



# Research Guide: Customary Law in India

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### RESEARCH GUIDE:

### CUSTOMARY LAW IN INDIA

#### I. Introduction

Custom is recognized as a major source of law under the Indian legal system. Article 13(1) of India's Constitution provides that when the Constitution entered into force, all previous laws that were inconsistent with the Constitution were considered void.<sup>1</sup> The Constitution defines "law" to include "custom or usage having in the territory of India the force of law."<sup>2</sup> The Courts of India have recognized custom as law only if the custom is (1) "ancient or immemorial" in origin, (2) "reasonable in nature and continuous in use," and (3) "certain."<sup>3</sup> The Courts have interpreted "ancient or immemorial" to mean that for a custom to be binding it "must derive its force from the fact that by long usage it has obtained the force of law."<sup>4</sup> A custom also "derives its validity from being reasonable at inception and present exercise."<sup>5</sup> Lastly, a "certain" custom is one that is "certain in its extent and mode of operation" and invariable.<sup>6</sup>

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

The Fifth Schedule provides for the administration of scheduled areas and scheduled tribes in the states outside the northeastern areas of India. The Sixth Schedule contains provisions for the administration of tribal areas in the northeastern states of India and grants tribes considerable administrative autonomy, endowing each regional administrative unit with its own regional council, and each district level unit with local district councils. Autonomous councils are invested with both executive and legislative powers, subject to the approval of the provincial governor, to "make laws with respect to a variety of subjects," and even exercise "judicial authority through traditional legal systems embedded with certain features of federal law."<sup>7</sup> Under the Fifth Schedule, on the other hand, tribal affairs are administered by the provincial government.

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<sup>1</sup> INDIA CONST. art. 13(1), <http://lawmin.nic.in/coi/coiason29july08.pdf>.

<sup>2</sup> *Id.* art. 13(3)(a).

<sup>3</sup> B.J. Krishnan, *Customary Law*, in SEMINAR (Aug. 2000), available at <http://www.india-seminar.com/2000/492/492%20b.%20j.%20krishnan.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Apoorv Kurup, *Tribal Law in India – How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better*, 7 INDIGENOUS L.J. 95, available at <https://tspace.library.utoronto.ca/bitstream/1807/17375/1/ILJ-7.1-Kurup.pdf>.

It was only with the enactment of the Panchayat (Extension to Scheduled Areas) Act, 1996,<sup>8</sup> that tribal communities were granted a limited level of local governance at the village level and that certain “political, administrative and fiscal powers” were devolved to local village assemblies or panchayat.<sup>9</sup> In addition, other laws are in force to protect the customary rights of tribal communities. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006<sup>10</sup> “provides for the recognition, vesting and securing of individual and community tenure rights to all forest dwelling Scheduled Tribes and Traditional Forest Dwellers on all forest lands.”<sup>11</sup>

## II. Role Played by Custom in Hindu Personal Status Law

Custom plays a significant part in Hindu law and is accepted as part of the Indian legal system. A variety of Hindu tribal customs concerning personal status and inheritance are also recognized despite the codification efforts of the central government. Section 2(2) of the Hindu Marriage Act<sup>12</sup> and the Hindu Succession Act have left the door open for the recognition of tribal customary laws and practices of “Scheduled Tribes.”

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<sup>8</sup> Panchayat (Extension to Scheduled Areas) Act, 1996, [http://rajbhavan.maharashtra.gov.in/pdf/pesa\\_1996.pdf](http://rajbhavan.maharashtra.gov.in/pdf/pesa_1996.pdf).

<sup>9</sup> Kurup, *supra* note 7, at 91.

<sup>10</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, <http://www.forestrights.nic.in/doc/Act.pdf>.

<sup>11</sup> Shawahiq Siddiqi & Shilpa Chohan, *Legal Brief on Legal Preparedness for Achieving the AICHI Biodiversity Targets: India, Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules, 2008*, INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO), <http://www.idlo.int/AichilawsSite/Docs/Target%2014%20-%20India%20Scheduled%20Tribes.pdf> (last visited July 5, 2013).

<sup>12</sup> Hindu Marriage Act, No. 25 of 1955, INDIA CODE (1993), vol. 20.

Customary Hindu practices in marriage and divorce that are outside the traditional norm are also recognized under Indian law. Traditional Hindu law recognizes eight forms of marriage, of which three—Brahma, Asura, and Gandharba—are the most prevalent. However, a marriage in a form “which is out of practice or obsolete is not necessarily prohibited by Hindu law.”<sup>13</sup> According to advocate D. H. Chaudari,

[i]n a vast country like India, with so many castes living in so many different places, multifarious forms of marriage allowed by custom have come into existence. These customary forms of marriage may be perfectly valid even though they do not strictly come within the definitions of any of the eight forms.<sup>14</sup>

According to Hindu law, ceremonies “of some sort are absolutely essential.” For example, “[c]ourts have attached great importance to the performance of Saptapathi or the ceremony of seven steps which is considered to be the most important of ceremonies.”<sup>15</sup>

However, it should be noted that the performance of ceremonies other than those referred to above are recognized by the Indian Courts where the ceremonies are allowed by the custom of the community or caste to which the parties belong.<sup>16</sup>

Divorce is not recognized by general Hindu law. Traditionally marriage, from the Hindu legal standpoint, “creates an indissoluble tie between the husband and the wife. Neither party, therefore, to a marriage can divorce the other unless divorce is allowed by custom.”<sup>17</sup> The Hindu Marriage Act modified this position, however, creating nine grounds for both husband and wife to claim divorce, and some additional grounds available to the wife alone. According to section 29 of the Hindu Marriage Act, dissolution of a Hindu marriage can also be obtained through a valid custom.<sup>18</sup>

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<sup>13</sup> D.H. CHAUDARI, *THE HINDU MARRIAGE ACT 1955* at 61 (3rd ed. 1966).

<sup>14</sup> *Id.*

<sup>15</sup> T.P. GOPALAKRISHNAN, *HINDU MARRIAGE LAW* 46 (2d ed. 1959).

<sup>16</sup> SATYAJEET A. DESAI, *PRINCIPLES OF HINDU LAW* 663 (7th ed. 2000).

<sup>17</sup> *Id.* at 666.

<sup>18</sup> Hindu Marriage Act § 29.

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