

**The Contest between Customary Law/Folk Law and Religion:  
A Case Study of Kashmir**

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Customary practices are rooted in antiquity. Custom signifies the initial attempts on the part of groups of human beings to provide a regulatory system for their members in the conduct of their affairs in society. Custom incorporated the traditions and cultural practices adopted by groups of people and followed over long periods of time during the course of assuming formal form of a clan and emerging as a unit of social organization. As clans and groups acquired economic strength and evolved hierarchical organizational structures, customs also became elaborate regulating personal and social affairs of their members. In due course of time, observance of customs became incumbent upon the members. Since the clan undertook the responsibility of welfare and security of lives and properties of their members, non-observance of customs invoked the punishment of expulsion of a member or members from the group or clan who would be designated as 'out law'. These outlaws would face the consequences of their defiance and could even put to death. Gradually, customs acquired cognitive and normative character and evolved their own sanctioning mechanisms. The recognition of a clan with its established hierarchical organizational structure in society during the course of onward march of human civilization provided the grounds for legitimacy for the enforcement of customs. Interestingly, with the emergence of modern nation state where the custom was gradually replaced by state law, the non-observance of customs still invite ostracism in some social groups with severe social consequences. The group might be lacking a formal coercive capacity, yet it has enough moral and social coercive power to enforce custom of a clan. However, certain social groups still enjoy enough coercive power to enforce their customs, e.g. tribal groups in NWFP (Pakistan), tribals in India and Bangladesh, some caste groups in India or tribal groups in Africa.

Customs which assumed the forms of unwritten codes of conduct regulating private and social behaviour of individuals and groups were rendered ineffective by two processes. Firstly, the onset of organized religion which promulgated its own codes to regulate the private and public conduct of individuals. In due course of time, the followers of religion devised their own

enforcement mechanisms for enforcing the codes among the followers, and prescribing sanctions for the disobedience and non-observance of the codes. It is interesting to note that the religion provided guidelines, using persuasive techniques appealing to the hearts and minds to follow the guidelines in amending the individual and collective behaviours. It was much later, through interpretations and commentaries, that coercive mechanisms were devised to enforce the religious codes. The acquisition of state power by specific religious groups made the enforcement of religious codes an easy affair. It is equally interesting to note that religion incorporated a host of customs within its fold without expressly acknowledging the fact. Recently in a reply to Special Rapporteur on Intolerance based on Religion and Faith, Saudi Arabia government informed the UN Commission on Human Rights that ‘our laws were based on our national customs [1].

Secondly, the process of law making in the modern democratic nation state replaced custom as the only source of law. Since the law making and law enforcing mechanisms are defined constitutionally, custom has gradually paved the way for the promulgation and enforcement of State Laws. The customs do find a place in such a system, of course, with the approval of the legal system. The legal systems which have provided space to ‘custom’ have laid down the exceptions for the legal validity of a customs to ensure that they are not opposed to public policy, that they are not obscene or contrary to justice, equity and good conscience.

The emergence of ‘State Law’ has not completely obliterated the appeal and legitimacy of ‘custom’, which has retained its position as ‘Customary Law’ in many parts of the world. Moreover, it is increasingly being realized that customary law is highly relevant in maintaining harmonious social relationships and it is the best mechanism for ensuring economic and environmental protection in societies. In this vein ECOSOC of the UN, through, declarations and resolutions, is re-emphasizing the relevance and recognition of Custom, as an important source of law. The Declaration on the Rights of Indigenous Peoples — particularly their relationship to Land and Declaration on Economic, Social and cultural Rights—may be seen in this very context of relocating the position of custom in modern societies and providing legal guarantees for its protection. It is being argued that uniformization and harmonization sought to be brought about by religious laws and/or state laws is violating the human rights of persons, apart from creating other social and political tensions in societies.

## II

### **The study:**

Generally, in view of the cultural diversity of India, customary law finds recognition in the Indian legal system. The Courts are liberal in upholding Customary law.

The place of customary law in Jammu and Kashmir State is the focus of this study. This study seeks to establish the interface between Religious Law and Customary Law. The Jammu and Kashmir State, hereinafter to be referred as Kashmir, has been chosen for this study for the following reasons;

- 1) It is the only Muslim majority state in the Union of India. The Muslims constitute about 65% population in the entire J&K State and Muslims constitute 93% population in the valley of Kashmir;
- 2) The Muslims are governed by State Laws; however, they are governed by Muslim Law and Customary Law in their personal affairs viz., Marriage, Divorce and inheritance;
- 3) The Customary Law impinging upon Muslim Law of Inheritance and adoption has been prevalent in Kashmir and this position has been upheld by the Courts;
- 4) The Muslim social and political groups have been demanding and taking initiatives to replace the Customary Laws with Islamic Laws;
- 5) The militant separatist groups active in Kashmir spearheading a militant separatist movement during the last twelve years and committed to establish an Islamic Order in Kashmir have not succeeded in changing the status quo relating to customary law in Kashmir. Since this situation has resulted in an interface, which at times assumes confrontationist postures between two world-views, it is appropriate to locate the status of custom in Islam.

### **Islam and Customary Law**

The Islamic Law, generally described as *Sharia*, is a comprehensive Code and prescribes the norms of human behaviour, defines rights and prescribes duties in all spheres — legal, religious, moral, social and economic. However, the fact that Prophet of Islam provided special recognition to Customs is generally underestimated. Obviously, these Customs cannot be described as part of divine revelation, a position usually taken by those who oppose the recognition of ‘Custom’ within Islamic framework. The Prophet is reported to have approved certain pre-Islamic usages and allowed their continuation without any expression of disapprobation [2]. According to a tradition attributed to Prophet: “Virtues of pre-Islamic period are to be retained in Islam [3]”, the status of custom in Islam becomes clear.

The status and position of Custom in Islamic Law has been varied in different phases of evolution of Islamic Law. The different schools of Islamic Law assigned different positions to Custom. For instance, Imam Shafi, the founder of Shafi School of Islamic Jurisprudence does not recognize Custom. However, Qadi Abu Yusuf, a great exponent of Hanafi School of Islamic Jurisprudence, and the Chief Justice of Abbasid Court held the opinion that:

“One who is not familiar with the Custom of his time is not permitted to give a religious verdict [4]”.

Be that as it is, Customary Laws were relegated to an inferior position in Islamic Legal Theory. Moreover, the territoriality of Customs became a very controversial subject. It may be mentioned that *Shariah*, which evolved over a long period of Islamic rule, recognizes those customs as were approved by Prophet and his four Caliphs. These Customs had been prevalent in pre-Islamic Arab world. However, there is no reference to the Customs which were prevalent beyond Arab world and subsequently came under the sway of Islam.

It is a well-recognized principle of Jurisprudence that in case of a contradiction between ‘State Law’ and ‘Custom’ the former shall prevail. However, there is no such final position regarding the contradiction between the ‘Religious Law’ and ‘Customary Law’. Ironically, some Scholars put both at par, which does not seem to be a correct position. In fact Custom became part of religious code and both became synonymous with each other in the places of the origin of religion. However, when religion transcended the boundaries of its origin, it had to face the challenge of Customs of other geographical locations. This contradiction has remained unresolved leading to friction between those who emphasize the supremacy of religious laws, particularly in personal matters, over Customary Law and those who are pleading the reverse of it.

This paper is precisely addressing this very issue in the context of Kashmir.

### III

#### **Customary Law in Kashmir**

Islam made its initial approach in Kashmir in eighth century AD with the arrival of some Muslim Scholars, but the mass conversions due to varied political, social and historical reasons took place in 14<sup>th</sup> century when Muslim rule was established in 1339 AD. The advent of Islam in Kashmir was the result of missionary efforts of visiting saints and *sufis* from Central Asia. However, Islam did not emerge in Kashmir in a pure and pristine form. The missionaries who preached and propagated Islam had to incorporate Kashmir’s pre-Islamic customs and traditions in Islam, which resulted in the emergence of a specific brand of Kashmiri Islam. Custom was an essential component of this Islam. It is important to note that the first tension and friction in Kashmir society arose when a Shia Scholar from Iraq, Mir Shamsuddin Iraqi came to Kashmir in 1496 to impose Islamic precepts in their pure form. This Scholar “believed that Islam faced a grave crisis, having been corrupted by the introduction of non-Islamic practices, and he therefore endeavoured to remove them and to restore Islam’s pristine purity [5]”. His initiatives, which in

today's parlance may be described as 'fundamentalism' created tension and friction in Kashmir Society. The friction grew so strong that Kashmir was annexed by Mughals, and later went to Afghans, and then Sikhs and ultimately came under Dogra rule until 1947.

Customs relating to social, cultural, personal and environmental spheres have been prevalent in Kashmir since time immemorial. Walter Lawrence provides graphic details of customs prevalent in Kashmir in *The Valley of Kashmir* (London, 1895). However, the first initiative to codify customs to prepare a basis for a codified Customary Law in Kashmir was made during the last phase of Dogra rule in 1915 AD. An Assistant Settlement Officer was appointed to prepare a consolidated code of tribal customs, relating to succession, inheritance, dower, divorce, adoption, marriage etc. prevailing in Kashmir. He compiled a Code known as *Code of Tribal Customs in Kashmir* hereinafter to be referred as Code. This consolidated Code was incorporated as Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1920. The Section 4(d) of the Act accorded supremacy to Custom over person law [6].

This position has been ratified by the Courts in their various decisions[7].

A survey of Customary Law in Kashmir brings forth the heterogeneity of Muslim society at the social levels. This heterogeneity is based on professions, language, geographic locations and tribal affinities. Thus one comes across the Muslim groups (or tribes) as *Gujjars, Bakarwals, Mussalman Pirs, Babas, Sayeds, Dunga Hanz, Watalas* etc. This social stratification is valid in other Muslim societies also. Customs vary from clan to clan or tribe to tribe and from place to place.

The Act provides that custom in Kashmir overrides the (Muslim) Personal Law, and is applicable to both agriculturists as well as non-agriculturists. As mentioned earlier that customs vary from tribe to tribe and place to place, yet there are customs which are largely prevalent at the provincial or state level and can be categorized as 'General Customs'. There are customs, which are prevalent and applicable to specific localities or to a particular tribe or a sect, or a family. The Courts have placed these customs in the category of 'Special Customs'. These customs provide exceptions to the general customs.

Kashmir is primarily an agrarian society with more than 70% population living in villages. Thus, the 'necessity' and 'requirement' of keeping the size of holdings intact and in order to keep a flock of cultivators readily available, an interesting Law of inheritance and adoption based on Custom has evolved in Kashmir. In order to maintain the integrity of family and keep the lineage of heirs continuing, adoption also emerged as a custom in society. These customs are obviously in contravention of Muslim Law. In other words, the Islamic Law of Inheritance does not override the Customary Law of Inheritance in Kashmir. It is equally interesting to note that

Customary Law has created a new category of ‘female heirs’ who are eligible to inherit the property on the footing of male heirs. Moreover, the Customary Law does not make any distinction between movable and immovable property or between ancestral and self-acquired property. For the reasons of brevity, all Customs and Customary Laws are not included in this study. It is confined to a discussion on the Institutional heirs recognized by Customary Law. It is this every category of heirs which is being sought to be de-recognized by a section of society.

1. ***Dukhtar-i-Khaana Nashin (Khaana Nishin Daughter)***: *Khaana Nishin* daughter is a unique institution created by Customary Law in Kashmir. *Khaana Nishin* daughter is the one who does not leave her parental home after marriage and continues to live there alongwith her husband. In *Sultan Lone v. Akhar Dar*[8], the Court observed:

“The expression *Khaana Nashin* according to etymological meaning signifies nothing more than that the daughters continued to live in their father’s house inspite of their marriage. It seems to have become more or less a term of art well understood in Jammu & Kashmir State as implying something more than the meaning referred to. When a daughter is spoken of as *Khaana Nashin*, the conception seems to be that the father treated such daughter *in all respects as a son* (emphasis added).”

Thus, according to this custom, it is necessary that *Khaana Nashin* daughter alongwith her husband must reside in her father’s house from the day of her marriage. The Courts have held that it is the father and not the mother who can make his daughter as *Dukhtar-i-Khaana-Nashin*.

A *Khaana Nashin* daughter inherits the property of her father just like a son [9]. Ironically, she excludes other married daughters who do not live with parents after marriage. A *Khaana Nashin* daughter succeeds to all kinds of property of her deceased father whether it is movable, immovable, ancestral or self acquired property.

## **2. *Khaana-daamad (Resident son-in-law)***:

*Khaanadaamad* is another institution recognized under Kashmir Customary Law to regulate familial affairs according to the choice of the master of the house.

The customary institution of *Khaana-nashin* daughter is to be seen in relation with the another institution of *Khanadamad*. Thus, when a *Khaana Nishin* daughter continues living with her husband in her parental house, the husband is called ‘*Khanadamad*’. In some tribes, a man has to first render service to the father of the would- be groom, before he is admitted as a ‘*Khandamad*’.

A *Khanadamad* does not inherit the property of the person who appoints him unless he assigns him a share through a deed. However, he is entitled to inherit from his deceased *Khana-nashin* wife, in case he does not remarry.

**3. *Pisar-Parwarda*:** The term *pisar-parwarda* generally means an adopted son. Thus, under the Customary Law in Kashmir, when a person who does not have a son, appoints one of his male Kinsmen or tribesmen to succeed him as his heir, the appointed heir is called *pisarparwarda*. However, in practice, the custom is practised by a person even though he has sons and appointment is not confined to Kinsmen or tribesmen. This authority empowers a man to replace an errant offspring or add to the manpower for domestic purposes.

The *pisar-parwarda* succeeds to the property of the person who appoints him as his heir as his son. In fact, the word ‘appointment’ is a fiction. It is actually the practice of adoption.

### **The Interface**

All the three institutions mentioned above have their roots in the agrarian society of Kashmir. A closer look and analysis of these institutions reveal that they have evolved to meet the requirements of a vast agricultural community. The custom regarding *Khaana Nishin* daughter and *Khaana-daamad* enables a person, particularly in the rural community to have a male available in the household to look after the family affairs and agricultural land in absence of the master, usually a father, in the family. He can also lend a helping hand to the master in his avocation. The institution is prevalent among agriculturists as well as non agriculturists. It has been generally observed that it is usually practised by those persons who do not have a son. Ironically, the muslim personal law as prevalent in Kashmir, excludes daughters from inheriting the agricultural land. However, a *Khaana Nishin* daughter inherits from the agricultural land, in addition to other movable or immovable property of the deceased father, and after her demise, the property is inherited by her husband as *Khaana-damaad*.

This institution is inviting the ire of proponents of Muslim Law on the ground that this custom excludes other married daughters from inheritance. However, the logic of the custom pleaded by the proponents of the custom is that a married women who lives with her husband away from the parental home is entitled to inheritance through her husband and enjoys the benefits of a home and hearth provided to her by her husband and in-laws. No such benefits accrue to a *Khaana-Nishin* daughter. This very logic applies to *pisar parwarda* (adopted son).

This institution enables a person to appoint a male heir in absence of a son in the family. Again, such an heir enables a person to assist him in conducting his family and occupational affairs. The presence of a male in the household is very essential, particularly among the rural folk, where it

is a taboo for women to indulge in the affairs which fall outside the domain of her domestic affairs.

These customs are basically secular institutions, which have evolved keeping in view the needs and requirements of people. It is equally true that Customary Law of inheritance is in contradiction with Islamic Law of inheritance. In the same vein the custom of adoption (as reflected in the institution of *pisar-parwarda*) is not approved in Islam.

Thus, there are demands from some sections of Muslim Society in Kashmir for the abrogation of these laws through a legislative enactment to be replaced by Muslim Personal Law. It may be mentioned that Muslim Personal Law (Shariat) Application Act, 1937 which codifies Muslim law to be applied to Muslims in their personal affairs all over India has not been applied to Kashmir. In the year 1938, one member of the then Praja Sabha (Legislative Assembly) of the state did introduce a Bill, Jammu and Kashmir Shariat Bill 1938, analogous to the Shariat Act of 1937, but it could not get through on the ground that it was deemed necessary to elicit the public opinion before the Bill was adopted and passed.

In the post Independent era of Jammu and Kashmir State, a member of the State Legislative Assembly and leader of Jamaat-i-Islami, Syed Ali Shah Geelani introduced a Bill titled "*The Jammu and Kashmir Application of Muslim Personal Law Bill*", 1977. The statement of objects of the Bill read as:

"In the State of Jammu and Kashmir, Muslims are residing in absolute majority; therefore it is necessary that courts shall decide the cases of Muslims with regard to inheritance, succession and marriage strictly in accordance with their Personal Law. Application of Customs by Courts in above mentioned cases is not only against the spirit of Islam but also creates confusion and results in prolonged litigation between the parties."

However, the Bill could not get through and ultimately lapsed.

These proposed legislative enactments could not get through because they did not enjoy the support of general public opinion. The weight of the public opinion is still in favour of Customary Law. Keeping in view this public support, the courts have been liberal enough to uphold a custom over personal laws.

The Customary Laws pursued by the people in Kashmir may be seen from human rights perspective as well. The human rights regime is laying a great emphasis on customs and their protection is guaranteed through various declarations and resolutions. Thus, the abrogation of customary laws in Kashmir, apart from violating the human rights, would lead to a great social

and political tension. The ongoing separatist militant movement which has the presence of strong Islamic groups pursuing the objective of setting up an Islamic order (*Nizam-e-Mustafa*) have not been able to change the position against Customs and Customary Laws.

There is a host of other customs, which have environmental significance and also provide clues for the effective protection of environment even without the help of legislative enactments. Two instances should suffice to provide illustrations to the point. The Muslims of Kashmir strictly follow a custom that ponds and springs can not be used for fishing. In this vein, a Muslim in Kashmir is forbidden to eat the fish from a pond and a spring. Kashmir abounds in springs and ponds. The prohibition, which is followed religiously, is to keep the ponds and springs clean. Similarly, certain trees usually having a herbal value, have been identified not to be defiled in any manner. Even children are advised to be careful. The rationale of these customs, as is evident, is to devise mechanisms for the environmental protection.

## Conclusion

A study of Customs and Customary Laws reveals that this regulatory system which evolved in many societies of the world has greater sensitivity in addressing the social, economic and environmental problems of the people. It is more democratic in the sense that it is being followed by an overwhelming majority of people without any formal coercive power to enforce it. There is a need to reassess the Customary/Folk Law and reconstruct it, wherever necessary, and bring it in tune with the modern times. It will provide greater satisfaction to specific cultural groups that they enjoy the freedom to choose the system of rules they think is best for them.

## References

1. Document E/CN.4/20006/65, UN Commission on Human Rights
2. Hassanally A. Rahman "Customary Law in Pakistan" in David B. Baxaum (Ed.) *Family Law and Customary Law in Asia*, p265 (The Hague 1968)
3. Quoted from Imam Ahmad, *Musnad*, Vol. 3, p 425 (Urdu Ed.) in Tahir Mahmood, *Custom as a Source of Law in Islam*, 7 J.I.L.I. p 102 (1965)
4. Akbarabadi, Syed Ahmad, "How to Effect changes in Islamic Law" in Tahir Mahmood, *Islamic Law in Modern India* (Ed.) p 116 (Bombay 1972).
5. Hassan, Mohibul, *Kashmir Under The Sultans* p 236-286 (Srinagar, 1974, 2<sup>nd</sup> Ed.)
6. Section 4 (d) of the Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977B (hereinafter referred Act) runs as under:

“In question regarding succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, waqfs, partitions, caste or religious usages or institutions, the rule of decision is and shall be as follows:

“The Mohammadan Law where the parties are Mohammadan and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been by this or any other enactment, altered or abolished or has *been modified by any custom* (emphasis added) applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been by this or any other enactment declared to be void by any competent authority.

7. *Mohd. Akbar Bhat v. Mohd. Akhoon* A.I.R. 1972 J&K 105 (FB).  
*Khatija v. Abdul Razak Sofi*, A.I.R. 1977, J&K 44.
8. 3 J&K, LR 189
9. *Khatij v. Mukhti*, A.I.R.; 1963 J&K 4.\_