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BLOG WRITING (TASK 1)

ROLE OF CUSTOMARY LAW IN INDIA

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What is law?

The concept of law can be understood as something natural, divine or human made. However, several factors like social, political, religious, media, power, gender, and economy shapes what the law is. Law is basically the rules and regulations which one is supposed to follow, failing which can lead to sanctions or punishments that may include death penalty, life imprisonment, rigorous imprisonment, or fine.

There are several sources of law. Legislation is one such source that is the law made by the government keeping in mind the changing situation of its country and required development. Legal precedents are another source of law that the judiciary or the courts decide on a case-by-case basis. The most controversial form of source of law is the customary source of law that is the practices and traditions that are been practiced since time immemorial should be considered as law or not.

Customary law?

In India Customary law is been recognised as the formal laws of the country. Provided that the followed practice must comply with some conditions. These conditions being that the practice should be (1) followed since time immemorial, (2) it must be continuous without any hinderance, (3) it must be reasonable, (4) it must be certain and clear, and lastly is (5) must comply with the existing laws rather than going against them.¹

Article 13 of Indian Constitution states that “(3) *In this article, unless the context otherwise requires,—* (a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;”². This Article clearly mentions customs and usages as being recognised as any other law in India.

¹ Law Library of Congress, *Research Guide: Customary Law in India* (Global Legal Research Directorate, July 2013), <https://tile.loc.gov/storage-services/service/lil/llglrd/2019670440/2019670440.pdf>

² INDIA CONST. art. 13.

India's Constitution also provides protection of tribal indigenous communities and their customs through Articles 244³, 244-A⁴, 371-A⁵, and the Fifth and Sixth Schedules. The Fifth and Sixth Schedules provide for a system of "Scheduled Areas" or tribal regions, which are designed to protect the interests of listed indigenous communities or "Scheduled Tribes."⁶

The law in India is not only the ones made by the parliament, it also includes the personal laws like Hindu personal law (Hindu Law) and Muslim Personal Law (Sharia Law). India also recognises tribal customs and traditions giving them legal protection.

Below are some of the examples of Customary laws in India-

1. Section 7 of The Hindu Marriage Act, 1955 states "*Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken*"⁷. It explicitly states that a Hindu marriage will get completed in the eyes of law only if done according to the customs. Customary practice such as Saptapadi, completes the marriage and makes it binding in law.

2. Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 states "*Application of Personal Law to Muslims. —Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).*"⁸ In Muslim religion, the other Indian laws about succession, property, inheritance, gift, etc are valid and accepted only if it does not contradict with the Sharia Law. It must not conflict with Quran, Sunnah or their other customs.

3. Section 5 of The Hindu Marriage Act, 1955 states "*Conditions for a Hindu marriage. —A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: - (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each*

³ INDIA CONST. art. 244.

⁴ INDIA CONST. art. 244-A.

⁵ INDIA CONST. art. 371-A.

⁶ Law Library of Congress, *Research Guide: Customary Law in India* (Global Legal Research Directorate, July 2013), <https://tile.loc.gov/storage-services/service/ll/lglrd/2019670440/2019670440.pdf>

⁷ The Hindu Marriage Act, No. 25 of 1955, § 7 (India).

⁸ The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, § 2 (India).

of them permits of a marriage between the two;"⁹. This means that the marriage between 2 Hindus will be valid only if it is within the allowed degrees of relationship. It also adds later unless the custom permits which means that customary law here holds upper hand than codified Hindu law. If there exists a custom that allows marriage between 2 Hindus who are within the prohibited degrees, then that marriage can be considered as valid.

However, there are certain Customs that were practiced earlier but then have been abolished later. Some of those customs were,

1. The act of Sati. This practice made the alive widow sit on the funeral pyre of her deceased husband and killing herself. This practice has been followed for antiquity but then later was abolished by The Commission of Sati (Prevention) Act, 1987. Section 4(2) of the act states "*If any person attempts to commit sati, whoever abets such attempt, either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine*"¹⁰.

2. Instant Triple Talaq (Talaq-e-Biddat) is a way of divorce in Islamic religion that has been taking place since very long time and was therefore followed by Muslim male when divorcing their wives. This practice was declared as arbitrary and unconstitutional by the supreme court of India in the case of *Shayara Bano v. Union of India* (2017)¹¹. Therefore, such customary practice was declared as null and void and illegal in the eyes of law.

Conclusion-

In India, both types of system, that is of customary laws, and modern legal system work hand in hand. If any conflict arises between them, then judiciary does its role of Interpretation and whether it complies with equity and good conscience. India being a diverse country with many religions, languages, castes, tribes in it, it is very difficult to ignore the practices close to people's heart which they have been following since time immemorial.

However, the sovereign power is in the hands of the constitution of India. If any practice clashes or contradicts the Indian constitution, it is declared to be null and void. What is prioritised is the fundamental rights of the people. To move towards modernisation and societal development, it is essential to focus on uniformity and equality for all citizens.

⁹ The Hindu Marriage Act, No. 25 of 1955, § 5 (India).

¹⁰ The Commission of Sati (Prevention) Act, No. 3 of 1988, § 4(2) (India).

¹¹ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

