CHAPTER - II

CUSTOMS AND PERSONAL LAWS

Importance of Customs in Personal Laws

Custom is the parent of personal law in each country, and even in India, which is a land of diverse customs of families, castes and territories. Custom is the most important source of Hindu law. The position of custom as a source of law (specially personal law) is unique. On matters not covered by the Shastras, the custom supplemented sacred law (Dharma). Manu enjoined the King to decide all disputes which fell under eighteen titles of law according to the principles drawn from custom or scared law. He further declared that the king who knows the sacred law must also inquire into the law of caste, of districts of guilds and of families, thus settle the peculiar law of each.\(^1\) Narada declared unequivocally, “custom decides everything and overrides the scared law”. It was said, “immoral usage of every province handed down from generation to generation can never be overruled on the strength of Shastras”. Yajnavalka said, “one should not practise that which is ordained by the smritis but is condemned by people”.\(^2\) The Privy council observed: “Under Hindu system of law clear proof of usage will overweight the written text of law”.\(^3\) Here two instances are given where custom overrides sacred law abound and being the personal law. It is rule of sacred law that one cannot marry one’s sister’s

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2. Yajnavalkyasrnti,1,156, quoted in ibid, at p 22
3. Collector of Madura v Mootoo Ramalinga, (1868)12 M.I.A. 397
daughter, they being sapindas to each other. But in South India, there is well-established custom under which one is permitted to marry one’s sister’s daughter. Similarly, under the sacred law one cannot marry one’s brother’s widow, but among the Jats of Punjab and Haryana such marriages are permitted by the custom and are valid. To a great extent the Dharmashastras themselves based on custom. The remarkable feature of Hindu law is that though the importance of sacred law is emphasized yet the new development and the local needs are not disregarded and sacred law is subordinate to custom. 

India is a country which abounds in personal laws; each community has its own personal law. The Hindus, the majority community, have their separate family law; so have the Muslims, the biggest minority community. Smaller minority communities, the Christians, Parsis and the Jews, whose number, in the context of the total population of India, is not very significant, too, have their own separate family laws. Although each of these communities is a religious community, yet it is not necessary that their personal law is essentially religious law. It is also not necessary for the application of the personal law that members of the community should be ardent believers or followers of that religion. In most of the cases if he is a member of the community by birth or by conversion that will suffice, even though in actual persuasion he may be atheist, non-religious, non-conformist, anti-religious or even deery his faith. So long as he does not give up his faith and embrace another religion (among some communities, mere denunciation of faith is not sufficient) he will continue to be governed by the personal law of the community to which he belongs. The Hindus have all along maintained that their

4. Dr Paras Diwan, op.cit p22
laws are of divine origin. The modern Hindu law, by judicial interpretation and legislative modification, has undergone drastic changes, so much so that any claim of divinity can hardly be sustained. Yet, another aspect of matrimonial law in India is that in personal matters of some communities, custom still plays an important role. Custom either supplements or modifies the personal law of some communities, and some communities are either partly or wholly governed by customs. Thus, even after codification of the Hindu matrimonial law, in matters of prohibitions on marriage on the ground of prohibited degrees of relationship, sapinda relationship, ceremonies of marriage and divorce, customs are allowed to override the statutory law.

Law as understood by the Hindus is a branch of Dharma. Its ancient framework is the law of the Smritis. The Smritis are institutes which announce rules of Dharma and traditional definition of Dharma is “what is followed by those learned in the Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection”. The expression Dharma is of very wide import and includes in its ambit the aggregate of rights, duties and obligations, religious, moral, social and legal. As the Hindu law was influenced by the theological tenets of the Vedic Aryans and their philosophical theories, therefore, we find the whole system of mingling of religious and ethical principles with legal precepts. Hindu law is a personal law and not a lex loci (law of locality or state or territory). What is meant by this is that whenever the laws of India admit the operation of a personal law, the

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5. ibid p.2  
6. Sections 5(iv),5(v),7 and 29(2) of the Hindu Marriage Act, 1955  
8. ibid.
right and obligation of a Hindu are to be determined by Hindu law, that is his traditional or personal law. But it is subject to the exception that any part of the law (personal law) may be modified or abrogated by the statutes. Where a Hindu migrates from one part of the country to another the presumption is that he retains the laws and customs of the region from which he comes and is not subject to the law of the place to which he migrates. This presumption has to be rebutted by showing that the family has adopted the law and usages of the state to which it has migrated.

There are two views as regards the origin of Hindu law. The first view states that it is of ‘divine origin’ while the other one states that the Hindu law is based upon “immemorial customs and usages”. According to the first view, since Hindu law is derived from revelations from the Almighty (i.e. the laws of God) it binds the sovereign as well as his subjects. Law is the King of Kings. It is far more powerful and rigid than them. Nothing can be mightier than the law by whose aid the weak may prevail over the strong. This shows that to the Hindus the theory of Rule of law is not new. According to the second view the Hindu law is based upon immemorial customs and usages. But this is not wholly correct. Publication of criminal textbooks along with commentaries and digests and research therein have shown the above view as incorrect. The jurist of modern Europe say that since the theory of “Law as a command of the Sovereign” does not fit in with the Hindu law it is not law. But one should remember that so long as a Hindu King occupied the throne of the Hindu community, the Bhramins enjoyed the legislative power, and commands issued by them were generally observed. One may say that therefore that the system of Hindu jurisprudence has shown no sign of decrepitude. 9

It is the high antiquity of the custom which gives its validity. A rule of human conduct by continued observance by the people for some period of time with the common sanction of the people, gets the status of a custom. The birth and growth of a custom is the natural consequences of organized living people and progress of human society. With the growth and progress of human society the rules of human conduct go on multiplying, till a stage reaches when they become a well recognized and well established body of rules, these rules are compendiously called customs. These rules of conduct must have, obviously, arisen and followed on account of their utility or necessity. They have been observed because they enjoyed the express or tacit sanction of the community.\textsuperscript{10}

The relation of customs to laws (particularly personal laws) and their importance as a source of law have given rise to a large mass of legal and juristic literature. Various theories have been advanced by writers on law and jurisprudence about the exact position and binding character of customs. Austin, having defined 'law' as the command of a political superior or definite human authority addressed to political inferiors and enforced by a penalty or sanction, held that custom becomes a law only when it receives judicial or legislative recognition.\textsuperscript{11} Holland on the other hand holds that courts do not \textit{proprio motu} for the time make custom a law, that they merely decide as a fact that there exists a legal custom about which there might have been some question up to that time, just as there might be about the meaning and interpretation of an Act of parliament, and the observance of a custom is not the cause of law; but is the evidence of its existence.\textsuperscript{12}

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\item \textsuperscript{10} Dr. Paras Dwan, \textit{Customary law of Punjab and Haryana}, (2nd edn. 1984) p.3
\item \textsuperscript{11} Campbell (ed), \textit{Austin's Lectures on Jurisprudence}, (1873) p.37
\item \textsuperscript{12} Holland's \textit{Elements of Jurisprudence} (12th edn. 1916) pp62-63
\end{itemize}
In modern India customs occupy a very important place and have been recognized by parliament and Indian legislatures as valuable in the administration of law and justice. It may not be out of place to mention some of these Statutes or Acts which protect customs. The Charter of the Mayor's court in Bombay in 1753 contained 'the earliest trace in royal Charters of a reservation to the natives resident in our territories in India of their laws and custom'. The Bombay Regulation IV of 1827 provided by section 26 that 'the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulation the usage of the country in which the suit arose; if none such appears the law of the defendant and in the absence of specific law and usage, justice, equity and good conscience alone'. The High Court Act, 1861 provided by section 11 that all provisions of Acts of Parliament or Acts of the Legislatures of India which were applicable to Supreme Court were to apply to High Courts to be established under the Act of 1861. The High Courts were also bound to decide according to usages in matters of inheritance and succession and in the other matters specified about just as the Supreme Court was bound. Further, the Government of India Act of 1915 by section 112 provides that the High Courts at Calcutta, Madras and Bombay shall in matters of inheritance and succession to lands, rents and goods and in matters of contract and dealing between party and party decide according to the personal law or custom having the force of law to which the parties are subject, and according to the personal laws or custom of the defendant if they are subject to different personal laws or customs. Section 223 of the Government of India Act of 1935 preserves intact the operation of section 112 of the Government of India Act of 1915. It shows that custom had been taking an
important role in the field of personal laws and at the same time the statutes also
had been protecting the personal laws of communities from the ancient times. A
custom may also be defined as a rule which in a particular family, tribe, caste,
sect, group or locality, has from long practice obtained the force of law though it
is inconsistent with or different from or an exception to the general law relating to
the same subject.13

**Constitution and Personal Laws**

As the Indian constitution has conferred under Part III Fundamental Rights
and has also enacted Directive Principles of State Policy under Part IV, the courts
have to determine whether any provision of Hindu law, a personal law contained
in the ancient texts or in the statutes or governed by custom infringes the said
provisions. After the constitution the validity of an Act has not to be
determined with reference to the powers of the legislature but with reference
to the question whether any of its provisions are opposed to the provisions of the
constitution and in particular to the chapter on Fundamental Rights. The infringement
of the provisions of Part III relating to the Fundamental Rights, renders any law
in force void (Article 13). The expression “law in force” would include Hindu law
as contained in the Texts as well as Hindu law based on custom. In *Santram v. Labh
Singh*,14 it was laid down by the Supreme Court that expression “Law in force”
would include custom and usage having the force of law. This expression ‘Law in
force’ in Art.13 is wide enough to include every kind of law; textual, customary
or statutory. One of the essentials of a good Government is a good system of

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law, which is capable of promoting the preferred values without giving rise to disharmony among the people that are governed by it. The purpose of law is to promote justice, keeping pace with the changing social, economic, political and other needs of the people. Reaffirming these ideas, the preamble of our Constitution speaks of four objectives, viz. justice, equality, liberty and fraternity, and rules out any kind of discrimination on the basis of sex, race and religion. Hindustani law is no exception. In fact, the present trend in law is towards the realization of certain democratic values such as equality of sex, social and economic security for women and children, and the development of secular outlook. Of all values equality of sex and equal opportunity for spouses is the major goal value with which the law of marriage (a branch of personal law) is mostly concerned. If the principle of Hindu law was held to give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife it would violate Article 14 of the constitution.16

In state of Bombay v. Narasu Appa Mali,17 the court observed that Article 14 of the Indian Constitution does not lay down that any legislation must be all embracing in character. The State may decide to bring about social reform by stages and the stages may be territorial or they may be community wise. The discrimination against Hindus in prohibiting bigamous marriages is not based only on religion within the meaning of Article 15(1). It is a historic fact that Muslims and Hindus have their own personal laws— which are based upon their respective religious texts which embody their own distinctive evolution and which are

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17. A.I.R. 1952 Bom.84.
coloured by their own distinctive background. The institution of marriage is differently looked upon by the Hindus and Muslims. The question of dissolution of marriage is differently tackled by the two religions. The State is also entitled to consider the educational development of the two communities. One community may be prepared to accept social reform while yet another may not be prepared for it. The court further observed that the legislature might have thought that the evil of bigamy could not be effectively put down unless stringent punishment and a special procedure is provided. It was proper for the legislature to take into account the social customs and beliefs of the Hindus and other relevant circumstances in that connection. The court held that Bombay Prevention of Hindu Bigamous Marriage Act was not violative of Articles 14,15 and 25(1) of the Indian Constitution which the State is given full powers to make laws providing for social welfare and reform. Probably, such observations were kept in the minds of the legislators while they enacted section 5(i) of the Hindu Marriage Act,1955.

The provisions of the Hindu Marriage Act,1955 prohibiting bigamy do not contravene Article 25(1) and are saved by Article 25(2) of the Indian Constitution. They do not affect Article 15(1)\(^\text{18}\). The personal laws are not co- incidental with religious faiths. Hindu law governed not only Hindus, Sikhs, Jains and Budhists. It governs Lingayats who deny caste distinctions and progressive sects like Brahma and Arya Samajists, and also governs persons professing other religious beliefs. If such was the customary law until the Shariat Act Mohammaden communities such as Khojahs, Cutchi Memons, Borahs, Hali

\(^{18}\) Ram Prasad Seth v. State of U.P., A.I.R 1961 All 334
Memons were governed by Hindu law in matters of succession and inheritance. On the other hand, Hindus like Nayars were governed by Marumakathayyam law and some communities in Canara were governed by Aliyasantana law and not by Hindu law. Hindu law, therefore, does not apply to several Hindus on important matters and it applies to several non-Hindus on important matters. The Parliament felt that the persons governed by Hindu law were ripe for social reform and in choosing them for reform it cannot be said that Parliament was discriminating against them. Not adherence to religion but subjection to a certain personal law is the basis of the classification under the Hindu Marriage Act and hence sections 5(i), 11 and 17 do not offend Article 25(1) and are saved by Article 25(2).

According to Mahabharata, a great epic it was the sage Svetaketu who decreed that promiscuity should be supplanted by regular marriage. We find the institution of marriage well established in the Rigveda. Not only was marriage well established in the Vedic age, but it was also regarded as a social and religious duty and necessity. This was the case even in the Indo-Iranian period. According to the Avesta oblations offered to Gods or ancestors by a maiden or a bachelor are unacceptable to them. A Vedic passage says that a person, who is unmarried, is unholy. From the religious point of view he remains incomplete and is not the fully eligible to participate in sacraments. This continues to be the view of the society even now. Marriage opened a new period of holy life which was to be led at the altar of truth and duty. Such being the views of society about marriage since very early times, it was naturally regarded as normally

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necessary and desirable for all. By about 300 B.C. marriage came to be regarded as obligatory for girls also. In India also marriage was made obligatory for women and not for men. One of the reasons may perhaps have been the possibility of men leaving a spiritual or intellectual lineage behind them. The real reason for this differential treatment, however, seems to have been the recognition by society of the simple fact that an unmarried woman has to face greater risks in society than an unmarried man. Public opinion also is much less sympathetic to a woman who has gone astray even unwillingly, than to a man who leads a vicious life deliberately.21 Marriage is a very important event in the life of a woman. Matrimony in course of time is followed by maternity, and its recurrence makes periodically helpless and absolutely dependent on her husband for some time. Marriage, therefore, determines the fate of a woman to a much greater extent than it does the destiny of a man. A good marriage is a welcome protection for the woman, a bad one is worse than a painful chain. This is true in case of law of marriage which is expected to be a good law for all. A significant feature of the Hindu Marriage Act, 1955 is that it provides for new matrimonial remedies such as, restitution of conjugal rights, judicial separation, annulment of marriage and the right to get divorce.22 These provide relief and a sense of security to woman who may be driven to seek anyone of these remedies in times of necessity. To a great extent the law of marriage laid down in the Hindu Marriage Act tends to establish the principles of equality, equal opportunities and equal protection of laws to both spouses without any sex discrimination. The law confers equal rights, imposed equal

21. ibid p.35
22 Sections 9,10,11,12 and 13 of the Hindu Marriage Act provide for these remedies on proof of any one of the grounds stated in the respective provisions.
obligations, and the parties are allowed to enjoy equal matrimonial status in all respects. For instance, a valid marriage confers certain rights like the right of consortium and maintenance on both the parties to marriage under this enactment. When the right of consortium is infringed by one spouse, the other spouse is entitled to enforce his or her right to have conjugal society of the other by obtaining the remedy called restitution of conjugal rights. In the same manner, both the spouses are under obligation to maintain each other in times of necessity and distress on fulfillment of certain conditions required under the relevant provisions of the law.

In Sareetha v. Venkata Subbaiah, a single Judge of the Andhra Pradesh High Court expressed the view that section 9 of the Hindu Marriage Act, 1955 providing for the remedy of restitution of conjugal rights is void as it offends Articles 14 and 21 of the Indian Constitution. He observed that section 9 of the Act is intended to be enforced by order 12 rules 32 and 33 of the C.P.C. by applying financial sanction against the disobeying party. The court could also enforce its decree through its contempt powers. According to him, sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights and the consequences of the enforcement of such decree are firstly to transfer the choice to have or not to have marital intercourse to the State and secondly to surrender the choice of the individual to allow or not to allow one’s body to be used as a vehicle for another human being’s creation to the State. The effect of the decree for restitution is to coerce

23. Section 9 of the Act
25. A.I.R 1983 A.P 356
the unwilling party to have sex against that person's consent and free will dignity with the decree holder. It, therefore, violates the right of privacy and human dignity guaranteed by Article 21 of the constitution. The learned judge further held that though the section applies to both the husband and wife the remedy actually works to the disadvantages of the wife whose life pattern is altered, whereas the husband's can remain almost it was before. In practice it operates only as an engine of oppression by the husband against his wife. By treating the wife and husband, who were inherently unequal as equals, section 9 violates the rule of equal protection of laws contained in Article 14. Section 9 does not subserve any social good and must therefore be held to be arbitrary and void offending Article 14. The learned Judge accepted the decision of the lower court that it had no territorial jurisdiction to entertain the petition and therefore it was unnecessary for the Judge to have considered the Constitutional question and all observations of the court relating to the Constitutional validity of section 9 are in the nature of obiter dicta. The Delhi High Court differed from the above decision and upheld the validity of section 9 of the Hindu Marriage Act 1955 in Harvinder Kaur v. Harmander Singh. It rightly pointed out that the object of restitution was to enable the husband and wife to live together in matrimonial home and to preserve the marriage. Sexual intercourse is one of the elements that go to make up the marriage but it is not the sumnum bonum. The Court does not and cannot enforce sexual intercourse. Order 21 Rules 32 and 33 of the C.P.C. constitute a financial sanction behind the restitution decree. Article 21 is in no sense violated nor is Article 14, as there is no discrimination between husband and wife. The court observed that the introduction of the

Constitutional law in home is most inappropriate and it is like introducing a bull in a China Shop. In the privacy of the home and married life neither Article 21 nor Article 14 have any place. The court went too far in making the sex observations. As already been noticed every law whether it pertains to the home or outside, has to conform to the provisions of the Constitution. The court would have been justified if it merely rested its decision on the ground that the matter of dealing with Constitutional validity of the personal laws and in particular laws relating to marriage the court must be cautious in its approach and must take into account the habits of the people which have been in vogue for centuries. Quite recently the Supreme Court overruled the decision of the Andhra Pradesh High Court is *Sareetha v. Venkata Subbaiah* and approved the decision of the Delhi High Court in *Harvinder Kaur v. Harmannder Singh*. The Supreme Court pointed out that the section 9 of the Hindu Marriage Act, 1955 contains sufficient safeguards to prevent the marriage from being a tyranny. Order 21 Rules 31 and 32 of the C.P.C. provide only a financial sanction to serve as an inducement by the court to effectuate restitution and serve as a social purpose as an aid to the prevention of the break-up of the marriage.

For a considerably long time, women have made victims of certain evil practices, like polygamy, dowry system and unilateral divorces by husband. Widowers, but not widows, were not permitted to remarry. Thus in a nutshell, what has been permissible to men has not been made equally permissible to women. However, this kind of unequal status is sought to be done away with, and is of course, being replaced by the concepts of matrimonial equality and equal

participation of both the spouses in all proceedings, though suitable changes to the personal law brought about by the statute. In case where the spouses fail to get on well due to psychological incompatibility or matrimonial misconduct of either spouse or due to some other reasons, and find their lives miserable, and are unable to pull on together as wife and husband, they are equally provided with suitable remedies to disrupt or dissolve the marital tie either temporarily or permanently, depending upon the gravity of the situation. The matrimonial courts are equipped with the jurisdiction to grant the necessary remedies to the aggrieved party on proof of anyone of the grounds set out in the provisions enumerated under the Hindu Marriage Act, 1955. While passing this Act the legislature asserted that the purpose of the statute primarily was to help the poor down-trodden Hindu women who were not getting a fair deal in marriage. This Act is one of the recent legislative innovations formulated to modernize Hindu law. Repudiating the inviolable and sacramental character of the Hindu marriage it treats marriage as a conditional socio-legal agreement between adult and equal parties with their free consent to establish a home as husband and wife. It declares its support to create appropriate conditions of formulation, duration and suspension of the marital tie in order to promote healthy and meaningful marriages, and help to uplift the down-trodden condition of the Hindu Women.

A Uniform Civil Code as distinct from a modernized personal law, is necessary but by no means a sufficient condition for integration into a single modern nation of the various religious groups which make up the Indian people.

30 V.Bagga (ed.), op.cit, p.65
31. ibid pp.75-76.
This is based upon the fact that the basis of a modern state is the individual citizen, and not any sub-national group collectively defined by religion, language or any other incidental attribute its members may share of homogeneity among the citizens as regards their rights, obligations and outlook, no matter what religion they follow or what language they speak. The champions of the Uniform Civil Code believe that without it such a homogeneity cannot be ensured. The framers of the Indian Constitution by committing to secure to all Indian citizens the social justice and equality of status were faced with the baffling problem how to obviate the prevailing social injustice and inequality. Unity of nation was another factor to be taken into consideration. To overcome all these difficulties they enacted Article 44 as a direction to the State. The Article 44 of the Indian Constitution has directed that “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”.

The first attempt for the Uniform Code of law as made by the first Law commission established under the Charter Act, 1833. But this uniformity could not be initiated for personal laws. The reason for this was expressed by the Second Law Commission32 in these words:

“But it is our opinion that no portion either of the Mohammedan law or of Hindu law ought to be enacted as such in any form by a British Legislation; such legislation, we think, might tend to obstruct rather than promote the gradual programme of improvement in the State of population”.33

32. Appointed in England on Nov. 29, 1853 under the provision of the Charter Act, 1853.
However, the aim of the Government was: “Uniformity where you can have it - but in all cases certainty”.34

Article 44 of the Indian Constitution which gives direction to the State to secure a Uniform Civil Code is, however, merely a directive principle of State policy and is thus possessed of persuasive rather than compulsive authority. Article 37 of the Constitution says that the directive principles of State policy shall not be enforceable by any court. Looking back to the history of Article 44 we find that some of the Constituent Assembly wanted this Article to be included in the Fundamental Rights. This was first of all suggested by M.R. Masani and strongly supported by Rajkumari Amrit Kaur, Hansa Mehta and B.R. Ambedkar. By a slender majority of 5:4, it was decided to keep this provision outside the scope of Fundamental Rights. M.R. Masani, Hansa Mehta and Rajkumari Amrit Kaur in their minute of dissent observed:

“We are not satisfied with the acceptance of uniform civil code as an ultimate social objective set out in clause 39 as determined by the majority of the Sub-Committee. One of the factors that kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into water-tight compartments in many aspects of life. We are of the view that a Uniform Civil Code should be guaranteed to the Indian people within a period of 5 to 10 years. We, therefore, suggest that

the advisory committee might transfer the clause regarding a Uniform Civil Code from Part II to Part I after making suitable modifications in it".  

Moreover, the Constituent Assembly did not provide a time limit for the implementation of this directive. This was perhaps because of the fact that members wanted the wounds of partition to heal up and Muslims to come out of the vicious climate generated by the Pakistan movement. The language of Article 44 is restrained and it is an expression more of hope than of mandate. This indicates immense difficulties in its implementation. The difficulties are multiplied by the existence of a large number of legislative jurisdiction, as both Parliament and the State legislatures are competent to legislate upon most of the topics which may be included in the Uniform Civil Code. For instance, divorce which is one of the subjects of Uniform Civil Code is included in Entry 5 of List III of the 7th Schedule to the Constitution. Further the vast sections of the people adhere to differing personal laws. Nonetheless, the objectives set by Article 44 merits earnest attention of the State and as endeavour to realize it soon. The diversity of family law and less tractable admixture of law and religion especially in the sphere of marriage and divorce make the problem of Uniform Civil Code more complex. The Uniform Civil Code can deal with many aspects of family law, such as marriage, divorce, gift, endowments, inheritance etc. But making a Uniform Civil Code on all the aspects of life at a stroke of pen may cause immense difficulty in changing the age old tradition and custom of the people as a whole. The best possible way is to

provide change in the habits and traditions of the people by a gradual process. Instead of making one civil code, covering all topics of family law it would be better if piece meal uniform legislation is made in certain specified areas.  

Indian society is a museum of diverse religions, cultures, races, languages and communities. Britishers, since their advent in India, were very careful in dealing with the Indians. In the beginning when they acquired small territories in Bombay, Madras and Calcutta and also the Dewani of Bengal, they did not like the existing law of the native people. By the plan of 1772, Warren Hastings specifically prescribed that in all suits regarding inheritance, marriage, caste and other religious usages and institutions, 'the law of Quran with regard to Mohammedans and those of Shastra with respect of Hindus' should apply. This plan of Warren Hastings was consistently followed by the Britishers during their rule in India. Many a times they desired a change in the existing system of family laws of these major communities but they hesitated to modify them in consonance with modern needs of the society because of the view held that personal laws were too much identified with the religion. They, therefore, thought that interference with the existing systems of law might be interpreted by the Indian as an interference with the religion and might be resented by them. They were careful not to injure the religious susceptibilities of the Indian. They came to India to rule and not to make improvement in the conditions of her people. They wanted to take the line of least resistance and to avoid all complications to the possible extent. The various Law Commisions appointed by them from time to time were of the view that personal laws ought not to be codified. The Fourth

36. ibid p 123
Law Commission which was appointed in 1882 was also not in favour of codification in the field of family law because in their view for a great mass of people such law was mingled with religion and it would be a political sacrilege to touch it.\textsuperscript{37}

But, the time has come when the matters of marriage and divorce cannot be considered purely on the basis of religion. The marriage and divorce can be tackled in the context of modern social conditions without touching the religious feelings of any group in this country. Recent events have also lessened the intractability of the problems. The age old resistance of the Hindus towards polygamy and divorce has been broken down. Similarly in Muslims also polygamy exists as a luxury only of a few rich and divorce no longer remains the monopoly of the husbands. The wife has also acquired independent rights through the Dissolution of Muslim Marriage Act, 1939. Inspite of the objections from Muslim fundamentalists Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to clarify the personal law of Muslims, and accord protection to divorced women so that there may not be controversy over it in future. Parliament has set at rest the controversy which arose on the case of \textit{Md. Ahmed Khan v. Shah Bano Begum}\textsuperscript{38} decision. The Act has not only provided for reasonable and fair provision and maintenance to the divorced muslim woman and her minor children, but it has also specifically provided that she is entitled to get 'mahr' amount from her former husband. Now, the Act secures to a divorced Muslim woman sufficient means of livelihood so that she does not become a destitute, is

\textsuperscript{37} ibid p.124
\textsuperscript{38} A.I R. 1985 S.C. 945.
not thrown on the street without a roof over her head and without any means of sustaining her. A uniform law dealing with identical situations, applicable to both the Hindus and the Muslims has yet not been ventured. The real cause appears to be the wrong notion that it would hurt the religious susceptibilities of the Muslims. In India, it is not the whole of the Muslim community that is opposed to such an idea. The opposition is mostly from uneducated or politically biased conservative section of the Muslim society which wants to perpetuate traditional Muslim separatism in the name of cultural pluralism. They would have some hesitant tinkering here and there with the outdated Muslim personal law and call it reform, but vigorously oppose any serious attempt to modernize Muslim society, and that too in the name of Islam and the poor ignorant Muslim masses. Some of the Muslims oppose the step towards reforms in Islamic law on the belief that once their personal law is changed and future Government might try to replace their religion. These arguments are highly misleading. If the matter of reform is properly explained to Muslim masses, particularly in the context of Quranic injunctions, many of them will soon realize the necessity of having a Uniform Indian Marriage Code. This argument does not take into consideration the fact that the Code would be based upon consideration of freedom of individual equality and social justice as enshrined in the Preamble of the Constitution of India.\textsuperscript{39}

The independent India and the framing of the Constitution brought hopes that evil of communalism from the social body would be eradicated. However, the Government which does not want to interfere with the religious life of the minorities, has worked towards strengthening of communal consciousness of the

\textsuperscript{39} K.B Agarwal, op.cit. p.136.
people. If the people are governed by different communal laws, there can hardly be an expectation of integration, unity and nationalism in the country. It is advocated on behalf of the Government and the Muslims that unless a demand for reform comes from Muslims themselves and all the communities agree to have uniform civil code, the government is not going to impose any law of such a nature. The argument that Muslims themselves have not yet come forward with a demand for the reform appears to be absurd. If a community has not been able to do so in fifty years of independence, it can safely be presumed that it shall never be prepared for reform and the Government will have to take steps in that direction. An example may be found in the Untouchability (Offences) Act, 1955, which was passed to eradicate untouchability from the country even though great opposition from the majority of the Hindus was not unknown. Such an opposition still continues in the villages. Should Government in this case have waited till a request from the Hindus of higher social strata was received? Sometimes laws have to be enacted in spite of some opposition here and there of vested interests, for the general welfare of the people themselves.  

Apart from having Uniform Civil Code for the Hindus and the Muslims in the matter of their personal laws, still there is also a great need of having clearly scrutinized uniform marriage law for the Hindus. The Hindu Marriage Act, 1955 itself needs many reforms. Here, out of the reforms the need of reformation with suggestion to section 7 of the Act has been taken up for discussion which may be uniformly applied to all sections of the Hindu communities. To start with, let us see the constitutional meaning of religion in the Indian context. The
answer to the question what is the meaning of religion in the constitution is given by the relevant Articles of the constitution such as Articles 25, 26 and 28. They make it clear that 'religion' includes two distinct elements, namely, (i) the religious doctrine or faith which an individual may profess; and (ii) religious practice according to which the followers of a particular religion may act. But personal law has never been regarded as a part of religion either as a religious doctrine or as a religious practice. The reason is obvious. Religion and law have always been separate from each other. They operate in two separate spheres, that is, the spiritual and the temporal. The sanctions of the two are different. Religion cannot be the sanction of law. Personal law may originate in religion in the sense that the religious books prescribe a certain type of conduct or religious practice which has been followed by the followers of that religion and which has become their personal law. But in religion there was only the source of the conduct. The conduct became enforceable only when it became customary. It is well known that a valid custom overrides the texts of the Shastras. Even if, therefore, the origin of the custom was in religion, it did not become law till it became a valid and enforceable custom. Prior to that, it may have been regarded as a religious practice followed by the followers of the religion. But when it obtained a temporal sanction it became law and ceased to be a religious practice. The distinction is that while a religious practice is obeyed only by the feeling that one ought to adhere to one's religion, the custom is obeyed because it must be obeyed. If it is not obeyed, civil consequences will follow. This feeling that the custom has to be obeyed is called opinio necessitatis and is the earmark of a valid custom which has become a part of the law. Personal law being thus subject to customary law as to its enforcement is as much as law as ordinary law.
Equality is not a part of religion just as ordinary law is not a part of religion. While religion cannot be enforced by recourse to a court of law, custom can be enforced just as an ordinary law can be enforced in a court of law.\(^41\)

However, it is undesirable that thousands of pieces of legislation should be created to ensure legal validity for all customary forms of Hindu, Sikh, Jain and Buddhist marriage solemnization found on Indian soil. Actually, the Indian Constitution, by directing in Article 44 that the State shall endeavour to secure for all citizens a uniform civil code has already predetermined the issue to the effect that modern Indian laws should not be concerned with religious matters or issues that vitally affect one of the religious communities of India. Then, the desirable procedure can certainly not be to amend and reamend section 7 of the Hindu Marriage Act, 1955. Here, with reference to the present scenario in the courts it may be said that the aim of the modern Indian laws like the Hindu Marriage Act, 1955 must be to create uniform legal provisions that will, moreover, relieve Indian Courts from their present arduous task of ascertaining the validity of the individual marriages. It must be clearly said that the Baby's case\(^42\) was easy to decide because of the large number of people directly affected by that particular decision. The learned Judge in the case has, appropriately, demonstrated a sense of social responsibility. The problem is much greater, and the position of the female spouse concerned much more vulnerable, if marriage rituals have been performed that may now be fashionable in India, but could not claim to be customary, or if, due to ignorance of traditions, negligence, or whether other reason adhoc ceremonies have

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41. Supra note 30 at pp. 9-10
42. Baby v Jayant Mahadeo Jagtap and others, A.I.R. 1981 Bom. 283
been performed with the genuine intention of the spouses to become husband and wife. Even if one made “intention to marry” a legal criterion, Judges will find it difficult to determine this intention unless there is some concrete evidence of manifestations of this intentions. Thus, despite growing evidence of individualism in contemporary India, the modern Hindu law would not necessarily uphold a marriage solemnized in disregard of custom and tradition; in fact the strict letter of the law as it stands at present would demand that such marriages be declared invalid.43

It would be interesting to see, however, as far as Indian evidence is concerned, whether migrant communities have, in a new socio-ecological environment, also changed their customary forms of marriage solemnization; whether for example, the working class Tamil Communities of Bombay or Delhi have been developing their own customs, which may differ considerably from the original models. Again, the warning that what we do not know may well exist, must be emphasized. An Indian High Court has recently had to face precisely this situation, and the modern Hindu law has had to concede defeat in view of the strength of customary practices. The decision in Baby v. Jayant Mahadeo Jagtab and others44 is of eminent interest in our present context. In this instance, prima facie a bigamy case, the husband had married twice both times in Buddhist ceremony. The parties were Hindus who were converted to Budhism under a movement started in 1956, the marriage was therefore performed according to Buddhist customary rite. Though custom was therefore not ancient, it was held


44. A.I.R 1981 Bom. 283.
that as the customary rites and ceremonies had been constantly followed for more than 25 years, and had been uniformly observed and had not suffered any discontinuance at any point of time the marriage was held valid. Undoubtedly with a view to the lenient attitude of many Indian Courts towards bigamists, it was pleaded on behalf of the husband that the first marriage had been validly dissolved by a customary divorce. The learned Judge held that the complainant, the first wife, had successfully proved the customary form of marriage undergone by herself and the second wife of the husband. In the result, the husband was convicted of bigamy and the second wife punished for having abetted the accused.

The importance of this judgement lies in its explicit recognition of neo-Budhist marriage ceremonies. Those had been continuously performed for the last 25 years and could no longer be denied legal recognition without adverse legal consequences for the millions of people affected by this decision. Baby's case shows that modern Indian Judges may well to adopt an approach of realism, which also includes consideration of the implications of their decisions for the litigants and their communities. Baby's case also contains an appeal to the Government of Maharashtra to persuade the Government of India to introduce changes to section 7 of the Hindu Marriage Act, 1955 that have been recommended by the Ninth Report of the Maharashtra State Law Commission, which suggests amendments to the above section in order to simplify the ceremonies of marriage amongst Hindus. It would not be surprised to hear that nothing has happened since. It must be seen very clearly that the major problem is not one of simplification of marriage rituals, because simple rituals of marriage have always co-existed with the more elaborate models in all parts of India. The real problem is that simple marriage rituals
may be denied legal recognition of some Indian courts at any time, and this has always happened rather often. In view of the well-documented strictness of Indian courts when it comes to the definition of “customary”, and especially in view of the fact that courts have at times found it necessary to rule that saptapadi and homa are essential ceremonies for all Hindu marriages, the suggestions made appear appropriate. But, should one not ask who should adjust to whom? If section 7 of the Hindu Marriage Act did not disturb the ancient patterns of marriage solemnization among Hindus and has adopted a course of non-interference, apart from its Sanskrit bias, it can hardly be the task of a more modern version of this section to prescribe marriage rituals to all Hindus. One could have removed the Sanskrit bias, but then the Supreme Court of India could have achieved this a long time ago.\textsuperscript{45}

We must note that the introduction of uniform legal provisions in India with regard to marriage solemnization would be a great step towards the somewhat Utopian uniform Civil Code, but that it would by no means abolish the traditional heterogeneity of normative traditions with regard to marriage solemnization among Hindus. One may ask whether this is a useful result of legal uniformity. In view of the current, growing confusion over the legal value of the innumerable customary forms of Hindu marriage solemnizations, registration, if effectively implemented and strictly controlled, could indeed relieve the Indian judiciary of an arduous problem.\textsuperscript{46}

While favourably commenting upon dynamism and progressive tendencies that are inherent in Hinduism, Derrett has expressed his opinion that the

\textsuperscript{45} Supra note 43 at p.7  
\textsuperscript{46} ibid p.8.
movements of legal and social reforms continued by Hindus both before and after independence including the probable motion towards the Indian Civil Code suggest that Hinduism is most suitably disposed towards secularism. The content of Hindu religion shifts in balance but the components remain the same as before. After clearly distinguishing between law and religion, legal commands and religious commands, Derrett concluded that many educated Hindus believed that the Dharmashastra which incorporates classical Hindu jurisprudence has said the last word on all the topics of both legal and religious importance. To them, there has never been any distinction between law and religion. This attitude which Derrett calls as “orthodox” point of view did not until the 1950s stand in the way of adjustment of Hindu law to the changing needs of modern life. But it tends to weaken the faith of a respectable section of the public in India in the validity and virtue of Indian legislation and presents an obstacle in the way of the Hindu Code. It is wrong to presume that Hindu law as left by legislation up to 1947, is a religious law and its amendment will place religion in jeopardy is a novelty, according to Derrett.\(^4\) It should be noticed that the difficulties of having numerous customary marriage ceremonies in the Indian soil have arisen only because of the absence of provision relating to civil marriage (court marriage) under the Hindu Marriage Act. Two considerations might have influenced the decision of the framers for not including the provision relating to civil marriage under the Hindu Marriage Act: either they must have presumed that the Special Marriage Act with its general application is a precursor to a Uniform Civil Code and that the Act would be followed by a comprehensive legislation giving effect to the objective laid down in Article 44 of the Indian Constitution, or that the traditional Hindu

Society which has always looked down upon the civil marriage may consider such a provision to be an affront to its religious outlook and values and, therefore, might have resisted the entire legislation. If the first consideration has weighed over their mind for not including such a chapter, it is submitted that it is high time a chapter on civil marriage is included in the Hindu Marriage Act.48

An attempt is now being made as suggestion to evolve marriage ceremony among all communities of the Hindus which may embody the greatest common measure of the existing rules so as to facilitate a uniform marriage code:

(i) A simple ceremony of marriage should be laid down which should uniformly apply to all Hindu marriages.

(ii) A civil ceremony of marriage on the lines of the Special Marriage Act, 1954 with simple formalities should also be made available to all Hindus under the Hindu Marriage Act, and facilities for its solemnization should be made available in the villages also.

(iii) The performance of either of the two ceremonies suggested above should be necessary for the ceremonial validity of all Hindu marriages. This suggestion, however, does not prevent parties from performing any other additional ceremonies and rites, shastric or customary, very elaborate or very brief.

(iv) Registration of Hindu marriages performed in either of the above should be made compulsory.49

However, the Indian policy makers are chary about giving effect to Article 44 of the Indian Constitution. The supporters of the Uniform Civil Code may

entertain a suspicion that the suggested performance of civil ceremony of marriage on the lines of the Special Marriages Act, 1954 may amount to a retrograde step in the direction of achieving the objective under Article 44 of the Constitution. It is, however, such performance of civil marriage will not run counter to the idea of a Uniform Civil Code for there is no conflict between provisions of the Special Marriages Act and the provision for civil marriage under the Hindu Marriage Act. It merely eliminates the drawbacks of the existing statutory provision (especially section 7 of the Hindu Marriage Act) by taking into account the immediate needs of the Hindu society.

**Essentials of a Valid Custom**

In modern law, before a custom can be enforced by a court it is necessary to prove the existence of custom. For a custom to receive legal recognition it is necessary that it should possess all the important requirements or essentials of a valid custom. Just as in most modern societies, in India, too, we have reached a stage when spontaneous growth of the custom has come to end, and no court of law in modern India is going to accord recognition to a custom on the basis that it grew out of the need of the modern society. Whenever we talk of recognition of custom either under customary law or under Hindu law we accord recognition only to those customs which have the requirements of a valid custom. As early as 1918 the Privy Council said, “It is of the essence of custom that they should be ancient and invariable, and it is further essential that they should be established by clear and unambiguous evidence. It is only by means of such evidence that the court can be assured of their existence, that they possess the

condition of antiquity and certainty on which their legal titles of recognition depend".

The primary function of modern judicial analysis of custom is to examine the nature and reality of existing custom, not to invent new customs or arbitrarily abolish those which are proved to exist in immemorial practice. It is the guiding principle that if a custom is proved in a court by satisfying evidence to exist and to be observed, the function of the court is merely to declare the operative law. In other words, the custom does not derive its inherent validity from the authority of the Court, and the ‘sanction’ of the court is declaratory rather than constitutive. But in order to merit recognition the custom has to satisfy certain tests, all of which tend in one direction proof of the actual existence and operation of the custom. Even in modern societies whose courts are the supreme interpreter of law, it is an essential characteristic of custom that it is not arbitrarily created by the jurisdiction of tribunal or any other determinate legal authority, but is scrutinized by them in order to test the actual observance and validity of the alleged custom as an existing rule of conduct. If satisfied by its scrutiny, the court recognizes the custom as being valid existing law obligatory for those who come within its ambit.

The Hindu Marriage Act, 1955 insists that every marriage must be solemnized through a ceremony. As to the question “Whether a ceremony or not” the answer of the Act seems to be an imperative “yes”, but as regards the question “what ceremony” it gives an option to the parties to follow “customary

53. ibid.p.150.
rites and ceremonies of either party”. Custom and usage have, in the course of time, modified the scriptural marriage rites and ceremonies in different parts of the country. Hence the Act does not want the purely scriptural ceremonies to be observed. It only requires that the rites and ceremonies chosen must be customary with at least one of the parties. Nothing more beyond observation such rites and ceremonies is required for the solemnization of marriage. Even if the community to which the parties belong has modified by long established usage the ceremonies prescribed by the Shastras and has adopted new forms and new conventions, they must be recognized by the courts. The essentials for judicial recognition of such custom are listed below:

1. Custom must be ancient

The first and the foremost requirement of custom is that it must be ancient. The word ancient denotes that custom must be of some antiquity. But it should be clearly understood that English law test of custom being immemorial is not applicable in India. Section 3(a) of the Hindu Marriage Act, 1955 lays down that custom to be valid must have been observed for a “long time”. It is difficult to say, in point of time, as to when could it be said that custom has been observed for a long time. The English rule that “a custom in order that it may be legal and binding must have been used so long that the memory of man runneth not to the contrary” (Blackstone quoted in Bahadur v. Nihal Kaur, 18 Lahore 594 at

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p.612) is not applicable to Indian conditions. A custom must be ancient but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man, still less must it be ancient in the English technical sense (viz. before 1189, the commencement of the reign of Richard I)\textsuperscript{57}. English law places a limit to legal memory and fixes 1189 A.D. as enough to constitute the antiquity of a custom. Undoubtedly, the year 1189 A.D. is an arbitrary limit.\textsuperscript{58}

In India custom need not be immemorial in the English law sense. The courts have time and again expressed an opinion that if a custom is established to be 100 years old or more, it is of sufficient antiquity to be called ancient. Derrett thinks that if it is 40 years old it is enough. In \textit{Mt. Subhani v Nawab}, (1941), Lah. 134, the Privy Council observed that it is not the essence of this rule that its antiquity in every case be carried back to a period beyond the memory of man - still less that it is ancient in the English technical sense, it will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent been accepted as the governing rule.\textsuperscript{59} The Madras High Court also said that a custom can receive recognition only on the satisfactory proof of usage as long and invariably acted upon in practice as to show that it has, by common consent, been accepted as the established governing rule of the particular family, class, tribe or locality.\textsuperscript{60}

\textsuperscript{57.} Dr. P.V Kane, \textit{Hindu Customs and Modern Law}, (1st edition, 1950)p.44.
\textsuperscript{60.} Sivanananja v. Muttu Ramalinga (1866)3 Mad.HC. 75.
2. Custom must be reasonable

Another important essential of a valid custom is that it must be reasonable. If any party challenges a custom it must satisfy the court that the custom is unreasonable. To ascertain the reasonableness of a custom, it must be traced back to the time of its origin. The unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. A custom, once indisputably proved, is law, but the courts are empowered, on sufficient reason, to change the law which it embodies. According to Prof. Allen, the unreasonableness of the custom must be proved and not its reasonableness.61 However, it cannot be said that custom is always founded on reason. No amount of reason can make a custom. What is reasonable or unreasonable is a matter of social values. It may differ from time to time, from place to place. Therefore, whether a custom is reasonable or not is determined by the contemporary values of every society, though there are certain rules or practices which are considered unreasonable in all times and in all societies.62 When it is said that a custom is invalid because it is unreasonable nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times. Since customs generally involve some inconsistency with the general law of the country or community the fact of this inconsistency by itself is not a ground for holding a custom unreasonable.63

61 C.K. Allen, op.cit.p.140.
62. Supra note 59 at p.42.
63. Supra note 57 at p.50
3. Custom should be continuous and compulsory

Continuity of a custom is an essential as antiquity. Suppose it is established that custom has antiquity of 400 years, but if it has not been followed since then, it may be sufficient indication of its abandonment. Mayne says that in the case of a widely-spread local custom, want of continuity would be evidence that it had never had a legal existence; but it is difficult to imagine that such a custom, once thoroughly established, would come to a sudden end.64 Suppose, it is established that one hundred years back a custom existed. But there is not a single instance on other evidence available that after that time it has been ever followed. The inevitable inference is that people had abandoned it or that it had become obsolete. An obsolete law can be repealed but there is no method of repealing custom except by abandonment. Abandonment, conscious or unconscious, is the mode by which a custom stands repealed.65 A custom is valid if its observance is compulsory. An optional observance is ineffective. It is the duty, of the court to satisfy itself that the custom is observed by all concerned and by anyone who pleases to do so. Mere non-exercise of custom for some time does not necessarily mean that custom has been abandoned. Non-exercise of custom for a long time leads to the inference of its abandonment but that fact alone is not sufficient and conclusive evidence of its abandonment. A custom cannot be abandoned by mere declaration. Once it is established that a custom exists, then the rule is that it would be presumed to have continued to exist. The onus of proving its discontinuance is on that person who alleges its abandonment or discontinuance.66

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65. Paras Diwan, op.cit p.43.
4. **Custom should be certain**

Custom should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the court can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depend. As observed by Chatterji J., (110 P.R. 1906, F.B.; see also 55 P.L.R. 1, confirmed in A.I.R. 1959 S.C. 1041; 57 P.L.R. 170) customary law is in a “fluid state” and changes with the times, and therefore the custom set up need not be absolutely invariable though no doubt the latter is the conception of what custom is. But such a change (of custom) would have to be gradual, and a new custom cannot be created by the mere assertion of the various tribes at a subsequent settlement; 1935, 17, Lah. 101 at p. 104, (Addison, J.). A change in custom should be slow and imperceptible and should be completed by the time that the changed custom is relied upon.67

A custom in order to be valid and enforceable must be proved to be uniform and certain in its nature and as to the people or locality whom or which it is alleged to affect. Mere vague allegations as to the existence of custom will not suffice. One who alleges a custom must show what exactly the custom is and how far it is applicable to the matter at issue. It is necessary to prove with reasonable amount of certainty that the custom as alleged exists, and further that it is applicable to the parties on the matter at issue.68

5. **Custom must not be opposed to morality and public policy**

Customs which are immoral or opposed to public policy or expressly forbidden by legislative enactments are not valid and are not recognized by the

68. Paras Diwan, op.cit p.43.
courts. Whether a custom is immoral or not is to be judged by the sense of the whole community.69 A good many cases have arisen where the courts have refused to recognize and enforce certain customs on the ground that they are immoral. In Budansa v. Fatima Bi,70 a custom which would enable a woman to marry again during the lifetime of her husband without any defined rules by which the marriage with the first husband is dissolved before the second marriage is contracted was held to be contrary to public policy and morality. Similarly in Uji v. Hathi,71 it was held that a custom which authorizes a woman of the mochi caste to contract a natra marriage without divorce on payment of a certain sum to the caste is an immoral custom which should not be judicially recognized.

The general words “opposed to public policy” may cover a very wide range of topics. Under section 23 of the Indian Contract Act, 1872, it is provided that if the consideration or object of an agreement is regarded by the court as immoral or opposed to public policy, then the consideration or object of the agreement would be unlawful and the agreement would be void. But the words public policy in relation to customs are rather vague and often mean no more than immoral.72 Like the standard of reasonability, the standard of morality may vary from time to time and from society to society.73

6. Custom must not be contrary to law

A custom opposed to sacred law prevails, but no custom opposed to statutory law can be given effect. The codified Hindu law has abrogated custom

69. Dr. P.V. Kane, op.cit.p.52.
70. A.I.R. 1914 Mad. 192.
71. (1870)7 Bom H.C.R. 133.
72. Dr. P.V. Kane, op.cit, p 58.
73. Paras Diwan, op.cit. p.43.
except in a few matters where it has been expressly saved. A valid custom must not conflict with the statue law of the country. According to Coke, “No custom or prescription can take away the force of an Act of Parliament”\textsuperscript{74} A State can abrogate a custom and not vice-versa. Though a custom as generally in derogation of the general law, it cannot override a statute which does not exempt it from its operation either expressly or by necessary implication.\textsuperscript{75} In India, customs have played a fairly large part in modifying the personal law, particularly the law of Hindus and Muslims but such customs must be ancient and invariable. But a custom contrary to express provision of law is not enforceable.\textsuperscript{76} Under the codified Hindu law large part of custom as applicable to Hindus has been modified or abrogated. Thus section 4 of the Hindu Marriage Act, 1955 lays down that save as otherwise expressly provided in this Act, any custom or usage in force immediately before the commencement of this enactment shall cease to have effect with respect to any matter for which provision is made in this statute.

**Proving of a Custom in Courts**

Custom is not law in the sense that the court is bound to take notice of it. There are very few customs of which the court takes judicial notice. The reason is that in our contemporary society custom is pleaded as something which is contrary to and overrides the law. In modern law, custom is treated as a question of fact.\textsuperscript{77} It is ancient principle of our law that a custom, since it claims a privilege


\textsuperscript{75} Dr. P.V. Kane, op.cit. p.59.

\textsuperscript{76} Dr. Paras Diwan, op.cit. p.20.

\textsuperscript{77} Supra note 66 at p.29.
out of the ordinary course of law, is *striti juris* (requiring strict proof). Customs go back into distant ages; they are set up with various motives for the furtherance of various interests, and the initial problem is always to decide whether the custom prayed in aid has a good foundation in fact. This finding of fact is for the jury; but the ‘judicial tests’ are applied as matter of law to determine in the first place whether there is evidence on which the jury can find the custom proved.  

Under the Indian law as custom is a question of fact and the burden of proof is on the party who relies on the custom. There are some customs of which the court takes judicial notice—when a custom is repeatedly brought to the notice of the court, the court may treat the custom proved without any necessity of fresh proof otherwise all customs are to be proved without any other fact. When a custom is recognized by the courts for a long time, it is not necessary to prove it, the court can take judicial notice of the same. Custom cannot be extended by analogy. It is a matter not of mere theory but of fact, and cannot be established by theoretical generalization, or by a priori method. Custom is not a matter of theory but of fact. It is not always logical and cannot be deducted by inferences. In dealing with cases in which the question involved relates to the existence of a particular custom it is not permissible to court to extend custom by logical process. In the absence of any authoritative statement of a custom it can only be established by instances and not by a priori method. The courts

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78 Supra note 61 at p.132.
should take cognizance of actual facts instead of being swayed by theories, even though they may be strictly logical, or by considerations affecting the symmetry of the customary system.

"Custom ought not to be enlarged beyond the usage, because it is usage and practice that makes the law in such cases and not the reason of the thing, for it cannot be said that the custom is founded on reason though unreasonable custom is void. No reason, even the highest whatsoever would make a custom or law and therefore you cannot enlarge such custom by any parity or reasoning, since reason has no part in the making of the custom". 83

While enforcing custom or while considering the question whether a custom has been proved, the court should not draw any analogy nor guess what the custom is or should be; it should go by evidence and see what the custom really is and whether it has been proved. Custom must be proved by evidence and courts are not permitted to deduce the existence of one custom from another. It is not the function of the Judge to surmise what custom ought to be; its duty is to see whether, as alleged, custom has been established by evidence. 84

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84. ibid, pp 30-31
Rattigan’s Digest lays down that a custom may be proved by any one of the following modes.  

(a) By the opinions of persons likely to know of its existence, or having special means of knowledge thereon (sections 48 and 49, Indian Evidence Act, 1872)

(b) By statements of persons who are dead, or whose attendance cannot be procured without reasonable delay or expense, provided they were made before any controversy as to such custom arose, and were made by persons who would have been likely to be aware of the existence of such custom, if it existed (section 32, clause 4, Indian Evidence Act, 1872)

(c) By any transaction by which the custom in question was claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence (Section 13(a), Indian Evidence Act, 1872)

(d) By particular instances by which the custom was claimed, recognized or exercised, or in which its existence was disputed, asserted or departed from. (section 13(b), Indian Evidence Act, 1872)

(e) By village oral traditions.

(f) Written memorials, such as the Wajib-ul-arz or the Riwaz-i-am. (Section 35, Indian Evidence Act, 1872)

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(a) **Proof of custom by opinions**

The proof of custom should not be confined merely to judicial precedents and definite instances, but may consist in the deliberate and well-considered opinion of the people living under, and governed by, the custom and in other recognized modes of establishing its existence. But the opinion must relate to "What custom is" and not to "What custom ought to be". Rossignol J., however, remarked that "as to this argument it is sufficient for us to say that the only adequate proof of a custom is clear evidence that such and such a custom is followed and not merely opinions however numerous that such and such a custom ought to be followed". 87

The most cogent evidence of custom is not that afforded by expression of opinion as to its existence but the examination of instances in which the alleged custom has been acted upon and by the proof of afforded by judicial or revenue records or private records that the custom has been enforced. Though judicial decisions are not indispensable, the acts required for the establishment of customary law ought to be plural, uniform and constant. 88 It is admissible evidence for a living witness to state his opinion in the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position

86 This was obviously not been mentioned by Rattigan in his above mentioned digest.
88 1926, 98 Ind.Cas. 43 (Calcutta) quoted in W.H. Rattigan, op.cit p 99.
and the character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. In *Chunni Lal v. Jai Gopal*. Bhinde, J. observed, “It is true that opinions of persons belonging to the same tribe on the question of custom are relevant in case of this kind, but mere opinions unsupported by instances have to be taken with caution”. It is thus clear that as a general rule oral evidence unsupported by instances are not in accordance with the entries in the Manual of the Customary Law of the district is not of much value, though the question in each case is as to the weight of evidence and the evidence of persons regarding the existence of a custom, specially when it is corroborated by documentary evidence, should not be rejected merely because specific instances have not been proved.

**(b) Proof by statements of persons who are dead**

Customs may also be proved by statements of persons who are dead, or whose attendance cannot be procured without unreasonable delay or expense, provided they were made before any controversy as to such custom arose, and were made by persons who would have been likely to be aware of the existence of such custom if it existed. But such statements must relate to the existence of any public right or custom or matter of public or general interest. Such statements are known as a declaration as to public and general right. Public rights are generally those common to all the members of the State e.g., rights of

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90. A.I.R. 1936 Lah.551.
91. Quoted in J.Rustomji, op.cit. p 79.
92. ibid. p.80.
highway and ferry or of fishery in tidal rivers. General rights are those affecting any considerable section of the community, e.g., question as to boundaries of a parish or manor. This mode of proving of custom is applicable in case of any public right or custom. The declarant must be disinterested at the time when he made the statement. If it is proved that the speaker had some interest to misrepresent, his declaration would be rejected. It is, therefore, necessary to the admissibility of declarations of this description that they should be made before the dispute had arisen in regard to which they are tendered as evidence. The reason why the statements of deceased persons are admitted upon the public right or custom made *ante-litem mortem* (when there was no existing dispute respecting them) is that those declarations are considered as disinterested and dispassionate and made without any intention to serve a particular cause or mislead the posterity.

Sir Charles Roe observed:

"The records of customs contained in the Punjab Land Revenue Act contain the answers of the leading men of all the Lambardars and of any others who choose to attend meetings of the various tribes residing within a convenient distance of the place of assembly. The recorded opinions of these men are available, under section 32(4) of the Indian Evidence Act, as the opinion of man who would likely to know of the existence of any custom if it did exist, and who are the very men who are from time to time summoned to give

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evidence when enquiries as to custom are made by the Tehsildar in particular cases under the orders of the Civil courts. The Settlement enquiries have this advantage that they are made *ante litteram mortem* (i.e., before the litigation pertaining to a custom arose); that the attendance at these enquiries is far greater than could be secured at any enquiries in a special case; and they are held under the directions of officers who may almost be considered experts at enquiring into and reporting on custom".95

(c) Proof of custom by transaction

Section 13(a) of the Indian Evidence Act, 1872 lays down that if in a transaction, in which a custom was involved, such custom was taken notice of, claimed, modified, relied, asserted, demanded or its very existence was contrary to the very transaction and the terms thereof, then the existence or non-existence of such a custom may be proved by that transaction. According to dictionary meaning a transaction is the doing or performing of any business management of any affairs, performance which is done, an affair, as transaction in the exchange. The term "transaction" means something already done such as a completed act of transfer of property, by way of sale, mortgage or exchange. If in such a transaction the existence of custom was accepted or the very basis, of such transaction was custom, then such a transaction or a series of such or alike transactions are a cogent evidence of the existence

of custom. Obviously, those transactions will be relevant for the proof of custom in which the custom in question has been created, claimed, asserted etc., and not the transaction in which a casual reference to such a custom is made. The word “assert” means to lay, claim, to insistent upon any thing, to affirm and so on. The word “assertion” includes both a statement and enforcement by act. Ordinarily the evidence tended under this section will be evidence of an act done, but a statement not amounting to and not accompanied by, an act would also be admissible if it amounted to a “claim”. A distinction is to be made between recital and assertion. A mere recital of a right in a deed or transition is not its assertion. It is well settled now that there is a fundamental distinction between mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in an exercise of the right. For example, if a tenancy is not transferable unless it is permanent character, a transfer of the tenancy would be an assertion of a permanent right but if a tenancy transferable, whatever its nature may be accompanied by a statement in the deed that the tenancy was of a permanent character will not be an assertion of a permanent. In Kumud kanta Pahari v. Province of Bengal, the executants were entitled to grant a usufructuary mortgage of the land, whether they held them under a revenue-free title or not. The executants mentioned in a deed of mortgage that they held revenue-free title in land mortgaged. It is held that in those circumstances the mere fact that in the document of the mortgage a revenue-free title was recited would not constitute an assertion of such title.

96. Dr. Paras Diwan, op. cit. p.33.
within the meaning of section 13 of the Evidence Act. The word "recognized" means to know again; to see the truth of. To recognize is to take cognizance of that which comes again before our notice; to acknowledge is to admit one's knowledge whatever comes fresh under our notice. The word "claimed" denotes a demand or assertion in relation to a thing as against or from some person, showing the existence of a right to it in the claimant. A bare statement may not be a claim according to the circumstances in which it is made. It may amount to a claim or be a mere statement of a claim. The words "created, claimed, modified", etc. relate to a completed transaction, a transaction which has already taken place, before the dispute actually arose.99

(d) Proof of custom by instances

Probably, the proof of custom by instances is the largest aspect of proof of custom. Instances should be in which a custom is claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.100 Instances of custom can be of various types. They may be oral instances, instances recorded in documents, or judgements, in which instances were asserted and accepted or rejected.101 The term "instances" here denotes an example; something which has once occurred. It must be born in mind that the instances in which the right or custom was claimed, recognized, exercised, etc. must be instances prior to the suit in question because this clause is the past tense throughout.102

100 Section 13(b) of the Indian Evidence Act, 1872.
101. ibid p. 33.
In customary law it is a repeated adage that custom grows out of the instances and acquired the force and sanctity on their multiplication. These instances may be in some record or document or they may be in the memory of people. The non-contest of a right or custom may raise a presumption that the custom was so well recognized that one thought of contesting it. The uncontested cases are a very good proof of an alleged custom, for greater the strength of the custom, the less probability is there for any body attempting to controvert it. In the words of Robertson, J.:

"The very best possible evidence of a custom is that which shows that it has been followed consistently in a number of instances without dispute".\(^{103}\)

But then there may be specified circumstances to explain as to why a contest did not take place, then uncontested instances of custom will not be taken as probative of custom where witnesses cite instances of custom, it is for the other side to show by cross-examination or evidence in rebutted that these instances did not support the custom. Instances cited by be rejected merely because these witnesses have not deposed to details as to which of them could have been and were not cross-examined. Again, the mere fact that instances have not been contested in the court does not make them worthless.\(^{104}\) Oral evidence of instances is also admissible. If a person has means of knowledge as to various instances of custom which have taken place in the past and

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103. *Saddan v Khemi* 15 PR 1906, quoted in Dr. Paras Diwan, op cit, p.35.
104. J Rustomji, op.cit. p.73.
they have gone uncontroverted, then such oral evidence of instances, cannot be treated of little value just because they are the oral narration of a person.105

No hard and fast rule can be laid as to how many instances are sufficient to make out a valid custom. Where a custom is a general one obtaining in a caste or clan composed of hundreds of families, the court would naturally expect a large number of instances in proof of the custom but when the custom set up is that of a single family or a small group of family, it is unreasonable to accept large number of instances in support of the custom. There should, however, be such a multiplication or aggregation of instances as is sufficient to establish a tangible recognition of the custom as obligatory.106 An instance which itself ambiguous cannot be proved by further instances in which it might have been noticed or discarded.107

The evidence of instances is very important to prove a custom but absence of evidence of instances is not fatal to the proof of custom. It may be noted that a custom may be proved either by actual instances or by general evidence of the members of the tribe or family, who would naturally be cognizant of its existence; specific instances need not always be proved.108 The instances, though an important evidence of custom; are not absolutely essential to its establishment. The full bench observed:

"The sanction of a rule of customary law depends
upon the consensus of opinion of the body of
persons to whom such law applied to be bound

105. Dr Paras diwan, op.cit. p.71
106 J. Rustomji op.cit. p 72
107 Dr. Paras Diwan, op cit. p 36.
by the rule. The expression of opinion in such case, if it is general, is sufficient proof of such custom". 109

The privy council in *Ahmed Khan v. Channi Bibi*,110 observed that a court cannot disregard the large body of general evidence before it in proof of customs merely on the ground that specific instances had not been proved; certain customs may be proved by general evidence as to its existence by members of the tribe or family, who would naturally be cognizant of its existence and its exercise without controversy. However, when a custom is sought to be proved by general evidence, the general evidence should be such that there is practical unanimity on a point of custom in village after village and among a large number of witnesses. 111

(e) Proof by village oral traditions

The village oral traditions have been considered to be good evidence of custom. The deliberate and well-considered opinion of the people living under and governed by custom is a recognized mode of proof of custom. However, Rattigan, J. said that no such importance can be attached to the broad, general statements made by witnesses who assert general rules of succession are unable to refer to precedents in support of their assertions.112 The question whether a particular custom does or does not prevail in any particular tribe is a matter on which tribemen themselves are in the best position to pronounce an

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opinion. Where questions relating to tribal custom have to be determined the
parties try to secure the evidence of the members of that tribe and even people
living in the neighbourhood, as regards the existence and non-existence of the
custom. The people of a particular community are the best and the most trustworthy
repositories of the traditions which go to constitute a particular custom
prevailing in that community and their evidence, therefore, is of a very great
value.\textsuperscript{113}

A rule of custom may be established and held to be of binding force, even
where no instance is forthcoming, if there is an overwhelming preponderance
of oral testimony of those governed by it and likely to know of its existence in
its favour or if it is fairly deducible from the analogy of other well-known
principles of customary law. In \textit{Vaishno Ditti v. Rameshri}, \textsuperscript{114} on a question of
succession among Arora Sikhs of Peshawar, the plaintiff's witnesses gave
evidence as to the custom in their community, and the defendants called
no rebutting evidence at all. The trial court (Distric Judge), however, held
that the custom was not established, as the witnesses were unable to quote any
instances in support of their deposition. Their Lordship of the Privy council, in
overruling the trial court on this point and holding that the custom relied on for
the plaintiff was sufficiently established in the absence of any evidence to
the contrary, said

\begin{quote}
"Having regard to the conditions existing in
this part of India (North-West Frontier
Province), both the lower courts erred, in the
\end{quote}

\textsuperscript{113} Supra note 106 at p. 77.
Lordships' opinion, in disregarding the unrebutted evidence of custom which was given by the plaintiff as to her right to succeed to her mother's share because it was unsupported by instances”.

Their Lordships concluded as follows:

“As regards the custom, there was the evidence of the two witnesses for the plaintiff that in the community of the Arora Sikhs to which the parties belong, a daughter succeeds to the inheritance in the absence of daughter's son, and there was no evidence the other way. Though the witness were unable to speak to any instances in which the custom had been observed, their evidence is entirely in accordance with what is laid down in the customary law of the Peshawar District.”.

It was also held by their Lordships of the Privy council in Ahmed Khan v. Channi Bibi, that custom could properly be proved by general evidence given by the members of the family or tribe without proof of specific instances. In the present case, there was overwhelming oral testimony that in this locality amongst Jats unmarried sisters succeed for life or till their marriage to the land

of their deceased brother which was not ancestral qua reversioners. It was a most important consideration that not less than fourteen lambardars had deposed to this custom.

(f) Proof of custom by written memorials

Records of rights or customs prepared by public officers (settlement officers) are important pieces of evidence. e.g. Riwaj-i-am and Wajib-ul-arz, pedigree tables and mutation entries etc.

Riwaj-i-am and wajib-ul-arz

Riwaj-i-am is a public record prepared by a public officer in the discharge of his public duties under Government rules. Historically, wajib-ul-arz was initially the record of right containing statement of custom prevailing in the villages. They were prepared as village wise record of custom. Later on, task of preparing wajib-ul-arz was given up, and, instead, riwaj-i-am were prepared; they were prepared districtwise. Although preparation of wajib-ul-arz ceased in the later settlement, this does not distract from the weight which is attached to such documents. These, being village wise record, has greater value so far as village level customs are concerned. The riwaj-i-am or records of tribal custom are most valuable evidence. In any case they may be said to be the best evidence of the kind procurable, and that the tribal representatives, whose answers have been recorded, however, ignorant or prejudiced. They may be, at any rate, superior to the partisan witnesses who would be called in each case if the record did not exist.116

116. Supra note 107 at pp.38-39
Yet, riwaj-i-am is a public record prepared by a public officer in discharge of his public duties and is, therefore under section 35 of the Indian Evidence Act, 1872 clearly admissible in evidence to prove the facts entered therein. Such entries are, of course, subject to rebuttal. There is an initial presumption of correctness as records the entries in riwaj-i-am. In Gokul Chand v. Pravin Kumari, the Supreme Court held that a custom may be proved by general evidence as to its existence and its exercise without controversy, and such evidence may be safely acted upon when it is supported by public record of custom such as the Riwaj-i-am or Manual of Customary Law. But if entries contained in the riwaj-i-am are based on the result of the inquiry conducted by its compiler, such entries should be given due weight. Recently, a full Bench of the Punjab and Haryana High Court has reiterated this position. Sharma J. observed that entries in a riwaj-i-am, which pertain to a special custom applicable to a locality or a class of persons, should be presumed to be correct unless rebutted. Privy Council also held that an entry in riwaj-i-am, even if unsupported by instances, is a strong piece of evidence in support of the custom and it lies on the person denying the custom to rebut that evidence.

In case there is a conflict between the entries recorded in the earlier riwaj-i-am and those recorded in the latter riwaj-i-am, it is always a question of fact which should be preferred; the initial presumption may be in favour of latter entries, but, if it is shown that the latter entries are unreliable, the onus will shift to the other party. The production of a latter record of rights

119. Beg v. Allah Ditta, A.I.R. 1916 P.C. 129, cited in Dr. Paras Diwan, op. cit. p.120.
120. ibid. p.41.
containing entries opposed to an earlier one is some proof of a change of custom, but is not conclusive on the question whether the earlier custom has, in fact, been abrogated, where the riwaj-i-am of 1878 and 1919 being apparently in conflict, the court relied on the former, remarking:

"The 1879 riwaj-i-am undoubtedly is an important piece of evidence and, supported as it is by instances, it was in our opinion sufficient to shift the onus laid upon the defendant to the other side".\(^{121}\)

As has been stated earlier, wajib-ul-arz is a part of record of right. Wajib-ul-arz is a villagewise statement of custom while riwaj-i-am is districtwise statement of custom. In Roshan Ali v. Asghar,\(^{122}\) the Privy Council observed that a statement in wajib-ul-arz is of high evidentiary value of a custom, but it is to be disregarded if it appears to have been made from interested motives. If it records merely the views of individuals who state what custom ought to be in their opinion, then such record of custom is not of much value. The presumption in favour of an entry in a wajib-ul-arz may be rebutted by showing that the entry is inconclusive or erroneous or is contradicted by instance or is opposed to justice, equity or good conscience or has been made with interested motives or it is not a statement of what custom is but of what custom ought to be.\(^{123}\)

Shajra Nasabs or pedigree tables form part of the records of rights, prescribed under section 31(2) clause (d) of the Punjab Land Revenue Act, 1887.

\(^{121}\) 1924, 6 Lah. 52, cited and quoted in W.H. Rattigan, op. cit.p.101.

\(^{122}\) I.L.R. (1929) 5Luck. 70.

If it can be shown that the law requires that entries dealing with ownership of land should be included in pedigree tables then such pedigree tables are properly part of the revenue records and constitute an entry in a public document which is prima facie evidence of the truth of its contents. As preferences with respect to the ownership of land are by law included in a pedigree table, presumption of correctness attaching to pedigree table, also attaches to entries. Similarly, entries made in the pedigree table prepared at the time of the settlement giving the history of the land are admissible in evidence. The mutation entries or register is not a part of record of right but a separate record kept by revenue authorities. Since it is not a record of right, no presumption applies to entries made in it. However, an entry in the mutation record is relevant under section 35 of the Indian Evidence Act, 1872 as an entry in a public record made by a public officer in discharge of his duties. When a mutation entry has been incorporated in a Jamabandi presumption of truth is attached to it. The burden of proof is on the party who challenges the correctness of these entries.

(g) Proof by judicial decisions

Judgments in other cases on the point of custom are admissible in evidence under section 13 of the Indian Evidence Act, 1872, only as instances in which the custom in question was judicially recognized but are not conclusive. It is open to rebut them by adducing fresh evidence to show that the custom was not correctly ascertained in those cases or that it had since been modified. A decision in a case of custom is not a judgment in rem. It is only relevant

125. Section 44 of the Punjab Land Revenue Act, 1887 does not apply to such record.
under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom being recognized.\textsuperscript{128} A judgment based upon a compromise or confession, although of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived.\textsuperscript{129} The reason for the relevancy of a judgment in a case of a custom under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom may be arrived at between certain parties while there may be another decision in a suit arising between other persons.\textsuperscript{130}

However, in \textit{Sher Mohammad v. Jawahar Khatun},\textsuperscript{131} it has been held that a judgment on a question of custom is relevant not merely as an instance under section 13 of the Indian Evidence Act, 1872 but also under section 42 of the same Act, as evidence of the custom. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decisions is sufficient to prove the custom. It was observed:

"It was argued that the judicial decision counts only as an instance, but a judgment on a point of custom is also relevant under section 42, Evidence Act. Besides, the value of the decision depends upon the nature of the enquiry and evidence produced. It may happen at times that the riwaj-i-am is held to be conclusive merely because no evidence has been produced to rebut

\begin{itemize}
\item[128.] Supra note 106 at p. 69.
\item[131] A.I.R. 1938 Lah. 309, cited and quoted in Rustomji, ibid. p. 70.
\end{itemize}
it; as for instance was the case in A.I.R. 1925 Lah. 842. On the other hand there was a very elaborate enquiry made in the case reported as 13 Lah. 276. The two decisions, therefore, cannot obviously be placed on the same footing. Although an initial presumption of correctness attaches to an entry in the riwaj-i-am, the presumption is a rebuttal one, and there is no good reason why that presumption should not be held to be rebutted by a finding arrived at after an exhaustive enquiry, as it was in 13 Lah. 276. It is indeed difficult to say how the presumption attaching to the entry in the riwaj-i-am can be rebutted in any other way”.

Similarly it was observed by Jai. J.,132

“In my opinion the courts should place greater value on judicial decisions than the statement of a custom in the Customary Law unless there is reason to hold that the custom has in the meantime changed. In any case the burden on the daughter under the circumstances is light.”

Addision, J., however, remarked in the same case,

“I am not in agreement with all respect, with the opinion of Jai Lal, J., that courts should place

132. A.I.R. 1936 Lah. 418 cited and quoted in Rustomji, op cit. pp. 70-71
greater value on judicial decision than on the statement of a custom in the customary law. A judicial decision depends on the evidence produced in the same case which may be badly conducted case. A decision on a question of custom is not a judgment in rem; it is merely an instance relevant under section 13, Evidence Act, of a particular custom being ascertained or denied, or possibly recognized, though the word 'recognized' may mean recognized by the parties to a particular transaction rather than by the court. In fact Jai Lal, J., has gone further in a later portion of his judgment and stated that a decision given by this court or the Chief Court of the Punjab as to the existence or non-existence of a custom ought ordinarily to be almost conclusive evidence of the existence or non-existence of the custom concerned and must overrule the statement to the contrary of this custom in the customary law and it is only in exceptional circumstances that such decisions should not be accepted as decisive of the question. This, with all respect, appears to me to overrule such decisions as 45 P.R. 1917, and many other such decisions of this court, as well as to go against the provisions of the Evidence Act."
The general opinion thus seems to be in favour of the view that a decision on custom only becomes a relevant instance under section 13 of the Indian Evidence Act, 1872, that such a right has been asserted and recognized. It is always necessary to assert and prove what the custom is. However, to the general rule that all the customs have to be proved, section 57 of the Indian Evidence Act, 1872 provides an exception. In *Ujagar Singh v. Mst. Jeo*,\(^{133}\) the Supreme Court observed that when a custom has been recognized by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under section 57(1) of the Evidence Act. The Lahore High Court and the Punjab High Court have consistently expressed this view. They observed that where a custom has been repeatedly brought to the notice of the court and has been recognized regularly in a series of judgments extending over a long period of time, such custom attains the force of law and is no longer necessary to prove it in each individual case.\(^{134}\)

**Proof by authoritative manuals of customary law**

This mode has obviously not been mentioned by Rattigan in his Digest. However, certain private manuals and books prepared on customary law by great exponents of custom are of great evidentiary value. For instance, in Punjab Rattigan’s Digest on Customary Law of Punjab throws a good deal of light on Punjab customs and may be used for the purpose of proving custom. But such manuals and digests have to be used with caution.\(^{135}\) In *Jagat Singh v. Ishaar Singh*,\(^{136}\) rejecting a statement of custom in Craik ‘s Customary Law being

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133. A.I.R. 1959 S.C. 1041
opposed to the statement of law in Rattigan’s Digest, Abdul Qudir, J., observed:

“On this particular point the manual (Craik’s Customary Law of the Amritsar District) states the proposition too broadly to be accepted as correct in as much as it is materially at variance with the view embodied in Article 48 of Rattigan’s Digest……….”

The court accepted Article 48 of Rattigan’s Digest as a more reliable basis for decision than the Craik’s Manual, which was an official manual. However, the correct view seems to be that in such a case the initial presumption is considerably weakened, but it can be rebutted only by evidence to the contrary. In *Ujagar v. Jeo*, the Supreme Court said that although Rattigan’s Digest is of the highest authority on questions of custom of the Punjab; the judicial notice of the custom stated therein can be taken only if it has been well-recognized by the decisions of the courts of law. In a series of cases the Supreme Court has held that whatever there is a conflict between an entry as to custom in riwaj-i-am and in Rattigan’s Digest, the presumption is the entries in riwaj-i-am are correct.