

Customary Law And Constitutional Provisions: Conflicts And Contradictions

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Abstract:

A central puzzle in jurisprudence has been the study of custom in law and its complexities. The question of custom and law has been in academic discussion for a very long time. It has become a contested study today and will become more complex in any society where there is diversity in culture and social values. The study is therefore aimed at looking at the customary laws and the conflict with the Indian constitutional provisions. Few case studies are selected to explore the growing tension between custom and law.

Keywords: *Jurisprudence, customary law, constitutional provisions, plurality, diversity.*

I. Introduction

Customs refer to the practices, usages, and traditions that characterize distinct communities. Understanding custom requires examining basic concepts such as habit and convention. Traditionally, customs have been viewed through a binary lens—either as "second nature" or as "unwritten law" (Bernard, 2014). This dichotomy suggests that customs arise either from inherent human nature or from established conventions, which are not formally codified in written law. However, this simplistic categorization does not capture the full complexity of customs. Rather than emerging solely from nature or convention, customs are often seen as manifestations of deeper social and cultural dynamics. Some scholars describe customs as "congealed irrationality," implying that these practices are outdated or devoid of rational justification. This perspective has led many social theorists to overlook the significance of customs in legal theory. Bernard, however, contends that the opposition between reason and custom is as misleading as opposing reason to emotion itself. According to Bernard, customs should be understood as "congealed reasons" rather than irrational or unreasonable practices (Bernard, 2014). This view suggests that customs are not merely arbitrary or outdated practices but are rooted in practical and rational considerations that have crystallized over time. This crystallization brings us to the debate over whether custom is a source of law and how far is it legally binding. Traditionally, custom is often seen as a primary source of law, alongside statutes and judicial decisions.

In 'Custom as a Source of Law', Bederman draws on both H.L.A. Hart and Bronisław Malinowski argue that customs, deeply rooted in historical and cultural practices, function as informal mechanisms that regulate behaviour and maintain social order. Hart emphasises the normative nature of customs, where individuals follow established practices not merely out of habit, but because they perceive these customs as obligatory rules within their communities. This view is complemented by Malinowski's anthropological insights, which highlight how customs emerge organically within societies as practical solutions to recurring problems, helping to maintain social cohesion and prevent conflict. Together, these perspectives support Bederman's argument that customs serve as effective regulatory systems, even in the absence of formal legal codification (Bederman, 2010, pp. 24-26). Customs, therefore, serve as informal social norms that guide behavior without formal enforcement mechanisms.

Custom and law represent fundamentally different modes of social regulation, each characteristic of distinct types of societies. In his view, customs are emblematic of primitive societies and are characterized by their spontaneous, automatic nature. They arise naturally from the traditions and practices of a community, are well-understood by its members, and do not require enforcement by an organized political authority. In contrast, laws are a product of more complex, civilized societies and are sanctioned through organized political force (Diamond, 1971).

However, not all customs are recognized as law, and many remain contested due to their inherent flexibility and localised nature. As Suri Ratnapala (2009) argues, the distinction between custom and law lies not merely in formality but in the authority conferred by state institutions. Ratnapala's work highlights how this authority can either reinforce or challenge long-standing customs, particularly in pluralistic legal systems. Moreover, the historical case of the Hindu Widows' Remarriage Act of 1856, analysed by Lucy Carroll (1983), illustrates how legal reforms can actively intervene in customary practices, sometimes leading to resistance and conflict within society.

In Nitya Rao's fieldwork (2007) among the Scheduled Tribe of Santhals in Jharkhand, tribal women operationalised their inheritance rights through the customary institution of 'gharjawae' (resident son-in-law) legally recognised under the Santal Pargana Tenancy Act of 1949 only in the absence of a male heir. But this struggle for recognition of their economic rights required a number of informal and formal strategies that made use of custom and law variably within the same context. Tribal women first negotiated their rights through the household and village councils largely within the idioms of custom, wherein village councils were more open to upholding their inheritance rights to "prove themselves progressive" within a larger legal framework based on equality and justice (*Ibid*, p. 316). But when violence struck, strategies went beyond local customs towards statutory civil and criminal courts- perceived as "legitimate enforcers of law and order" (*Ibid*). But while civil revenue courts were more likely to pay attention to local customs, criminal courts tended to sideline local understandings within a legal parlance that marginalised these women in accessing law. Rao (2007) argues for a 'hybridization' of laws with respect to customs to pay due attention to local contexts and legally recognise women's customary rights- thereby indicating that empirical complexities also make necessary the blurred boundaries between law and custom.

The Sabarimala Temple Case, formally known as *Indian Young Lawyers Association vs. State of Kerala*, is a pivotal case in understanding the relationship between custom and law, and the potential conflicts between traditional practices and constitutional principles. This case centers on a longstanding tradition that prohibits women between the ages of 10 and 50 from entering the Sabarimala Temple in Kerala, and the Supreme Court's decision to prioritize constitutional morality over these customs.

The Sabarimala Temple is a significant pilgrimage site dedicated to the Hindu deity Lord *Ayyappa*, who is revered for his strict asceticism and celibacy. According to tradition, Lord *Ayyappa's* form as a "Naishtika Brahmachari"—a lifelong celibate—means that he abstains from contact with women. This belief underpins the custom of barring menstruating women from entering the temple. According to ancient folklore, Lord *Ayyappa* himself explained how the Sabarimala pilgrimage shall be undertaken, emphasizing the importance of the '*Vratham*' (fasting) and what the devotees can attain by his darshan. The pilgrimage to Sabarimala involves a rigorous process of fasting and ritual purification, aimed at emulating the deity's ascetic life. Pilgrims, known as *Ayyappans*, undertake this journey in a state of purity and adherence to the deity's celibate practices (Jaggi & Niar, 2020).

The restriction on women, codified in Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, was challenged in various legal forums over the years. In the case of *S. Mahendran v. The Secretary and others*, 1993, the Kerala High Court had upheld the restriction on the entry of women between 10-50 years, citing its longstanding historical and traditional significance (Chaudhary, 2019). The court maintained that the prohibition was in line with the deity's celibate nature and therefore did not constitute a violation of constitutional principles.

However, with India's shift towards a rights-based constitutional framework since independence in 1947, traditional customs have come under scrutiny in light of fundamental rights guaranteed by the Constitution (Parasar, 2013). In 2006, the Indian Young Lawyers Association filed a petition with the Supreme Court challenging the entry ban, arguing that the prohibition was arbitrary, discriminatory, and in violation of Articles 14, 15, 17, 21, and 25 of the Indian Constitution. They contended that the restriction was a non-essential practice and incompatible with the principles of equality and non-discrimination enshrined in the Constitution (Jaggi & Niar, 2020).

The core issue was whether the ban on women aged 10 to 50 entering the Sabarimala Temple constituted gender discrimination. The petitioners argued that this restriction was unreasonable and unjustified, emphasizing that Article 25(1) of the Constitution protects not only religious beliefs but also the practices undertaken in pursuit of those beliefs. The crucial question was whether the prohibition was considered an essential part of the religious practice of the temple's followers. In its judgment, the Supreme Court held that Article 25 guarantees the right to religious freedom without gender discrimination. Consequently, the exclusionary practice at Sabarimala was found to violate women's rights. The Court also addressed the issue of whether Lord *Ayyappa's* worshippers constituted a separate religious denomination under Article 26. It concluded that there was insufficient evidence to prove that the exclusionary practice was essential to Hinduism.

Similarly, the ongoing debate surrounding Jallikattu exemplifies the inherent contradictions between custom and law within contemporary society. Jallikattu is deeply rooted in the region's cultural heritage. However, it has faced significant legal challenges due to concerns over animal welfare and cruelty. The Supreme Court of India previously banned the practice, citing evidence of extreme suffering inflicted on bulls during the event, which raised questions about the ethical implications of such customs in modern society. In response to the ban, the Tamil Nadu government enacted laws to protect Jallikattu, arguing that it is an essential aspect of Tamil culture and identity. The contradiction between custom and law in the case of Jallikattu raises broader questions about how societies reconcile traditional practices with evolving ethical standards.

The Case of Nagaland:

Election to the urban local bodies in Nagaland, including the Kohima Municipal Council, scheduled for February 1st, 2017 has seen many collisions with State and the peoples' organisations, particularly with the tribal hohos. This requires a very careful analysis. The bone of contention lies between Naga customary laws and the Indian Constitutional provisions which many argue are infringing on the former. Interestingly both customary laws and constitutional provisions are meant to work for the welfare of the people and this reservation is aimed at empowering the much-needed women of the State where there is not a single political representation in the present State Assembly from the category. Therefore, it is pertinent to understand Naga customary laws and practices and in which way Constitutional provisions can/may hamper the Nagaland State which enjoys special status in the form of article 371 (A) granted by the Constitution of India. The following are the points that may be considered:

1. Nagas have the right and authority to decide their laws as per customs and traditions which is safeguarded by Article 371 (A) of the Indian Constitution which says, "Notwithstanding anything in this Constitution, (a) no Act of Parliament in respect of (1) religious or social practices of Nagas, (2) Naga customary law and procedure,(3) and administration of civil and criminal justice involving decisions according to Naga customary law,(4) ownership and transfer of land and its resources, shall apply to the state of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides."

2. This means that any law(s) passed by the Parliament of India or directive(s) given by the Supreme Court of India is not binding to the State and there lies the bone of contention in the current upcoming election where various organizations, tribal hohos tribal bodies in the state including the Naga Hoho have called for a boycott to oppose 33 percent reservation for women arguing that reservation (for women) would infringe on Naga customary laws and tradition as protected under Article 371(A) of the Constitution of India.

3. It can be noted that the election to the urban local bodies including the Kohima Municipal Council has not been held since Article 243(T) of the Constitution came into force in 1993, with constant opposition and threats from the Naga Hoho and other tribal bodies. The Hoho and other bodies have recalled a resolution of the Nagaland State Assembly of September 22, 2012, which too had opposed reservation for women in civic bodies. It argued that the Nagaland Municipality Act (NMA) of 2001 is a copycat from other States that cannot be replicated by the Naga society.

4. In this regard, a Joint Coordination Committee (JCC) – a conglomerate of Naga tribal Organisations was formed to oppose the women's reservation for being against 'local culture and traditions' and has been imposing bandhs in the State districts to disrupt the proposed elections by the State Government.

5. The present State Government under T.R. Zeliang however has reiterated that 33 percent reservation for women did not amount to infringing upon Naga customary law and tradition, because the very concept of urban bodies is new and was never a part of the customary practices of the Nagas. He said, "Towns and municipalities are new concepts and have nothing to do with the tradition and customary practices of the Nagas". The decision was taken long back during a Cabinet meeting in August 2000 and enjoys peoples' support today, he augmented.

5. On the other hand, the Naga Mothers' Association (NMA), which has been spearheading the movement for granting reservation to women argued that 33% reservation for women in Urban Local Bodies elections "only aims to translate to full fruition the very idea of gender equity under the Naga Customary Law. The Constitution of India does not infringe upon the social practices of the Nagas," it said.

6. Furthermore, it can be argued that the reservation issue of women in local bodies in the State of Nagaland is a confrontation between articles 243 (D) which gives 33% reservation for women and 371A which gives special status to the Nagaland State on distinct political and cultural structure. It must be noted that Article 243 (M) of Part IX of the Constitution gives an exception to the reservation policy which is spelled out under Article 243 (D). Accordingly, the reservation will not apply to many North-Eastern States such as Meghalaya, Mizoram, Nagaland and Hill Areas of Manipur. However, the decision of giving reservations to empower women by the present State government is otherwise faced with strong opposition, on the grounds of infringing Naga customary laws and practices.

7. Having known both sides of the story, and realising a need for correct interpretation, it is therefore proposed to observe the following points. That:

(i) It is tantamount to protect and preserve Article 371 (A).

If Nagaland State continues to follow any Act of Parliament or any judgement of the Supreme Court in Toto, then, it is setting a negative precedent that is neither beneficial nor constructive for the future of Nagas. Such precedent may be misquoted (in the near future) to give different meaning and in the long run, the State may even lose its special status of Article 371A granted by the Constitution of India.

(ii) It is only because Nagas have distinctive customary laws and practices that GOI has granted this special protection in the form of Article 371(A) in the Constitution to preserve and promote the rich culture and traditions of the Nagas. Otherwise, India will continue to be pressured to follow the “one country, one law” system which will be detrimental to the Nagas in the long run.

(iii) Therefore it is proposed that the Nagaland Municipality Act of 2001 (which was amended in 2006) may be further modified or amended to suit the cultural and customary practices of the Naga people. And, for that, the Government of Nagaland should constitute a committee to discuss and dialogue with various tribe hohos and various organisations (including Churches) of the tribe. In this way, the rich traditional institutions and organisations of the Nagas can be kept alive democratically.

(iv) Meanwhile, more efforts should be initiated by the State Government to include more women in the political institution/s though they had already provided 25 percent for women quota in the Village Development Boards. This is in conjunction with the Christian principle that “all men and women are equal”. Therefore, giving women reservations is a big step towards achieving that goal.

(v) However, the crux of the issue is to defend its aged old customs and practices and at the same time reciprocate to the changes that are fast occurring. For, no society is static and no customary laws and cultural practices are permanent. Therefore, Nagas should codify their rich customs, oral history, faiths and cultural practices (by Naga CSOs, Academics, Church leaders etc.) so that it can counterbalance the Constitutional provisions of India which come with attractive packages.

II. Conclusion

The examination of the above cases reveals the complex relationship between custom and law, highlighting the evolving nature of legal interpretation and application. It highlights the persisting opposition between law and custom and how law emerges in conflict with custom. The cases underscore the conflict between entrenched customs and constitutional values, demonstrating how law can both challenge and reshape traditional practices. Though the judiciary affirms that legal norms are not static extensions of custom but are subject to scrutiny and reform in light of constitutional principles. It illustrates that law must balance respect for established practices with the imperative to uphold fundamental rights and values. Ultimately, the case serves as a pivotal example of how legal systems navigate the tension between preserving cultural traditions and advancing progressive societal principles, reaffirming the role of law in fostering justice and equality within a societal context.

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