yes. The famous case of Shayara Bano vs Union of India, which challenged a long tradition which was referred to as 'Talaq-e-Biddat.' Also known as Triple Talaq, it provided an unfair advantage to males over females in that a husband can anytime renounce his marriage without the will of her wife. This practice was arbitrary and made a lot of women helpless due to the easy abandonment procedure without any accountability. The court clarified that Triple Talaq was not greatly encouraged in the Quran. The Quran largely

puts emphasis on reconciliation. Thereby, Triple talaq was quashed and struck down as unconstitutional.

But this case helped in easing a lot of gender disparity and discrimination, and now women have their own grounds of divorce under the Muslim Women (Protection of Rights on Marriage) Act, 2019. Before this case, there was a previous case named the Shah Bano case, where the court upheld that they cannot infringe the personal laws.

### **JUDICIAL INTERPRETATION**

Article 13 of the Indian Constitution declares any law inconsistent with Fundamental Rights void, while Article 372 ensures continuity of pre-Constitution laws until repealed. The issue was raised as to whether personal law can be immune to constitutional scrutiny in the Narasu Appa Mali Case (1952). They concluded that personal laws do not come within the ambit of “laws in force” defined under Article 13. This judgement was later turned down in various cases, like the Sabrimala judgement. In *Kasilingam v. PSG College of Technology*, the court clarified that the “laws in force” include personal law too.

The Constitution does not define personal laws but empowers Parliament and State legislatures under Article 246, read with List III, Entry 5 of the Seventh Schedule, to legislate on matters like marriage, divorce, succession, and adoption. Following Narasu Appa Mali, several High Courts, including Allahabad, Madras, and Kerala, held that personal laws were beyond the scope of Part III. However, courts have at times overridden personal law in favour of constitutional or secular principles, as in cases interpreting Section 125 of the CrPC to ensure maintenance rights for Muslim women, or in *Anil Kumar Mahasi*, where women’s vulnerability justified broader divorce grounds. In *Danial Latifi*, the Muslim Women (Protection on Divorce) Act, 1986 was upheld with emphasis on women’s dignity, while in 2003, Section 118 of the Indian Succession Act, 1925 was struck down as unconstitutional. In the Triple Talaq case (2017), instant divorce was invalidated as un-Islamic and contrary to the Shariat Act, though the broader Article 13 question was left unresolved. Finally, the Sabrimala judgment (2018) declared unconstitutional the exclusion of women aged 10–50 from the temple, affirming that customs conflicting with fundamental rights cannot be immunised, and drawing a line between essential religious practices and superstitions. Therefore, it is finally concluded that customary rights cannot prevail over constitutional rights.

## CONCLUSION

Customs have long provided the framework for regulating personal and social life in India, reflecting the cultural diversity and historical continuity of its communities. It holds a significant role in community and society, but in order to be validated, legislative backing is highly important. Yet, their patriarchal underpinnings and occasional conflict with constitutional principles highlight the limits of relying solely on tradition. Judicial interpretations have made it clear that while customs are valuable in preserving identity, they cannot override fundamental rights of equality, dignity, and liberty. The debate on the Uniform Civil Code illustrates the challenge of balancing cultural pluralism with constitutional morality. A uniform law imposed without consensus risks eroding India's diversity, while unchecked customs may perpetuate discrimination. The way forward lies in gradual reforms of personal laws, guided by public participation and constitutional values, so that social progress is achieved without erasing cultural distinctiveness. In this manner, India can honour both its traditions and its constitutional promise of justice for all. Today's India respects the wisdom of our ancestors and will always be forever grateful for the traditions and culture they gifted. But rather than holding a blind faith and unintentional following. We aimed to value their teachings and therefore aimed to build a scientific temper and harmonise society with the principles of equity and discrimination. We aimed to stay connected to our roots without being rotten and stagnated like still water.

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