



Custom and Gender Justice: Reforming Discriminatory Traditions Through Law and Policy

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ABSTRACT:

Customs and traditions have historically shaped the social, religious, and cultural identities of communities around the world. In India, these customs are deeply entrenched in the societal framework and often form the basis of personal laws, especially in areas such as marriage, succession, property, and religious practice. While customs can preserve cultural continuity and foster a sense of belonging, they can also serve to perpetuate outdated, discriminatory, and patriarchal norms that are inconsistent with the principles of constitutional morality and gender justice. Over the decades, a number of customary practices in India—such as Sati (the self-immolation or forced immolation of widows), Triple Talaq (instant divorce in Muslim personal law), the Devadasi system (ritualistic dedication of young girls to deities, often resulting in sexual exploitation), child marriage, and gender-biased inheritance norms—have come under intense scrutiny for violating the fundamental rights of women and reinforcing systemic gender inequality. These practices, often justified in the name of tradition and religious autonomy, clash directly with the constitutional promises of equality, dignity, liberty, and non-discrimination.

This research paper aims to critically examine the interface between customary practices and the constitutional mandate of gender equality in India. It seeks to explore the constitutional, legislative, and judicial mechanisms employed to reform or abolish discriminatory customs. In particular, the paper delves into the scope and interpretation of Article 13(1) of the Indian Constitution, which invalidates pre-constitutional laws—including customs—that are inconsistent with the provisions of Part III (Fundamental Rights). Through an analytical lens, the paper reviews landmark judicial pronouncements and progressive legislations that have addressed the oppressive aspects of customary laws. The role of the judiciary in reconciling tradition with constitutional ethics—while ensuring the protection of women's rights—is of central focus. It also reflects upon the broader societal and political challenges encountered in reforming entrenched traditions.

The study ultimately argues that customary law must evolve in consonance with the dynamic values of the Constitution, and that gender justice must be treated as a non-negotiable imperative in the interpretation and application of any custom or tradition. In a democratic and pluralistic society like India, the recognition of cultural diversity must not come at the cost of human rights and gender equality. Therefore, continuous legal reform, awareness generation, and judicial activism are essential to ensure that customs serve society rather than hinder its progress.

Keywords: Customary Law, Gender Justice, Constitutional Morality, Triple Talaq, Discriminatory Practices, Legal Reform, Fundamental Rights.

1. Introduction

Customs have long played a central role in shaping the structure of personal and community life. In traditional societies, especially in countries like India, customs serve not only as unwritten norms that govern behavior but also as powerful tools of social regulation. They influence a wide array of personal matters such as marriage, divorce, inheritance, guardianship, succession, adoption, and social conduct, often with deep roots in religious and communal identity. As such, they offer communities a sense of historical continuity, cultural belonging, and moral guidance. However, with the advent of a modern, rights-based constitutional framework, it has become increasingly important to scrutinize these customs through the lens of equality, human dignity, and justice. While some customs foster social cohesion and cultural richness, others reflect patriarchal hierarchies, gender bias, and exclusion, particularly when applied to women and other marginalized groups. These regressive practices, though shielded under the guise of tradition or religious freedom, frequently contradict the core principles enshrined in Part III of the Indian Constitution, especially the Fundamental Rights guaranteeing equality before law (Article 14), prohibition of discrimination (Article 15), and the right to life and personal liberty (Article 21).

In India, where personal laws vary across religious communities and derive largely from customary and religious traditions, the coexistence of constitutional norms and customary practices creates a complex legal landscape. The state's commitment to pluralism and religious freedom often conflicts with the constitutional imperative to eliminate practices that perpetuate injustice and inequality. As a result, the persistence of certain customs—such as child marriage, unequal inheritance for women, caste-based restrictions, and patriarchal norms governing marriage and divorce—poses a formidable obstacle to the realization of substantive gender equality.

This paper critically examines the relationship between custom and gender justice, with a focus on how Indian law and policy have responded to the challenge of reforming or abolishing discriminatory customary practices. It aims to explore the tension between cultural relativism and universal human

rights, while emphasizing the transformative potential of the Indian Constitution to reshape tradition in accordance with constitutional morality. Special attention is given to the role of the judiciary, legislature, and civil society in addressing these issues.

Ultimately, the paper highlights that constitutional principles—particularly those relating to equality, dignity, and non-discrimination—must serve as the touchstone for validating or invalidating customs. A progressive and inclusive legal order requires that customs evolve in harmony with constitutional values, ensuring that tradition does not become a tool of oppression but instead aligns with the goals of a just, equitable, and democratic society.

II. The Legal Status of Custom in India

Under Indian jurisprudence, custom is recognized as a valid source of law, particularly in personal matters. A custom must be ancient, certain, reasonable, and not opposed to public policy to be legally valid. However, Article 13(1) of the Indian Constitution explicitly states that all laws, including customs, in force before the commencement of the Constitution, shall be void to the extent of their inconsistency with fundamental rights.

Judicial interpretation has consistently emphasized that customs violating fundamental rights cannot be sustained. In cases involving personal laws and customs, courts have balanced cultural sensitivity with constitutional mandates, often choosing to prioritize the latter where the two conflict.

III. Discriminatory Customs and Practices: An Overview

A. Sati: Historically glorified as a form of wifely devotion, Sati was a practice where a widow immolated herself on her husband's funeral pyre. Though abolished under British rule and criminalized by the Sati (Prevention) Act, 1987, sporadic cases and glorification still surface, reflecting deep-rooted patriarchal values.

B. Triple Talaq: The practice of instant divorce among Muslims, known as Triple Talaq, allowed a husband to unilaterally dissolve a marriage by uttering "talaq" three times. In *Shayara Bano v. Union of India* (2017), the Supreme Court declared it unconstitutional, leading to the enactment of the Muslim Women (Protection of Rights on Marriage) Act, 2019.

C. Devadasi System: Originally a religious practice involving the dedication of young girls to deities, the Devadasi system devolved into institutionalized exploitation. Despite legal prohibitions, the custom persisted due to social and economic vulnerabilities. The judiciary and human rights groups have condemned it as violative of dignity and bodily autonomy.

D. Child Marriage: Although prohibited under the Prohibition of Child Marriage Act, 2006, child marriage continues in many parts of India under the garb of tradition. It disproportionately affects girls, leading to early motherhood, denial of education, and exposure to abuse.

E. Inheritance Discrimination: Customary and religious personal laws have often denied women equal inheritance rights. The Hindu Succession (Amendment) Act, 2005, was a major step toward rectifying this injustice, granting daughters equal coparcenary rights. Yet, customary practices continue to undermine this statutory guarantee.

F. Khap Panchayats and Honor Killings: Khap panchayats in northern India enforce traditional norms related to marriage and community honor. They often justify violence against inter-caste or same-gotra marriages, reflecting a severe clash between custom and constitutional rights.

IV. Legislative and Judicial Reforms

Legislative Measures: Key legal reforms include:

The Sati (Prevention) Act, 1987

The practice of Sati, historically viewed by some as a ritual of honor and devotion, involved the immolation of a widow on her husband's funeral pyre. Although legally prohibited during British rule in the 19th century, isolated instances and glorification of the practice continued in post-independence India. The shocking case of Roop Kanwar in Rajasthan in 1987 reignited national debate and led to the enactment of The Commission of Sati (Prevention) Act, 1987. This law not only criminalized the act of Sati but also the abetment, glorification, or propagation of the custom in any form. It imposed stringent penalties on those who encouraged or celebrated the act and empowered the state to confiscate property associated with its promotion. The Act marked a critical legal stance against a deeply entrenched patriarchal practice, affirming the State's role in upholding the dignity and life of women.

The Muslim Women (Protection of Rights on Marriage) Act, 2019

This legislation emerged in response to the Supreme Court's landmark decision in *Shayara Bano v. Union of India* (2017), which declared the practice of Triple Talaq—a form of instant divorce among Muslims—unconstitutional. The Muslim Women (Protection of Rights on Marriage) Act, 2019 subsequently made the practice of pronouncing triple talaq void and illegal, and classified it as a cognizable and non-bailable offence punishable by up to three years' imprisonment. The Act also included provisions for maintenance and custody of minor children, thus seeking to protect Muslim women from arbitrary and unilateral divorce. This law represents a significant shift toward gender justice within personal laws, acknowledging that religious customs must comply with the principles of equality and non-discrimination.

The Prohibition of Child Marriage Act, 2006

Despite longstanding awareness of the harms associated with early marriage, the practice remains prevalent in various parts of India, often justified by custom and economic considerations. The Prohibition of Child Marriage Act, 2006 strengthened previous legislation by clearly defining a child marriage, declaring it voidable at the option of the contracting party who was a child, and introducing penalties for those who solemnize, promote, or permit such marriages. The Act also provided for the appointment of Child Marriage Prohibition Officers to prevent and respond to violations. Importantly, it recognized the gendered impact of child marriage, which predominantly affects young girls, depriving them of education, exposing them to early pregnancies, and increasing their vulnerability to domestic violence and abuse.

The Hindu Succession (Amendment) Act, 2005

Prior to this amendment, under the Hindu Succession Act, 1956, women did not enjoy equal rights to ancestral property as sons did under the Mitakshara coparcenary system. The Hindu Succession (Amendment) Act, 2005 was a watershed moment in the reform of Hindu personal law, as it granted daughters equal rights in coparcenary property and placed them on par with sons in matters of inheritance and property succession. The amendment eliminated gender-based discrimination and strengthened women's economic autonomy within the family. However, societal resistance and lack of awareness, especially in rural areas, have continued to limit the full realization of this legal reform.

The Protection of Women from Domestic Violence Act, 2005

Recognizing that violence within the home is often normalized under the guise of tradition or family honor, the Protection of Women from Domestic Violence Act, 2005 was enacted to provide a comprehensive and accessible legal remedy for women facing physical, emotional, sexual, verbal, and economic abuse. Unlike criminal provisions under the Indian Penal Code, this law is civil in nature and emphasizes protection, residence rights, and maintenance, along with provisions for emergency relief and protection orders. It reflects an important shift from punitive to preventive and restorative approaches in addressing gender-based violence within the domestic sphere. The Act directly challenges customary norms that treat domestic violence as a private matter, instead positioning it as a violation of women's fundamental rights to life, liberty, and dignity.

B. Judicial Interventions: The judiciary has played a transformative role in interpreting customs through a constitutional lens:

- *Shayara Bano v. Union of India* (2017) invalidated Triple Talaq.
- *Gian Kaur v. State of Punjab* (1996) addressed the right to life vis-à-vis Sati.
- *Vishaka v. State of Rajasthan* (1997) created guidelines against sexual harassment where customs allowed tolerance.
- *Joseph Shine v. Union of India* (2018) decriminalized adultery, condemning patriarchal morality.
- *Danamma v. Amar* (2018) upheld daughters' rights in coparcenary property.

V. Challenges in Reforming Customs Despite legal reforms, challenges remain:

Resistance from Conservative and Religious Groups

One of the most persistent challenges in reforming discriminatory customs is the resistance posed by conservative and religious factions who perceive any attempt at reform as an attack on their cultural or religious identity. These groups often argue that state interference in personal or customary laws violates the right to religious freedom guaranteed under Article 25 of the Constitution. In many instances, even progressive legal reforms are met with intense backlash, protests, or non-compliance, with reformers being accused of undermining age-old traditions. This resistance creates a climate of fear and hesitation, both for lawmakers and for communities seeking change, thus slowing down or obstructing essential reforms aimed at promoting gender justice.

Deep-rooted Patriarchal Attitudes

At the heart of many regressive customs lies a deep-seated patriarchy that perpetuates male dominance and female subordination. These societal attitudes are internalized over generations and often go unchallenged within families and communities. Even when laws are passed to empower women, the mindsets of individuals often lag behind, leading to continued discrimination in practice. For example, despite laws granting equal inheritance rights to daughters, many women are still denied property under the pretext of family honor or social stigma. Changing laws is easier than changing entrenched social beliefs, which continue to uphold customs that are fundamentally unjust to women.

Lack of Awareness in Rural Areas

A significant obstacle in the implementation of gender-just reforms is the lack of legal awareness, especially in rural and remote areas. Many women are unaware of their rights or the legal remedies available to them. Moreover, even when aware, socioeconomic dependence, illiteracy, and lack of access to

legal aid make it difficult for them to challenge customary practices. Local governance bodies such as panchayats sometimes promote or enforce regressive norms under the guise of tradition. Bridging the urban-rural divide in legal consciousness is crucial for the effective reform of harmful customs.

Inefficient Implementation of Laws

Even where progressive laws exist, their implementation often falls short due to administrative apathy, lack of political will, corruption, and inadequate infrastructure. Law enforcement agencies may be reluctant to intervene in “private” or “cultural” matters, especially in tight-knit communities where local customs are viewed as sacrosanct. Furthermore, judicial delays, lack of trained officials, and insufficient follow-up mechanisms lead to a gap between the letter of the law and its practical impact. This inefficiency emboldens those who wish to preserve discriminatory customs and undermines the credibility of the legal system in the eyes of victims.

Political Reluctance to Confront Sensitive Religious Customs

Reforming customs that are intertwined with religion often involves navigating politically sensitive terrain. Politicians and lawmakers may be reluctant to challenge practices that could alienate large vote banks or provoke communal unrest. As a result, personal law reform is frequently sidelined or approached cautiously, despite urgent need for change. The reluctance to enact a Uniform Civil Code (UCC), as envisioned in Article 44 of the Directive Principles, is a classic example of this political hesitation. In the name of preserving religious freedom and social harmony, gender justice is sometimes compromised, leaving harmful customs unchecked.

VI. The Way Forward: Harmonizing Custom with Constitutional Morality Reforming discriminatory customs requires:

Promoting Gender-Sensitive Education and Legal Literacy

One of the most effective long-term solutions to dismantling discriminatory customs is the promotion of gender-sensitive education and legal awareness. From an early age, individuals must be taught the values of equality, dignity, and respect for human rights through school curricula and public discourse. Education should not only challenge patriarchal mindsets but also empower individuals—particularly women and girls—to recognize and resist oppressive practices. Simultaneously, legal literacy campaigns, especially in rural and marginalized communities, are essential to ensure that people are aware of their rights and the legal remedies available to them. A well-informed citizenry is key to challenging unjust customs and demanding accountability.

Strengthening Grassroots Campaigns and Women's Rights Organizations

Grassroots activism and community-level mobilization play a pivotal role in transforming societal norms and pushing for legal reforms. Women's rights organizations and civil society groups act as catalysts for change by raising awareness, providing legal aid, organizing protests, and supporting victims of customary injustices. These groups often bridge the gap between the legal system and marginalized communities, making justice more accessible. Strengthening such organizations—through funding, legal backing, and policy support—can help sustain long-term campaigns aimed at eradicating regressive practices and promoting gender equity at the local level.

Encouraging Judicial Activism and Progressive Interpretation

The judiciary has often emerged as a defender of constitutional morality, especially when legislative or executive action has been lacking. Landmark rulings—such as those striking down Triple Talaq or expanding women's inheritance rights—demonstrate the transformative role that judicial activism can play in aligning custom with constitutional values. Courts must continue to interpret personal laws and customs through a progressive and rights-based lens, ensuring that no tradition is allowed to violate fundamental rights. Judicial training, sensitization, and a strong commitment to precedent rooted in gender justice are necessary for continued advancement.

Involving Religious and Community Leaders in Reform Dialogues

Since many customs are linked to religion and community identity, inclusive dialogue with religious and community leaders is crucial for meaningful reform. These leaders often wield significant influence over social norms and can help shift public opinion when engaged constructively. Instead of imposing top-down legal changes that may provoke backlash, involving community stakeholders in the reform process can foster greater acceptance and legitimacy. Creating spaces for interfaith and intra-community dialogues that emphasize constitutional values and gender justice can help bridge the gap between tradition and modern law.

Considering a Uniform Civil Code While Respecting Cultural Diversity

The debate over implementing a Uniform Civil Code (UCC) has long centered on the tension between equality and religious autonomy. While a UCC has the potential to eliminate gender-based disparities in personal laws across religions, it must be approached with caution, sensitivity, and inclusivity. The objective should not be cultural homogenization but rather the harmonization of personal laws with constitutional principles. A well-drafted and consultative UCC, developed through democratic engagement and consensus-building, can promote gender justice while respecting India's pluralistic ethos. It can serve as a crucial step in ensuring that all citizens, regardless of religion or community, enjoy equal rights under the law.

VII. Conclusion

Customs and traditions undoubtedly form the backbone of a society's cultural identity, offering continuity, a sense of belonging, and social cohesion. However, their legitimacy in a modern constitutional democracy must be constantly evaluated against the foundational values of the Constitution—equality, dignity, liberty, and justice. In the Indian context, where personal laws and customary norms often intersect with deeply entrenched patriarchal structures, certain customs—though historically accepted—have come to conflict with the rights and freedoms guaranteed under Part III of the Constitution. While it is important to respect the diversity of India's cultural and religious traditions, customs that discriminate on the basis of gender, suppress individual autonomy, or violate human dignity cannot be shielded under the guise of cultural preservation. The persistence of such discriminatory traditions undermines the nation's progress toward gender justice and weakens the rule of law. Therefore, any practice or norm that contradicts the spirit of constitutional morality must either be reformed to align with constitutional principles or be abolished altogether.

Achieving this balance requires a multifaceted and collaborative approach. Legal reforms are indispensable, but laws alone are not sufficient unless complemented by effective enforcement, public education, social awareness, and community engagement. The judiciary must continue to play a proactive role in interpreting customs through the lens of human rights and constitutional morality. Simultaneously, civil society organizations, educators, and policymakers must work together to challenge regressive mindsets and promote a culture of equality and respect. Ultimately, the survival of customs in a constitutional democracy depends on their ability to evolve. For India to move forward as a truly inclusive and egalitarian society, custom must become an instrument of social justice—not a barrier to it. Upholding the Constitution as the supreme law of the land means that all traditions, no matter how long-standing, must yield to the ideals of equality, non-discrimination, and human dignity. Only then can the vision of a just and equitable India be realized in both law and practice.

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