IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. ... Respondents

AND

OTHER CONNECTED CIVIL APPEALS

MISCELLANEOUS NoTE ON TEMPLES AND SADACHARA

BY DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE ON RECORD:EJAZ MAQBOOL

I AN ILLUSTRATIVE LIST OF TEMPLES IN INDIA WITH NO IDOLS

1. **Thillai Natraja temple, Chidambaram-** No idols, curtain is raised and people worship the notional linga behind the curtain.
2. **Pakshi Mandir, Sabarkantha District, Gujarat** (Part of khed roda group of monuments)- no idols, birds are carved on the walls and are worshipped.
3. **Male female temples-Nilgiris** – no idols, worshop to male and female powers
4. **Patal Mandir, bhuvaneshwar-** No idols but has natural formations in the form of The Sheshnag (five-headed serpent). Belief is that the cave is placed on the spine of this Sheshnag.
5. **Kamakhya Mandir-** no idols, a yoni-like stone with a natural spring flowing over it is worshipped.
6. **Alopidevi temple, Allahabad-** worship is to a swing
7. **Raja Rani temples, Bhubhaneswar-** images of siva and parvarti, though no idols.
8. **Hadimba Temple in Manali, Himachal Pradesh:** There are no idols in the temple; the devotees worship two large footprints.

Unconventional temples

9. **Dog Temple in Channapatna, Karnataka:** This unconventional temple was established in 2009 to respect dogs and their quality of faithfulness. There are two dog faces acting as idols within the temple. Villagers believe that the deities in this temple will stop any wrongdoing in the area.
10. **The Om Banna temple** – better known as the Bullet Baba temple, near Jodhpur- No idols, no pictures; the deity in this temple is a 350cc Royal Enfield Bullet motorcycle.

It is relevant to note that in each of the above, though there are no idols in the temple, yet there is either a natural manifestation of an image, formation, or a tangible entity that is worshipped.

II. Note on Sadachara

Significantly the path chosen in this case was intermittent belief with indifferent practice, if any, but not sadachara – one of the sources of Hindu Law. As sadachara would have required greater certainity and would be also accepted as not necessarily in conformity with the sastra.

[See Mayne's Hindu Law & Usage (13th Edition-1991) pgs. 44-51]

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(3)

MAYNE'S
Treatise on
HINDU LAW
&
USAGE

Also containing commentaries on

THE HINDU MARRIAGE ACT, 1955
THE HINDU SUCCESSION ACT, 1956
THE HINDU ADOPTIONS & MAINTENANCE ACT, 1956
THE HINDU MINORITY & GUARDIANSHIP ACT, 1956
THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937

THIRTEENTH EDITION

Revised by

JUSTICE ALLADI KUPPUSWAMI

BHARAT LAW HOUSE
New Delhi
1991

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CHAPTER 3

The sources of Hindu law

33. Custom and its potency.—The third source of Hindu law is custom.[1] Custom is transcendant law.[2] As has already been pointed out, the Smritis and Digests were largely based upon customary law.[3] In fact commentaries are evidence of customs which formed the law.[4] On matters not covered by the Smritis and Commentaries, usage supplements the law laid down in them. Even where a custom exists in derogation of the law laid down in the Smritis, it is nonetheless a source of law governing the Hindus. The Smritis repeatedly insist that customs must be enforced and that they either override or supplement the Smriti rules. Manu declares that it is the duty of a king to decide all cases which fall under the eighteen titles of VYAVAHARA or civil law according to the principles drawn from local usages and from the institutes of sacred law,[5] and that " a king who knows the sacred law must inquire into the laws of castes, of districts, of guilds and of families and (thus) settle the peculiar law of each".[6] Narada, who deals only with civil law says, "custom decides everything and overrules the sacred law" and one of the earliest writers, Asahaya (c. 7th century) commenting upon that verse cites a text: "immemorial usage of every country (or province) handed down from generation to generation can never be overruled on the strength of the SASTRAS".[7] Yajnavalkya also emphasises this view when he says that "one should not practice that which, though ordained by the Smriti, is condemned by the people".[8] Manu is also to the same effect: "what may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the (customs of) countries, families and castes".[9] Brihaspati, who like Narada, is dealing with civil law alone, lays down emphatically that "the time-honoured institutions of each country, caste and family should be preserved intact". He refers to customs which according to him are contrary to the SASTRAS and which nevertheless must not be interfered with, and after referring to

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1 Manu, II, 12; Yajn., 1, 7.

2 *Deivanai* v *Chidambaram Chettiar* (*RM*) 1954 Mad 657.

3 See *ante* paras 6, 22.

4 *Anjubai* v *Hemachandra Rao* 1960 MP 382; *Kasturi* v *Chiranjitlal* 1960 MP 446; *A Jagdarao* v *Babarao Irbaji* 1983 HLR 446.

5 Manu, VIII, 3.

6 Manu, VIII, 41; Sir William Jones's translation of the verse in Manu, I, 108, that "immemorial usage is transcendent law" which appeared in former editions of this work and which was cited by Dr. Sarvadhikari (II edition, 854) and by Mookerjee, J. in *Rajani Nath* v *Nitai* (1921) 48 Cal 643, 715 (FB) and by others is erroneous (Ganapathi Iyer, 297, Bhattacharya, 2nd edn., 50) The correct translation is given by Dr. Buhler and Dr. Jha. "The rule of conduct is transcendent law whether it be taught in the revealed texts or in the sacred tradition; hence a twice born man who possesses regard for himself should be always careful to follow it" (Dr. Buhler, S.B.E., Vol. 25, 27). "Morality (right behaviour) is highest dharma—that which is prescribed in the Sruti and laid down in the Smriti. Hence, the twice born person, desiring the welfare of his soul, should be always intent upon right behaviour" (Dr. Jha, Manu Smriti, Vol. I, Part I, 149). The reference is to right behaviour or conduct as laid down in the Vedas and in the Smritis and not to any customs or usages of the world. Verses 107 to 110 read together establish the correctness of the above translations and have nothing to do with custom or usage in the modern sense.

7 Nar. I, 40 and comment. S.B.E., Vol. XXXIII, p. 15.

8 Yajn., I, 156.

9 Manu, VIII, 46. See also IV, 178 "Let him walk in that path of holy men which his fathers and his grandfathers followed: while he walks in that, he will not suffer harm". The Mitakshara cites that as deciding that family usage should be followed. Mit. on Yajn., I, 254, Vidyarnava, 344.

certain customs in connection with marriage, etc., which were contrary to the SASTRAS, he declares that the men who follow those customs are neither subject to the rules of penance nor to punishment.[1] Katyayana expressly recognises a local custom as valid, whether it is in consonance with law or in derogation of it.[2] As referred to already, usage is expressly declared to overrule the Smriti law in the decision of cases, according to the texts of Narada and Brihaspati.[3] Speaking of a newly subjugated country, Yajnavalkya says: "whatever the custom, law and usages, those should be observed and followed by the monarch, as before".[4]

Sadachara.—The Sanskrit work for custom which is used by Manu and Yajnavalkya is SADACHARA or the usage of virtuous men. This term has been defined by Manu himself as "the custom handed down in regular succession from time immemorial among the four chief castes (VARNA) and the mixed races of the country".[5] So SADACHARA or approved usage only means that it should not be contrary to Dharma. No doubt, Gautama says: "the laws of countries, castes and families which are not opposed to the sacred records have also authority".[6] Vijnanesvara and Kulluka, commenting respectively on Yajnavalkya and Manu, state that the customs should not be repugnant to the Vedas or the Smritis.[7] On this point, there is a difference between the religious and the civil law in the Smritis and the general requirement that usage should not be opposed to the Vedas and the Smritis is confined to the rules relating to religious observances (ACHARA) and does not apply to the rules of Civil Law (VYAVAHARA) as to which, the texts of Narada, Brihaspati and Katyayana, recognising the force and validity of custom, are decisive.[8] All that Vijnanesvara and Kulluka must have meant is that custom should not be immoral or criminal or opposed to public policy, in which case, it will cease to be the conduct of virtuous men.

34. Custom overrides Smriti.—While the writers on the Mimamsa do not recognise local or tribal customs in respect of religious matters, local or tribal customs of a secular nature fall according to them outside the scope of positive injunctions of universal application.[9] Further the requirement that it should not be opposed to the Smritis means that it should not be contradicted by an obligatory text. It is enough if it is not positively condemned by the Smritis.[10] There are very few cases in which express prohibitions in the Smritis are contravened by a custom. In most of those cases, the prohibitions themselves are not imperative, but are only monitary. Positive rules of succession which are varied by custom cannot be read as prohibitions preventing a different rule from being established by custom. In any event, it is clear that any condemnation in the Smritis, express or implied, will not affect the validity of custom as a matter of civil law.[11] The exact legal status of custom as itself a rule of Smriti which

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1 Brih., II, 28-31. See also Parasara-Madhaviya, Setlur's edn., 552-553.
2 Smritichandrika, Vyavaharakanda, 21, 22 (Mysore edn.): Sankararama Sastri, 149-151; Katyayana says further; the customary law should be recorded in books and as much care should be taken in respect of them as in respect of sacred law (Text cited in Note I on page 3 of Jolly's L & C). See also the Viramitrodaya, Setlur's edn., 370; Vas., I, 17.
3 Brih., II. 18: SBE Vol. 33, p. 7, note. Narada, I, 40.
4 Yajn., I, 342-343, Vidyarnava's trans., 415.
5 Manu, II, 18.
6 Gaut., XI, 20.
7 Mit. on Yajn., I, 342; Vidyarnavas' trans., 415; Kulluka on Manu, VIII, 41; "The Digest (Mitakshara) subordinates in more than one place the language of texts to custom and approved usage" per Sir Robert Phillimore in *Bhyah Ram Singh* v *Bhyah Ugur Singh* (1870) 13 MIA 373, 390.
8 Brih., II, 18, 28; Nar., I, 40; for Katyayana's verses see note 1, p. 11.
9 K L Sarkar, Mimamsa, 258; Jha, Mimamsa Sutras, 80-84.
10 K L Sarkar, Mimamsa, 247-248; Colebrooke's Mics. Essays, p. 338. compare Jaimini's rule "Without reference to causes, usages prevail". K L Sarkar, Mimamsa, 444.
11 P N Sen, 10.

has been emphatically laid down by Medhatithi, the commentator of Manu,[1] is almost conclusive on this question. And the Mitakshara quotes texts to the effect that even practices expressly inculcated by the sacred ordinances may become obsolete and should be abandoned if opposed to public opinion.[2]

35. Recognized by modern law.—Fullest effect is given to custom both by courts and by legislation. The Judicial Committee in the *Ramnad* case said: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law".[3] And all the Acts which provide for the administration of the law dictate a similar adherence to usage, unless it is contrary to justice, equity or good conscience, or has been actually declared to be void.[4]

Records of local customs.—Customs are of various descriptions: customs of castes, tribes and classes, local or territorial customs and customs of families.[5] When family custom is established general custom cannot be set up.[6] There is no comprehensive digest of all local or tribal customs prevailing in different parts of India, prepared and published under authority. Records of a limited scope are, however, available. In Punjab and in United Provinces, most valuable records of village and tribal customs, relating to the succession, to and disposition of, land have been collected under the authority of the settlement officers, and these have been brought into relation with the judicial system by an enactment that the entries contained in them should be presumed to be true.[7] For instance, the Riwaji-i-am is a public record prepared by a public officer in the discharge of his duties under Government rules and is admissible to prove the facts entered therein, subject to rebuttal. The statements therein may be accepted, even if unsupported by instances. Manuals of customary law, in accordance with the Riwaji-i-am have been issued by authority for each district and stand on much the same footing as the

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1 Medhatithi on Manu, II, 10; Jha, Vol. I, Part I, 211-212; (Practices of cultured men should also be taken as included under the term Smriti); Sankararama Sastri, 146-147.

2 Mit I, *iii*, 4; Mandlik, Introduction, 43, 70. The text referred to in the Mitakshara is the text of Yajnavalkya, I, 156. The remark in the note (at page 382, Stokes, HLB) that it is not found in Yajnavalkya Smriti, is incorrect.

3 *Collector of Madura* v *Mootoo Ramalinga* (1868) 12 MIA 397, 436; *Palaniappa Chetti* v *Alagan Chetti* (1921) 48 IA 539, 547 44 Mad 740; *Shibaprasad* v *Prayag Kumari* (1932) 59 IA 331, 352: 59 Cal 1399, 1421; *Madhavrao* v *Raghavendrarao*, AIR (1946) Bom 377.

4 See, as to Bombay, Bom Reg. IV of 1827, section 26; Act II of 1864, section 15. As to Burma, Act XVII of 1875, section 5. Central Provinces, Act XX of 1875, section 5. Madras, Act III of 1873, section 16. Oudh, Act XVIII of 1876, section 3, Punjab, Act XII of 1878 section 1. See *Sunder* v *Khuman Singh* (1879) 1 All 613.

5 Manu, VIII, 3, 41; Yajn., II, 12 (the same law prevails in the case of usages of Srenis, Naigamas, Pakhandins and Ganas); Brih; II, 28. *Harihar Prasad* v *Balmikiprasad* 1975 SC 733: (1975) 1 SCC 212: 1975 Pat LJR 84.

6 *Nazirsingh* v *Kehar Singh* 62 Punj LR 692.

7 These records are known by the terms, wajib-ul-arz (a written representation or petition) and Riwazi-i-am (common practice or custom). See Punjab Customs, 19; Act XXXIII of 1871, section 61; XVII of 1876, section 17. *Lekraj Kuar* v *Mahpal Singh* (1880) 7 IA 63: 5 Cal 744; *Harbaj* v *Gumani* (1880) 2 All 493; *Isri Singh* v *Ganga* , *ib*, 876; *Thakur Nitepal Singh* v *Jai Singh* (1897) 23 IA 147: 19 All 1; *Muhammad Imam* v *Sardar Hussain* (1899) 25 IA 61: 26 Cal 81; *Parbuti Kunwar* v *Chandar* (1909) 36 IA 125: 31 All 457. In the case of *Uman Parshed* v *Gandharp Singh* (1888) 14 IA 127: 15 Cal 20, the Judicial Committee criticised a practice which had grown up in Oudh of allowing the proprietor to enter his own views upon the Wajib-ul-arz, whereas it ought to be an official record of customs, arrived at by the inquiries of an impartial officer. See too, *Tulsi Ram* v *Behari Lal* (1890) 12 All 328, 335; *Superunddhwaja Prasad* v *Garuraddhwaja* (1893) 15 All 147. A Wajib-ul-arz, which has long stood on record, and been unquestioned by the parties who would be affected by it, is *prima facie* evidence of custom, though not signed by any landholder in the village. *Rustam Ali* v *Abbasi* (1891) 13 All 407.

original itself.[1] Reference may also be made to the following works: Steel's 'Law of Castes and Tribes in the Dekhan'; C.L. Tupper's 'Punjab Customary Law' (1881); C. Boulnois and W.H. Rattigan's 'Notes on the Customary Law of the Punjab';[2] Bolster's 'Customary Law of the Lahore District'. The district manuals and census reports of the several provinces contain useful information on the usages and customs, especially of aboriginal and other tribes in the various parts of India; for instance, E. Thurston's 'Castes and Tribes of Southern India', Nelson's Madura Manual, Logan's Malabar Manual, Dr. Maclean's 'Manual of the Administration of the Madras Presidency', Risley's 'Tribes and Castes in Bengal'. Croke's 'Tribes and Castes of the North-Western Provinces and Oudh'. But, as these books were compiled for different purposes and upon information acquired in many ways and as there have been great changes amongst the people and their usages during the last fifty years, caution is required in taking the statements contained in them as always accurate or as representing the customs or usages now in force.

In some parts of Northern India, particularly in districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshara, as recognised by the school of Benares, have not been followed by some castes, tribes and families of Hindus, and customs which are at variance with the law of the Mitakshara, as recognised by that school, have been for long consistently followed and acted upon, and when such customs are established, they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. Customary law governs agricultural communities of all castes and religions in Punjab.[3] Such customs relate to a variety of subjects as for instance, to widows, adoptions, and the descent of lands and interest in lands; they are to be found principally amongst the agriculturist classes, but they are also to be found amongst classes which are not agricultural.[4]

36. Evidence of valid custom.—The first question is as to the validity of customs, differing from the general Hindu law. The beginnings of law were in Customs. Law and usage act, and react, upon each other. A belief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of the community, it becomes a custom, which is a part of their personal law.[5] Hence, where a special usage of succession was set up, the High Court of

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1 *Vaishno Ditti* v *Rameshri* (1928) 55 IA 407, 421: 55 MLJ 746, 755; *Beg* v *Allah Ditta* (1916) 44 IA 89, 97: 44 Cal 749, 759; *Ahmed Khan* v *Channibibi* (1925) 52 IA 379: 6 Lah 502. For Wajib-ul-arzes, see *Roshan Ali Khan* v *Chowdari Ashgar Ali* (1930) 57 IA 29: 5 Luck 70; *Bal Gobind* v *Badri Prasad* (1923) 50 IA 196: 45 All 413. A great deal of intersting information, derived from the records of the Pondicherry Court has been made available by the Labours of Leons Sorg., Juge President du Tribunal de Premiere Instance at Pondicherry in his works. *Saligram* v *Mt Maya* 1955 SC 266: 1955 SCR 1191: ILR 1955 Punj 167: 1955 SC 332: 1955 SCJ 248: 57 Punj LR 247; *Mayaram* v *Jai Narain* (1989) 1 HLR 352.

2 *Gopal Singh* v *Ujagar Singh* 1955 SCR 86: 1954 SC 579: 1954 SCJ 562: 1955 SCA 223; *Saligram* v *Mt Maya Devi* 1955 SC 266; *Dayasingh* v *Dhankuer* 1974 SC 665: (1974) 3 SCR 528: (1974) SCD 292: (1974) 1 SCC 700: (1974) 2 SCJ 145; *Balwinder Singh* v *Gurpal Kaur* 1985 Delhi 14.

3 *Kaur Singh Gajjan Singh* v *Jaggar Singh* 1961 Punj 489: 63 Punj LR 537.

4 *Ramakishore* v *Jainarayan* (1921) 48 IA 405, 410: 49 Cal 120.

5 This sentence is referred to by Sargent, CJ in *Patel Manilal* (1892) 16 Bom 470, 476. See the subject discussed, *Khojah's* case, Perry, OC, 110; *Howard* v *Pestonji*, *ib*, 535; *Tara Chand* v *Reeb Ram* (1866) 3 Mad HC, 50, 56; *Bahu Nanaji* v *Sundarabai* (1874) 11 Bom HC, 249; *Mathura* v *Esu* (1880) 4 Bom 545; Savigny Droit Rom., *i*, 33-36, 165-175. Introduction to Punjab Customs. As to the effect of judicial decisions in evidencing a custom, see *Shenbhu Nath* v *Gayan Chand* (1894) 16 All 379.

Madras said: "What the law requires before an alleged custom can receive the recognition of the court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, district or country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty".[1] The decision in *Sivanananta* v *Muttu Ramalinga* was affirmed on appeal, and the Judicial Committee observed:[2] "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity[3] and certainty on which alone their legal title to recognition depends."

Accordingly, the Madras High Court, when directing an inquiry into an alleged custom in the south of India that Brahmans may adopt their sister's sons, laid it down that: "I. The evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence; II. Evidence of acts of the kind; acquiescence in those acts; decisions of courts, or even of panchayats, upholding such acts; the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted".[4] If a custom is found to have existed at a particular date within living memory, it must be taken to have the ordinary attribute of a custom that it is ancient.[5]

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1 *Sivanananja* v *Muttu Ramalinga* (1866) 3 Mad HC, 75, 77; affirmed on appeal, sub-nominee, *Ramalakshmi* v *Sivanantha*, the *Oorcad* case (1872) 14 MIA, 570: 12 BLR 396: 17 WR, 553. Approved by the Bombay High Court, *Shidhojirav* v *Naikojirav* (1873) 10 Bom HC 228, 234. See also *Bhujangrav* v *Malojirav* (1868) 5 Bom HC (ACJ), 161; *Chinnammal* v *Varadarajulu* (1892) 15 Mad 307; *Sundarbai* v *Hanmant* (1932) 56 Bom 298; *Saraswati Ammal* v *Jagadambal* 1953 SC 201; *Indramani Devi* v *Raghunandha Banja* 1961 Orissa 9.

2 *Ramalakshmi* v *Sivanantha* (1872) 14 MIA 585. A long continued practice which appears to have originated from, and to be maintained by, a series of erroneous decisions cannot be supported as a custom, if the decisions themselves are ultimately reversed. *Pettapur* case (1899) 26 IA 83: 22 Mad 383; *Ramakanta Das* v *Shamanand* (1909) 36 Cal 590.

3 As to the test of antiquity, see *Ambalika Dasi* v *Aparna Dasi* (1918) 45 Cal 835, 858. The Calcutta High Court takes either 1773 AD or 1793 AD as the date for treating a custom which was then in existence as immemorial; *Nolin Behari* v *Hari Pada* AIR 1934 Cal 452. In *Umrithnath Chowdari* v *Goureenath* (1870) 13 MIA 542, 549, the expression 'immemorial' instead of 'ancient' was used with reference to a family custom. Hindu law recognises usage beyond 100 years as 'immemorial'; the Mitakshara on Yajn., II, 27 (Setlur's edn, 342) says: Time within memory is 100 years', for, the Sruti says 'A man's life is 100 years. See also *Deepsingh* v *Jorsingh* AIR 1950 Raj. 14; *Harihara Prasad* v *Balmiki Prasad* 1975 SC 733: (1975) 1 SCC 212: 1975 Pat LJR 84.

4 *Gopalayyan* v *Raghupatiayyan* (1873) 7 Mad HC 250, 254. See too, per Markby, J., *Hiranath* v *Baboo Ram* (1872) 9 BLR 274, 294: 17 WR 316; *Collector of Madura* v *Mootoo Ramalinga* (1868) 12 MIA 436 and *Hurpurshad* v *Sheo Dayal* (1876) 3 IA 259, 285;: 26 WR 55; *Vishnu* v *Krishnan* (1884) 7 Mad 3; *Harnabh* v *Mandil* (1990) 27 Cal 379; *Mirabivi* v *Vellayanna* (1885) 8 Mad 464, 466. It must be more than a mere practice and must be consciously accepted as having the force of law; approved in *Abdul Hoosein* v *Bibi Sona* (1917) 45 IA 10, 17, 18: 45 Cal 450.

5 *Kunwar Basant Singh* v *Kunwar Brijraj Singh* (1935) 62 IA 180, 193: 57 All 494, 508 (where the custom was shown to have existed for about fifty years): compare *Chattan Raja* v *Rama Varma* (1915) 28 MLJ 669.

Antiquity and certainty.—A custom must be ancient, certain and reasonable,[1] and being in derogation of the general rules of law, must be construed strictly.[2] However the English rule 'that memory of men runneth not to the contrary' should not be strictly applied to Indian conditions.[3] When a family custom is followed for a long period, it is binding on the family.[4] Customs are not to be enlarged beyond the usage by parity of reason, since it is the usage that makes the law and not the reason of the thing. It cannot be said that a custom is founded upon reason, though an unreasonable custom is void, for no reason (even the highest whatsoever) would make a custom or law.[5] 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 cognisant of its existence; specific instances need not always be proved.[6] But when a custom or usage is repeatedly brought to the notice of the courts, that custom may be held to be introduced into the law without the necessity of proof in each particular case.[7] Of course, it is easier to prove a custom which supplements Hindu law than one which varies it, as in the case of customs governing religious institutions or forms of marriage other than those prescribed by Hindu law.[8] If satisfactory evidence as to what is the rule of customary law is not forthcoming, a presumption that the Hindu law on the point is the customary law applicable to that community can be raised.[9]

37. Immoral usages.—Customs which are immoral or opposed to public policy or opposed to enactments of the legislature will neither be recognised nor enforced.[10] A

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1 Barbarous customs or customs which are repugnant to natural justice, equity and good conscience are bad and they cannot be made good by courts modifying them. *E Eleko* v *Officer Administering the Government of Nigeria* (1931) AC 662, 673; Punjab Laws Act, 1872, section 5; NWF Province's Regulations, section 27; Oudh Laws Act, section 3. A custom is not unreasonable merely because it is contrary to a rule of law or against the interest of an individual; 10 Halsbury, 2nd edn., paras, 9-11. See *Shib Narain Mookerjee* v *Bhutnath* (1918) 45 Cal 475, 479; *Saladhur Jaman* v *Oojaddin* (1936) 63 Cal 851; *Hashmat Ali* v *Mt Nasibunnissa* (1924) 6 Lah 117 PC; *Saraswati Ammal Jagadambal* 1953 SC 201; *Deivanai Achi* v *Chidambaram Chettiar* 1954 Mad 657: (1955) 1 MLJ 120: 67 Mad LW 965.

2 *Hurpurshad* v *Sheo Dayal* (1876) 3 IA 259, 285; *Luchman* v *Akbar* (1877) 1 All 440; *Lala* v *Hira* (1878) 2 All 49.

3 *Gokulchand* v *Parvin Kumar* 1952 SC 231: (1952) 3 SCR 825: 65 Mad LW 646: 90 Cal LJ 73.

4 *Harihara Prasad* v *Balmiki Prasad* 1975 SC 733: (1975) 1 SCC 212: 1975 Pat LJR 84.

5 *Arthur* v *Bokonham* 11 Modern, 148, 161: 88 ER 957, 962; *Muharam Ali* v *Barkat Ali* (1930) 12 Lah 286, 290; *Pallaniappa Chetty* v *Chokalingam Chetty* (1929) 57 MLJ 817; *Muthala Reddy* v *Sankarappa* (1934) 67 MLJ 106. This rule is in accordance with Hindu law, for, according to Jaimini's rule. 'Without reference to causes, usages prevail'. KL Sarkar, Mimamsa, 444, 481.

6 *Ahmed Khan* v *Channi Bibi* (1925) 52 IA 379, 383: 6 Lah 502 affirming AIR 1924 Lah 265; *Vashno Ditti* v *Rameshri* (1928) 55 IA 407, 421: 55 MLJ 746, 755; *Gopikrishna* v *Mt. Jaggo* (1936) 63 IA 295, 298: 58 All 397 (Sir Shadilal's observation); *Akbarally* v *Mahomedally* (1933) 57 Bom 551 (mere affidavits—no good); *Sobansingh* v *Mt. Narain* AIR 1936 Lah 540; *SK Wodeyar* v *Ganapathy* AIR 1935 Bom 371; *Suganchand Bhikamchand* v *Mangibai* ILR (1942) Bom 467; *Madhavrao* v *Raghavendrarao* AIR 1946 Bom 377; *Shanmugathammal* v *Gomathi* (1934) 67 MLJ 861; *Jagadambal* v *Saraswati* (1950) 1 MLJ 50, 52.

7 *Rama Rao* v *Raja of Pitapur* (1918) 45 IA 148, 154: 41 Mad 778; *Hemandranath* v *Jnanendra* (1935) 63 Cal 155, 161; *Effuah Amissah* v *Effuali Krabha* AIR 1936 PC 147; *Krishnamoorthy* v *Krishnamoorthy* (1927) 54 IA 208: 50 Mad 508; *Gireeschandra* v *Rabeendranath* (1934) 61 Cal 694; *Banarasi Das* v *Sumat Prasad* (1936) 58 All 1019; *Pemraj* v *Chand Kanwar* (1947) 2 MLJ 516, 519 PC: ILR (1947) All 748; *Janardhanan* v *Kali Amma* 1968 Mad 105: ILR (1968) 1 Mad 548: (1968) 2 MLJ 94: 80 Mad LW 388.

8 *Sheobaran Singh* v *Kulsumunnissa* (1927) 54 IA 204: 49 All 367: *Chattan Rajah* v *Rama Varmah* (1915) 28 MLJ 669. Cf *Kulandaivelan* v *Offl. Receiver of South Arcot* (1949) 2 MLJ 708 PC.

9 1970 Ker LT 799.

10 *Vanniakone* v *Vannichi* (1928) 51 Mad 1, 10 (FB); *Latchamma* v *Appalaswami* (1960) 2 An WR 335: 1961 AP 55: (1960) ALT 948; *Thummakka* v *Rangappa* 1977 Kant 115: (1977) 1 Kant LJ 206; *Krishnan* v *Kesaven* ILR (1970) 2 Ker 484; *Motiram* v *Sukma* 1960 MP 46: 1959 MPLJ 693: 1958 MPC 790; *Chidambaran* v *Subrahmanyan* 1953 Mad 492: (1952) 2 MLJ 524: (1952) 65 MLW 680; *Balusami* v *Balakrishna* 1957 Mad 97: (1956) 2 MLJ 357: 69 Mad LW 681.

custom by which the second husband is made to pay the expenses incurred by the first husband's family for the earlier marriage as compensation for allowing the widow to re-marry on the death of her husband is a restriction on the widow's re-marriage and hence invalid.[1] The forfeiture of jewellery given to a woman on the occasion of her marriage, if she remarries is opposed to section 5 of the Hindu Widow's Remarriage Act and is therefore invalid.[2] The requirement in the books that a custom should be the usage of the virtuous and should not be opposed to the Dharmasastras means, as already pointed out that it should not be immoral or opposed to public interest.[3] However, a marriage by a person with his mother's father's brother's daughter was held valid.[4]

Accordingly, caste customs authorising a woman to abandon her husband, and marry again without his consent, are void for immorality.[5] And it was doubted whether a custom authorising her to marry again during the lifetime of her husband, and with the consent, would have been valid.[6] In Madras, it has been held that there is nothing immoral in a custom by which divorce and re-marriage are permissible by mutual agreement, on repayment by one party to the other of the expenses of the original marriage.[7] Amongst 'Barai Chaurasias' there is a custom of divorce by consent.[8] When custom permits divorce by consent amongst Patwas of Madhya Pradesh, a minor girl may validly consent for such divorce before the Panchayat. The rule of Hindu law that the age of marriage is 15 years does not apply to such a case, the test being whether she had sufficient understanding.[9] But a custom permitting a Hindu husband to dissolve the marriage without the consent of the other party on payment of a sum of money to be fixed by the caste is bad.[10] So also a custom allowing a woman to remarry during her first husband's lifetime without any defined rules by which the marriage of the first husband is dissolved has been held to be bad.[11] The custom among Nadars in Udumalpet Taluk permitting a second marriage while the first marriage was subsisting, even if established cannot have the force of law in view of statutory provisions against bigamy.[12] But a custom amongst a certain class of Vaishyas by which abandonment or desertion of the wife by her husband dissolves the marriage tie and enables her to remarry during his lifetime has been upheld.[13]

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1 *Premalatha* v *Jesodha* 1953 Ajmer 7.

2 *Latchamamma* v *Appalaswami* 1961 AP 55: (1960) 2 An WR 335: 1960 ALT 948; *Venkata Subha Rao* v *Bhujangaiah* 1960 AP 412: (1960) 1 An WR 215: 1960 ALT 239.

3 Custom should be the custom of the virtuous (Sadachara) Yajn., I, 7; custom should not be opposed to revealed law, Yajn., II, 186. See also section 23, Indian Contract Act. As to the test of immorality, it must be determined by the sense of the community as a whole and not by the sense of the section of a community; per Oldfield, J. in *Daivanayaga* v *Muthureddy* (1921) 44 Mad 329, 333. According to the Mimamsa rule, customs influenced by an improper cause or perverse motive are bad (K L Sarkar, Mimamsa, 240); *ante*, para 33.

4 *Reddiar (VVS)* v *Sitharaman* 1972 Mad 421: (1972) 1 MLJ 497.

5 *R* v *Karsan* (1864) 2 Bom HC 117, at p 124 see *R* v *Manohar* (1868) 5 Bom HC (CC), 17; *Uji* v *Hathi* (1870) 7 Bom HC (ACJ), 133; *Narayan* v *Laving* (1878) 2 Bom 140.

6 *Khemkor* v *Umiashankar* (1873) 10 Bom HC 381; In re *Gedalu Narayana* AIR 1932 Mad 561.

7 *Sankaralingam Chetti* v *Subhan Chetty* (1894) 17 Mad 479; *Thangammal* v *Gengayammal* (1945) 1 MLJ 299, 300 where this passage is followed; *Parandhamayya* v *Navarathna* (1949) 1 MLJ 467; *Jina Magan* v *Bai Jethi* ILR (1941) Bom 535 distg. *Keshav* v *Bai Gandi*, infra; *Madho Prasad* v *Shakuntala* 1972 All 119 (Barai Chaurasia Community Chuttan Chutta).

8 *Madho Prasad* v *Shakuntala* 1972 All 119.

9 *Preman Bai* v *Channo Lal* 1963 MP 57: 1962 MPLJ 770: 1963 Jab LJ 588.

10 *Keshav* v *Bai Gandi* (1915) 39 Bom 538. See contra 1958 Ker LT 916 (Thiyas of Ernad Taluk in Malabar). But a custom among Sikh, Jats of Amritsar whereby a husband can dissolve a marriage out of court preferably by written instrument was upheld *Balarindu Singh* v *Gurpal Kaur* 1985 Delhi 14 following 1884 Punj Re 78; 1889 Punj Re 84; 1933 Lah 755: 1896 Punj Re 33.

11 *Budansa Rowther* v *Fatmabi* (1914) 26 MLJ 260; *Venkatakrishna* v *Lakshminarayana* (1909) 32 Mad 185.

12 *Raghuvira Kumar* v *Shanmukha Vadivu* 1971 Mad 330: 1970 2 MLJ 193.

13 *Gopikrishna* v *Mt. Jaggo* (1936) 63 IA 295, 302: 58 All 397 (Vaishyas of Gorakhpur).

A practice similar to Niyoga obtaining among Domes in Tehri Garhwal of an issueless widow taking a "Kathala" for begetting children for her deceased husband was held to be not invalid on the ground that custom must be looked at from the viewpoint of the society concerned.[1] The usage among Nattukotai Chetties by which an adoptive parent pays a sum of money to the natural parent in consideration of his giving his son in adoption is, just like an agreement to that effect, bad,[2] particularly so, after the coming into force of the Hindu Adoption and Maintenance Act, 1956 (*vide* section 17).

Opposed to public policy.—In a case before the Privy Council, a custom was set up as existing on the West Coast of India, whereby the trustees of a religious institution were allowed to sell their trust. The Judicial Committee found that no such custom was made out but intimated that in any case they would have held it to be invalid, as being opposed to public policy.[3]

Dancing girls.—The custom amongst dancing girls or naikins of adopting one or more daughters has been held by the Bombay[4] and Calcutta[5] High Courts to be opposed to morality and public policy. In Madras, such an adoption by a dancing girl for the purpose of prostitution, after the Penal Code, has been held to be illegal.[6]

Adoption of daughters.—In a Muhammadan case,[7] the Privy Council upheld the view that the custom of adoption of daughters by a prostitute class or family aims at the continuance of prostitution as a family business and that it has a distinctly immoral tendency and should not be enforced in courts of Justice. These observations will apply equally to the custom of adoption of daughters amongst Hindu dancing girls. In Madras, however, a distinction has been sought to be made between an adoption made with the intention of training a girl for the purpose of prostitution and one made with a different intention; and the custom, amongst the dancing girls, of adoption has so far been recognised as to make the adoption of a daughter valid, where it is not for the purposes of prostitution.[8] This line of reasoning overlooks a vital consideration. The custom must be judged as a whole, not only with reference to the ultimate objects in view but also as regards the probable consequences of encouraging prostitution. Further, there is always the difficulty of proof whether pure or impure motives actuated the adoption. As the general, if not invariable, tendency of the custom is undoubtedly to promote prostitution and to corrupt youthful and innocent minds, the custom can only be regarded, on broad grounds as opposed to morality and public policy, apart from any criminal intention under the Penal Code or any enactment for the suppression of immoral traffic.[9] An adoption by

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1 1979 All LJ 1245.

2 *Murugappa* v *Nagappa* (1906) 29 Mad 161. See also *Kothandaram Reddi* v *Thesu Reddi* (1914) 27 MLJ 416; *Danakoti* v *Balasundara* (1913) 36 Mad 19; *Subba Raju* v *Narayana Raju* (1926) 51 MLJ 366.

3 *Rajah Vurmah* v *Ravi Vurmah* (1876) 4 IA 76: 1 Mad 235.

4 *Mathura Naikin* v *Esu* (1880) 4 Bom 545; *Hira* v *Radha* (1913) 37 Bom 116; *Thara Naikin* v *Nana* (1890) 14 Bom 90.

5 *Hencower* v *Hanscower* 2 Morley's Digest 133.

6 *Kamalakshi* v *Ramaswami Chetty* (1896) 19 Mad 127.

7 *Ghasito* v *Umrao Jan* (1894) 20 IA 193: 21 Cal 149.

8 *Venku* v *Mahalinga* (1888) 11 Mad 393, 402. See also *Muthukanna* v *Paramaswami* (1889) 12 Mad 214; *Veeranna* v *Sarasiratnam* (1936) 71 MLJ 53 (where the question is fully discussed); *Balasundaram* v *Kamakshi* ILR (1937) Mad 257; *Gangamma* v *Kuppammal* ILR (1938) Mad 789 (There is no legal objection to a customary adoption of two daughters by a dancing girl). See *Chalakonda* v *Chalakonda* (1864) 2 MHC 56; *Padmavati*, Ex parte (1870) 5 Mad HC 415; *Kamalam* v *Sadagopa* (1878) 1 Mad 356; *Reg* v *Ramanna* (1889) 12 Mad 273; *Srinivasa* v *Annasami* (1892) 15 Mad 323; *Kamalakshi* v *Ramaswami* (1896) 19 Mad 127; *Sanjivi* v *Jalajakshi* (1898) 21 Mad 229; *Chelamma (V V)* v *Gaddam Subba Rao* 1953 Mad 571.

9 For instance, the Madras Suppression of Immoral Traffic Act (V of 1930); and the Madras Devadasis (Prevention of Dedication) Act, XXXI of 1947.