



E-ISSN: 2790-0681
P-ISSN: 2790-0673
IJLJJ 2022; 2(2): 05-09
Received: 06-04-2022
Accepted: 07-05-2022

Dr. Pradeep Kumar Sharma
Assistant Professor,
Department of Law, Dr. B.R.
Ambedkar National Law
University, Sonapat, Haryana,
India

Dr. Sanjeev Kumar
Assistant Professor,
Department of Legal History,
Dr. B.R. Ambedkar National
Law University, Sonapat,
Haryana, India

Correspondence
Dr. Sanjeev Kumar
Assistant Professor,
Department of Legal History,
Dr. B.R. Ambedkar National
Law University, Sonapat,
Haryana, India

International Journal of Law, Justice and Jurisprudence

Orchha kingdom's customary law protection under the constitution of India

Dr. Pradeep Kumar Sharma and Dr. Sanjeev Kumar

DOI: <https://doi.org/10.22271/2790-0673.2022.v2.i2a.37>

Abstract

This research-based article talks about the customary practices of Orchha Kingdom which were recognized by the Union of India at the time of accession of this kingdom. Orchha is a historically famous place of Bundelkhand region in Niwari district of Madhya Pradesh. It has the wide collection of historical, natural and living heritage. The territory was founded by Rudra Pratap Singh, the Bundela chief in the year 1501 AD. During the rule of the British Empire in India, Orchha was appointed as one of the princely states of India. After the country gained independence from the British administration in the year 1947, the princely state was acceded to the newly formed Union of India, also called the Dominion of India, in the year 1950. The most important architectural site of this kingdom is The Ram Raja Temple under which lies the popular custom of worshipping Lord Rama both as a God and as a King, inside a palace. This temple was built only for Lord Rama to be worshipped with all the royal furnishings. Even today, a Guard of Honour is held every day, police personnel have been designated as Guards at the temple, much in the manner of a king. The royal feast is also provided to the deity at the temple as a royal repast. This temple has a huge grandeur attached to it.

Keywords: Customary law, guard of honour, god, heritage, humanitarian law, international law, king, lord Rama, Princely state, union of India, Rama Raja temple, phenomenon, etc.

Introduction

Custom is a habitual course of conduct observed uniformly and voluntarily by the people. Custom occupies an important place in regulation of human conduct in almost all the societies. In fact, it is one of the oldest sources of law-making. C.K. Allen defined custom as, "legal and social phenomenon growing up by forces inherent in society" ^[1]. But with progress of the society custom gradually diminish and legislation and judicial precedents become the main source. Custom is created by the people, by their unconscious adoption of a certain rule of conduct whenever the same problem arises for solution and its authority is based on nothing but its long-continued use and recognition by the people. Custom is some kind of special rule which is followed from time immemorial. Law based on custom is known as customary law. Custom, as a source of law, involves the study of a number of its aspects: its origin and nature, its importance, reasons for its recognition, its classification, its various theories, its distinction with prescription and usage, and the essentials of a valid custom ^[2].

Orchha is a historically famous place of Bundelkhand region in Niwari district of Madhya Pradesh. It has the wide collection of historical, natural and living heritage. The territory was founded by Rudra Pratap Singh, the Bundela chief in the year 1501 AD. During the rule of the British Empire in India, Orchha was one of the princely states of India. After the country gained independence from the British administration in the year 1947, the princely state was acceded to the newly formed Union of India, also called the Dominion of India, in the year 1950. Customs are always an integral part of kingdoms and so has been the case with Orchha Kingdom as well ^[3].

Significance of the theme

The main significance of this topic is to study the various customs prevailing in India from which our legal authority derives. It recognizes the importance of customs with special reference to Orchha Kingdom. The customs are the oldest source of law.

¹ Custom as Source of law, available at, <https://www.blogpleaders.com> (last visited on December 12, 2021).

² Custom as Source of law, available at, <https://www.law.uok.edu.in> (last visited on December 12, 2021)

³ Princely State of Orchha, available at, <https://www.indianetzone.com> (last visited on December 12, 2021)

This research overall objectifies and act as a bridge to connect people with the ancient customs to modern days of people.

Objectives of the Study

The objectives of the study are some following:

1. To Study the historical practices of customaries values
2. To examine the recognition of kinds of customs at national and international level.
3. To analyze the modern aspects of society in connection with ancient customs.
4. To highlight in modern time the customary practices at India and International Court of law.

Research Methodology

The study is based on the primary and secondary sources of information. Here, we shall study the various steps that are generally adopted by a researcher in working on his research problem along with the logic behind them. It is necessary for the researcher to know not only the research method/techniques but also the methodology. The data collected from the secondary sources of information is classified and presented in the form of simple tables for easy understanding. In addition to this, the literature is collected through journals, books, articles, seminar reports. The city of Orchha has a rich history which unfortunately has not been that popular as some of the other places of India. Orchha as a smaller kingdom within the center of India Orchha survived often on excellent diplomatic relations with the then neighboring kingdoms or states. Thus, customary laws of Orchha Kingdom are accepted by Government of India.

Essential of a Valid Custom

Each and every custom cannot be legally enforced. They must be proved before the courts like any other thing before they can have the force of law. Custom to be legally recognized by the courts and acquire the binding force of law evolved some judicial tests. These tests are as follows [4].

Immemorial Antiquity

The first test of a valid custom is that it must be immemorial. It must be old or ancient and must not be of recent origin. Allen, Paton, Salmond and all other jurists are of the views that before custom can be have the validity in law; it must be shown that the custom is of immemorial antiquity or origin. To keep the force and power of precedent the law sees that modern or unreasonable custom should not be accepted.

Reasonableness

The second important judicial test of a valid custom is that it must be reasonable. It must not be unreasonable. It must be useful and convenient to the society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. That is the burden of proof upon the person who challenges the custom. 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. In *Lyme Corporation V/s Wolstanton* [5], the court held that where a custom is vague or unreasonable it must not be enforceable in court of law.

Morality

Third test of a valid custom is that a custom, to be valid, must not be immoral. It is a well-recognized rule that a custom should not be opposed to decency and morality. A custom must not be opposed to public policy. As decided by Bombay High Court in *Baluswami vs. Balakrishna* [6] that the prevalent custom of practice of marrying a daughter's daughter is an unethical

Continuance

The fourth test for a valid custom is that it must have been continuously observed without any interruption. General rule is that if a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all. It must have been in existence and recognized by the community without any intervening break, for such duration as may, under the circumstances of the case, be recognized as reasonably long. Blackstone has drawn a distinction between the interruption of the 'right' and the interruption of the mere 'possession'. It is the discontinuance of the 'right', for howsoever small a time that ends the custom. It means that if possession for some time is disturbed, but the claim to enjoy the custom is not abandoned, the custom continues. The discontinuance of the right even for a day shall put the custom to an end. In *Muhammad Hussain Faroki vs, Syed Miam Saheb* [7] it held that there is no custom unless there is continuity.

Peaceable Enjoyment

The next important test is that custom must have been enjoyed peaceably. If a custom has been in dispute for a long time in a court of law or otherwise, it will negate the presumption that it did originate by consent as most of the custom naturally did. Therefore, for the enforceability of a custom; it is necessary to show that the custom has been enjoyed without any disturbance or contest. A custom is based on consent or habit, and unless there was an undisturbed existence of the custom, we cannot say that it was based on the general consent of the people.

Consistency

The test for a valid custom is that it must be in conformity with the statute law. It should not be contrary to the statutory law. A custom should necessarily yield where it conflicts with a statutory law. This rule is observed as a positive principle of law in England and countries like India which follow English law. The Roman law and various continental systems, however, do not adhere to this rule. Justinian in his corpus juris mentions several statutes which have fallen into disuse by a posterior contrary custom. That is to say, the latter rule prevails over the earlier, regardless of their origins and legislation has no inherent superiority in this respect over custom. If an enacted law comes first, it

⁵ Newcastle-under-Lyme-Corporation v. Wolstanton, (1947), Ch 92

⁶ Baluswami v. Balakrishna, AIR 1957 Mad.97

⁷ Muhammad Mahmood Hussain Faroki alias Chan Bash v. Syed Abdul Huq alias Sabju Saheb, minor by guardian Syed Miah Saheb, (1942) 1 MLJ 564

⁴ Sanjana Shikhar, XV Essential Element of Valid Custom(Legal Bites,2021)

can be repealed or modified by a later custom and vice versa. Commenting on this aspect saving any point e doubt that customs and statute share put on the same level with respect to their legal efficiency and customary law may complete, modify or repeal a statute, it may create a new rule and substitute it for a statutory rule which it has abolished. Supreme Court in *Mohammad Baqar vs. Naim-Un-Nisa- Bibi* ^[8], that the existing custom should not be in contrary to the law made.

Which follow English law? The Roman law and various continental systems, however, do not adhere to this rule. Justinian in his corpus juris mentions several statutes which have fallen into disuse by a posterior contrary custom. That is to say, the latter rule prevails over the earlier, regardless of their origins and legislation has no inherent superiority in this respect over custom. If an enacted law comes first, it can be repealed or modified by a later custom and vice versa. Commenting on this aspect Savigny pointed out that customs and statutes are put on the same level with respect to their legal efficiency and customary law may complete, modify or repeal a statute, it may create a new rule and substitute it for a statutory rule which it has abolished. Supreme Court in *Mohammad Baqar vs. Naim-Un-Nisa-Bibi* ^[9], that the existing custom should not be in contrary to the law made.

The Custom of Orchha Kingdom

We know that Constitution is the Supreme Law of the Land and it is important for any custom to go through all the tests that have been mentioned above and if the custom fails in any of the tests and then it can never be regarded as a valid custom and cannot be in existence as well. Orchha is an ancient city which was earlier a kingdom, with a magical soul and a colorful past. Basically, the customary practice of Orchha Kingdom lies under the Ram Raja Temple. This temple has been an epitome of royalty and also a sacred place of pilgrimage. Large number of devotees can be seen at this place and it is also known as Orchha Temple. There is a brief history attached to this temple and many historians believe that the customary practice of worshipping Lord Shiva both as a God and a King.

The King of Orchha Madhukar Shah Ju Dev (1554 to 1592) was a devotee of Banke Bihari (Lord Krishna) of Brindavan while his wife Queen Ganesh Kunwari, also called Kamla Devi, was a devotee of Lord Ram. One day the King and the Queen went to Lord Krishna's temple but the temple had closed by that time. The queen urged the king to go back but the king wanted to stay. So, both the king and queen decided to stay back. They joined a group of devotees who were singing and dancing in praise of Lord Krishna outside the temple. The king and queen also joined in the prayers and started to sing and dance. It is believed that Lord Krishna and Radha personified and danced with them and golden flowers were showered from the heavens at that moment.

After that incident the king asked the queen to accompany him to Braj-Mathura the land of Lord Krishna, but the queen wanted to go to Ayodhya. The king got annoyed and told the queen to stop praying child form of lord Ram and accompany him to Braj. But the queen was adamant, after which the king said that "You keep praying to Ram but Ram

never appears in front of us, unlike Lord Krishna who danced with us along with Radha the other day. If you are so adamant to go to Ayodhya then go, but return only when you have the child form of Ram with you. Only then will I accept your true devotion." The queen took a vow that she would go to Ayodhya and return with the child form of Ram or else she would drown herself in Ayodhya's Sarayu River. The queen left the palace and started the long journey to Ayodhya on foot to bring Lord Ram with her to Orchha. She didn't tell the King before leaving that she had ordered her servants to start building a temple (Chaturbhuj Temple) when she brings Lord Ram with her.

On reaching Ayodhya, the Queen started praying to Lord Ram close to Laxman or at near Sarayu River. She ate only fruits, then she gave up fruits and ate only leaves, and eventually she gave up all food. The Queen fasted and prayed for about a month but Lord Ram did not appear, so eventually in despair, she jumped into the river at midnight. Just then something magical happened and Lord Ram appeared in child form in the Queen's lap.



Picture 1: Orchha King Built Ram Raja Temple in his Kingdom



Picture 2: Chaturbhuj Temple Built by Orchha Rulers

Lord Ram told the queen that he was happy with her prayers and she could ask for a boon, at which the queen asked Ram to come with her in child form to Orchha. Ram agreed to go but he put forth three conditions: "I will travel only in Pukh Nakshatra. When Pukh Nakshatra will end I will stop and resume only when Pukh Nakshatra sets in again. In this manner I will travel from Ayodhya to Orchha on foot along with a group of sages. Secondly, once I reach Orchha, I will be the King of Orchha and not your husband. Thirdly, (since the child form of Ram would travel in the queen's lap), the first place you seat me will be my final place of stay and will be famous by the name of Ramraj." The Queen agreed and started her journey to Orchha with baby Ram in her lap. Since the queen travelled only in Pukh Nakshatra it took 8 months and 27 days for the queen to reach Orchha from Ayodhya on foot (between 1574 and 1575).

King Madhukar Shah meanwhile had a dream where Lord Banke Bihari scolded him on discriminating between Lord

⁸ Mohammad Baqar and Ors. v. Naim-Un-Nisa Bibi And Ors., AIR 1956 SC 548

⁹ Mohammad Baqar and Ors. v. Naim-Un-Nisa Bibi And Ors., AIR 1956 SC 548

Ram and himself. Lord Banke Bihari reminded the King that Lord Ram and he are one and the same, there is no difference. King was very apologetic when he woke up and found out that the queen was returning from Ayodhya. The King went to receive the queen with horses, elephants, servants, food, etc. and apologized to the queen. The Queen did not accept king's apology and refused the comforts offered to her by the King. The Queen claimed that she now possessed everything one could ever ask for (Lord Ram in child form). On returning to Orchha, the queen went back to her palace with baby Ram and retired in her room for the night, only to take Lord Ram to the Chaturbhuj Temple the next day. But according to Lord Ram's conditions he took the first place where he was seated, hence Lord Ram transformed into an idol and got transfixed in the queen's palace itself. To this day the Ram Raja Temple is in the queen's palace (Ranivaas or Rani Mahal) and not in the Chaturbhuj Temple which is right next to the palace. Originally, lord Ram was standing position and the queen was serving Him 3–4 hours every day in standing position and used to get tired. Lord Rama requested to serve Him sitting only but queen replied that Your Lordship is standing then how she can sit. The deity of Lord Rama sat down on hearing this from queen (source Bhakt mal by Nabhadasi Maharaj). Additionally, as promised by the queen, Lord Ram is the King (Raja) of Orchha, hence the name Ram Raja Temple.

Shri Ram is sitting in Padmasan (Lotus position), with only left leg crossed over the right thigh though (both legs are not crossed unlike in the usual Padmasan). Every day after worship sandal wood's teeka is applied on Lord Ram's left toe. It is believed when visiting the Raja Ram Darbaar if worshippers look at the left foot's big toe, then their wish gets fulfilled. Spotting the left foot's big toe on Lord Ram's idol is not easy, one should not look down since the left leg is folded, instead one should look close to Lord Ram's right hand. The temple priest can also help in spotting the toe.

After the country gained independence from the British administration in the year 1947, the princely state was acceded to the newly formed Union of India and this was the only time when Government of India permitted the custom of worshipping Lord Rama because it had all the essentials of a valid custom. There are many customs which have not been recognized by Union of India because some how they lack the qualities of a valid custom. In Orchha's case, the custom was not against any public policy and people are happily enjoying this custom and it has also been given due respect by the Hon'ble Government of India. Even today, the Guard of Honour provided by the Madhya Pradesh Government and the festivities take place in the same manner as they used to take place in the earlier era. Royal food is provided to the Lord and due care is taken by the police personnel^[10].

We find certain instances where if the custom fulfils all the requirements, then it even over powers the laws, rules and regulations made by the Legislature of the country. Under Hindu Marriage Act, 1955; when the Act talks about conditions and ceremonies of a valid Hindu Marriage then it particularly and expressly states that the parties can perform certain processes if they are entitled for the same due to the prevalence of certain customary practices. Constitution

expressly doesn't talk about customs but it is the duty of the judiciary to declare any law or practice which is against Constitution, as null and void. The Grund norm cannot be left ignored in any of the ways.

Judicial Pronouncement of Custom as Law

- **Shibnarain Mookerjee v. Bhutnath Guchait** ^[11]: A custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, has been held to be unenforceable in law both because it is unreasonable and uncertain.
- **Palanjappa Chettiar v. Alayan Chetti** ^[12]: A custom prevails among the Chetti inhabitants of a few villages in Madura District whereby when a husband during the life of his wife marries another wife, he sets aside a portion of his property for the first wife's maintenance (called moopu) and the rest of the property is divided in two parts, each part going to the sons of each wife.
- **Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon** ^[13]: Nairs in South Malabar have peculiar usages. Some of them have been judicially established. Amongst them, polyandry was legally recognised, and descent of property was through females. Adoption of females with the family when necessary to preserve it was also recognised.
- **Tarachand v. Reeb Ram (3 Mad. HCR 50)**: The Judges of the Madras High Court referred to the jurisprudential theories and said that they all referred to customary law, antagonistic to the general law, to be established by evidence of the acts of a single family confessedly subject to the general law.
- **Bhiku v. Sheoram (AIR 1928 Nag. 87)**: A right enjoyed for 20 years by kumhars to take earth from a portion of a field was held valid as a customary right.
- **Mt. Subhani v. Nawab** ^[14]: The Privy Council held that in India it is not of the essence of the rule that the custom to be binding must be ancient and its antiquity must be carried back to a period beyond the memory of man - still less, that it is ancient in the English technical sense. It depends 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 time as to show that it has, by common consent, been submitted to as the established governing rule of the particular locality. In the instant case, a custom proved to be in existence over a period of nearly 30 years was held legally enforceable. The Privy Council has held that customary law, if found to exist in 1880, must be taken to have the ordinary attribute of a custom that it is ancient.

^[11]Shibnarain Mookerjee v. Bhutnath Guchait (1918) ILR 45 Cal. 475

^[12]Palanjappa Chettiar v. Alayan Chetti (1921) 48 IA 539

^[13]Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon (1900) 27 IA 231

^[14]Mt. Subhani v. Nawab ((1940) 68 IA 1, 31, AIR 1941 PC 21)

^[10] Orchha-A Treasure History of India, available at, <https://www.farhorizontours.com/blog> (last visited on December 14, 2021)

- **Balwant Rao v. Baji Rao** ^[15]: The Privy Council said that the commentators do not enact, they explain and are evidence of the congeries of customs which form the law.
- **Md. Ibrahim v. Shaik Ibrahim**, ^[16]: It was stated that in India, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedan.
- **Roshan Ali Khan v. Chaudhri Asghar Ali** ^[17]: Customs prevail in Oudh, mainly in the matter of succession and they have figured before the courts from time to time both among Hindus and Muslims.
- **Krishnan v. Sridevi (1889) ILR 12 Mad. 512**: On the Malabar Coast, Maramakatayam law of inheritance in which descent is traced in the female line, a person's heirs being the children of his sister, came to be judicially recognized on the basis of custom.

International Reorganization of Customs

Customary International law refers to the International customary practices that has not been formally written or inculcated into Act or any convention or treaties but are very much consider as law. After the Geneva Convention signed the customs which were not written also got recognized and legally enforceable. Customary International Law has been defined under Article 38 (1) (b) of the Statute of International Court of Justice as “usual and general practice accepted as law”. It shows that customary law as sources of international law ^[18].

Customary laws are humatarian law that is in existence since time immemorial. They are totally based on natural justice. In case Portugal vs. India, it was held by ICJ that if two nations are following their customs while entering into a treaties or convention then both the customs are legally enforceable in court of law.

If we take some examples of Indian customs followed worldwide:

- Namaste: the traditional custom of greeting people. It has been globally recognized. US President and UN Secretary General Ban-Ki- Moon used it in New York while celebrating 1st International Yoga Day. It is one of the five traditional greetings mentioned in the Vedas.
- The Religious Symbol of Swastik as used by Adolf Hitler, the fore arms of it represents the four Vedas.
- Removing shoes while entering into any religious pilgrims.

Concluding Remarks

Custom is a habitual course of conduct observed uniformly and voluntarily by the people. Custom occupies an important place in regulation of human conduct in almost all the societies. In fact, it is one of the oldest sources of law-making. But with progress of the society custom gradually diminish and legislation and judicial precedents become the

main source. Custom is a significant wellspring of law and it is attractive to characterize the equivalent. Custom has been characterized by different legal advisers according to their idea, getting, theories, views and beliefs. According to Salmond, “custom is the exemplification of those standards which have complimented themselves to the national still, small voice as standards of equity and open utility”. The custom should be certain, based upon morality, faraway from ambiguity, in conformation with public policy, etc. Orchha is an ancient city which was earlier a kingdom, with a magical soul and a colorful past. Basically, the customary practice of Orchha Kingdom lies under the RAM RAJA TEMPLE. This temple has been an epitome of royalty and also a sacred place of pilgrimage. Large number of devotees can be seen at this place and it is also known as Orchha Temple. There is a brief history attached to this temple and many historians believe that the customary practice of worshipping Lord Shiva both as a God and a King. Even today, Lord Rama is provided with guard of honour, royal food and festivities, etc. by the Government of India. This temple is a magnificent example of how a customary practice can be recognized by the government if it passes all the tests. Many case laws have been described in this research-based assignment in which it is shown that how courts and law have incorporated the customs for the smooth functioning of society. These cases explain how law and customs are inter-related with each other. The internationally recognition of Customs shows the relevancy of it in guiding people's life in day-to-day activity in the form of law. In short, the all provisions as well as judicial pronouncement declare customs as soul of Legal system in India.

References

1. Customs As a Source of Law, available at: <https://www.legalserviceindia.com/legal/article-4874-customs-as-a-source-of-law.html>(lastvisitedon December 12, 2021).
2. Dr. BN Mani Tripathi. Jurisprudence- The Legal Theory 192 (Allahabad Law Agency, Faridabad, 19th edn. 2019).
3. Jain MP. Indian Constitutional Law (Kamal Law House, Calcutta, 5th edn., 1998).
4. Orchha – A Treasured History of India, available at: <https://www.farhorizontours.com/blog/orchha-treasured-history-india> (last visited on December 10, 2021).
5. Princely State of Orchha, available at: https://www.indianetzone.com/60/princely_state_orchha.htm lastvisitedon December 12, 2021.
6. Topic: Custom as a source of law, available at: <http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf> (Lastvisited on December 13, 2021).

¹⁵Balwant Rao v. Baji Rao (1921) ILR 48 Cal. 30, 41

¹⁶Md. Ibrahim v. Shaik Ibrahim, AIR 1922 PC 59

¹⁷Roshan Ali Khan v. Chaudhri Asghar Ali (1929) 57 IA 29, 33

¹⁸Importance of Customary International Law, available at, <https://www.blogileaders.com>(last visited on December 16, 2021)