

CUSTOMARY MARRIAGE IN KHASI TRIBE: DECONSTRUCTION OF THE DISSOLUTION

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Abstract

The highlight of 'custom' as a source of law has been adopted and enacted through the sixth schedule of the Indian constitution in the state of Meghalaya. Also, referred to as the mini constitution, the sixth schedule allows the establishment of 'Autonomous District Councils' (ADC) to identify the customary practices and assimilate the cultural traditions into the mainstream laws of the country. The ancient customary practice of marriage wherein the groom resides in the bride's house is unique and unlike the patriarchal system. The rich custom of Khasi marriages and dissolution of marriages are uncodified and have been passed orally from one generation to the other. The power to identify and preserve such custom has been bestowed on the ADC's of Meghalaya. The concern arises when the rights of women remain vulnerable and the only codified law available to preserve Khasi women's rights is the "Khasi social custom of lineage act, 1997" which highlights whether the offspring will be recognised as a Khasi or a non-Khasi. The silent unrecognized custom of cohabitation is rampant which the state discourages by enacting the 'compulsory registration of marriage act 2012'. Maintenance as a right is non-existent leading to the rise of single mothers. The latest NFHS data states that 7% of children have their firstborn child by 15-18 years and polygyny is higher compared to the other states.

Keywords: Tribal Custom, Nonregistration, Dissolution, Codification.

Introduction

Ancient history has witnessed a wide diaspora of the movements of tribal people in all parts of India. Even the two epics, 'Ramayana' and 'Mahabharata' have mentions of tribal people such as Sabaras, Adhiras, Pulindas, Dravidas, Sudras etc. According to the Tribal Activist Verrier Elwin, the role of tribal people has been and will make the life of India. The ascertainment of the existence of tribal life leads to the discernment of custom as the soul of tribal people. The uncodified transfer of rituals and traditions from one generation to the other is unique due to

rich cultural perspectives but such custom requires codification to be afloat at par with the mainstream laws of the country.

Custom plays an important role in India to protect the customary practice and usages. The trajectory of common law in upholding custom to have the force of law is highlighted in Article 13 (3)(a) of the Constitution of India.¹ The State of Meghalaya is enriched with custom and practices which are protected by the enactment of the Sixth Schedule of the Constitution of India. As the only matrilineal State in India, Meghalaya has enhanced the cultural thread of India among the other patriarchal States.

The unique concept of marriage in the Khasi matrilineal system is unlike the patriarchal system. Justice S Ravindra Bhat has noted that cultures and traditions have kept the institution of marriage breathing to the stage wherein the concept of marriage has evolved over time.² The concept of marriage is an accepted union between two different genders. The fundamental right to marry is an inherent part of the Constitution as well.³

The uniqueness of the matrilineal system of marriage needs unlearning of the patriarchal system. The system should not be romanticized nor criticized from a distance as the custom is such that gives the Khasi tribal people an identity of their own. There are various Khasi men groups that are against the matrilineal system namely '*Ka Syngkhong Rympei Thymmai (SRT)*' that want patriarchy instead of a matrilineal system.

The problem arises when the rich customary practice of marriage is in decline due to various external social and religious factors. The non-codification of custom has led to various social issues debilitating society. The constant mushrooming of common law over customary law and practice has gradually eroded the reliance of tribal people on custom.

Jurisprudence of Custom

The post-ancient societies were skeptical about recognizing custom as a source of law and rather used it as a gap filler where the common law had a vacuum. The jurisprudential debates witnessed polar views regarding the 'shifting positions' of custom to be a law. Kant, claims lawyers aiming to reconcile betwixt legal rules and their practice should repudiate rational

¹ Article 13(3)(a), Constitution of India, 1950.

² The Hindu Bureau, 'Traditions have not stopped concept of marriage', The Hindu (May 10, 2023), <https://www.thehindu.com/news/national/traditions-have-not-stopped-the-concept-of-marriage-from-evolving-sc/article66831897.ece>.

³ Ibid.

justice concepts while analyzing legal doctrines.⁴ The two schools of Jurisprudence namely the ‘Analytical’ and ‘Historical’ schools aided in absorbing custom from different outlooks. HLA Hart opposed the classical positivists with an argument that validation of custom requires the assent of the legislature.⁵ Austin similarly stated that custom will be just a mere ‘positive moral rule’ if not enacted as a law.⁶

Savigny in ‘*Rechtsquellenlehre*’ (doctrine of legal sources) takes an analytical approach in comprehending custom. The doctrine appreciates ‘positive law’ claiming all law to be positive in nature. The true source of positive law is the common consciousness of the ‘*Volk*’ (people) and to derive it custom acts as a ladder.⁷ Historical Jurists believe the growth of law to be organic and unconscious in nature. Law can only be discovered and not be created.⁸

Blackstone in the ‘*Commentaries on Laws of England*’ acted as a savior to the unending debates on the legal scope of custom. He identified the characteristics of custom that is a pre-requisite to recognize such custom to be valid under the common law system.⁹ The seven criteria that were identified by Blackstone which still acts till date to recognize a valid custom are as follows¹⁰:

1. **Immemoriality:** The concept of ‘time out of memory’ for a custom is quintessential to prove its validity.
2. **Continuity:** Even a temporary halt of the usage of custom will break the continuity of custom which will make the custom void.
3. **Peacefulness:** Custom should not be disputed as it indicates that such custom must have been forced against the common consent of the people.
4. **Reasonableness:** Sir Edward Coke quoted, a custom should be such that a layman can decipher the meaning out of it.
5. **Certainty:** The Latin maxim “*Id certum est, quod certum redid potest*” means that it should be made certain if there is a possibility of it. Likewise, custom should be certain to have its recognition.

⁴ Amanda and James, *Nature of Customary Laws* (Cambridge University Press, 2007).

⁵ HLA Hart, *The Concept of law* (Oxford University Press, Third Edition 2012).

⁶ *Ibid.*

⁷ Yasutomo & others, *Interpretation of Law in the Age of Enlightenment* (Springer 2011).

⁸ B.N Mani Tripathi, *Jurisprudence the Legal theory* (Allahabad Law Agency 2021).

⁹ William Blackstone, *Commentaries on Laws of England* (Oxford Edition 2016).

¹⁰ *Ibid.*

6. **Compulsory:** Custom cannot be made optional. It should be followed compulsorily to have its effect.
7. **Consistency:** Each custom should be harmonious with the other custom and cannot superimpose or oppose other custom.

The jurisprudence of custom can be further divided into two parts which consist of 'custom with sanction' and 'custom without sanction'. Such custom which are observed by common consent of the people but do not have legal obligations are custom without sanction. Austin claims such custom as positive morality whereas custom which has the force of law and has been enforced by the State such custom falls under the head of custom with sanction.

Post-Independence India accepted custom to have the force of law in Article 13(3)(a) of the Constitution of India.¹¹ Customary practices of tribal people are recognized and empowered by the President of India under Article 342 of the Constitution to specify the recognized tribes in India.¹² The drafting of the Fifth and Sixth Schedule in the Constitution depicts the autonomy provided to the tribal people to administer themselves through the customary practices prevalent among the tribes.

Khasi customary practice of Marriage and Dissolution of Marriage

The commonly accepted custom unlike the patriarchal system is that the groom has to reside in the bride's place after marriage. The system is still in practice due to the prevalence of the matriarchate. The Matrilineal clans are strictly exogamous in nature and it is a strict rule that a Khasi man cannot take a wife from his own clan. The custom of marriage has a rich layer of religious tribal practices wherein the spirits of different tribal Gods are invoked before the marriage ceremony.¹³

There are three forms of Khasi traditional marriage which were followed in ancient times namely *Pynhiarsynjat*, *Lamdoh* and *Iadih-Kiah*. The forms of marriage are dissected based on the wealth of each family. The first two forms are considered respectable forms of marriage and the last-named is often resorted by the poor families.¹⁴ The role of maternal uncles is crucial as according to custom the rights of betrothal lie under the supervision of uncles.¹⁵

¹¹ Article 13(3)(a), The Constitution of India, 1950.

¹² Article 342, The Constitution of India, 1950.

¹³ P.R.T Gurdon, *The Khasis*, Second Edition (Macmillan & Co Ltd, 1914).

¹⁴ *Ibid*, pg-127-128.

¹⁵ Astha Dewan & Others, *Inteligible Heritage of Khasis and Pnars*, DU Journal of Undergraduate Research and Innovation (Vol-, Issue-2, pg-73).

Khasi marriages had a unique custom of ‘breaking eggs’ to examine fowl’s entrails. The ceremony is conducted to check if the omens are favourable to both sides. If not favourable the marriage comes to a halt as there was a strong prejudice against marriage being conducted under unfavourable auspices as the belief was that such a union would bring untimely death, childless situation, poverty in the family etc.¹⁶

Likewise, the dissolution of marriage among Khasis is commonly termed as ‘*ka pynlait tnga*’ or ‘*ia pylliat san shyieng*’. The reasons for dissolution of marriage among Khasis are due to various reasons like adultery, bareness, alcoholism etc. The rule amongst the Khasis is that both parties should agree to it. The concept of restitution is not prevalent among Khasis. The couple after divorce cannot reunite together but can marry within each other’s family.¹⁷ The custom of divorce is complete when both parties do the customary ritual of handing over five pieces of coins or betel nuts to each other and customarily throwing them on the ground. Following it, the crier announces the divorce by beating drums all around the village that the woman is unmarried.¹⁸

U Jeeban, in his book, critiques the non-stricter ideas of monogamy among the Khasis. He highlighted the concept of a ‘stolen wife’ (*ka tynga tuh*) in contrast to the legally married wife (*ka tynga trai*). The offspring from the stolen wife cannot claim ancestral property. The custom can be drawn parallel to the characteristics of polygyny.¹⁹ In an instance of separation between the spouses, mothers have the right to custody of the children. It becomes the responsibility of the mothers to take care of their children.

The Role of Christian Missionaries

The Britishers aided the missionaries in bringing Christianity to Meghalaya. These hills were the foremost to advance under the missionaries among the other North Eastern States. The Welsh Missionaries were the first to translate the Khasi language into the Roman script which aided in uniting the Khasi villages. The missionaries opened schools and educated various villages on works of literature and worship.²⁰ Women attained education which was a gateway to being a part of the executive committee of various local dorbars (administrative councils). The developments later aided the women in establishing social organisations like ‘*Ka Lympung*

¹⁶ Supra at 9.

¹⁷ Jeuti Barooah, Customary Laws of the Khasis of Meghalaya, pg-34 (Law Research Institute 2007).

¹⁸ Supra at 12, Pg-81.

¹⁹ U Jeeban Roy, ‘Ka Niam Jong Ki Khasi’ (Ri Khasi Press 1994).

²⁰ Nalini Natarajan, The Missionary among Khasis (United Publishers 1977).

Ki Seng Kynthei’ to address issues on women.²¹

The gradual transition from ‘animism’ to ‘Christianity’ brought many cultural and religious changes. The concept of marriage had its impact accordingly. The traditional Khasis opposed the Christian Khasis which created a lot of tussle between them. In a suit often referred to as the ‘Synteng case’ (1833), Colonel Starke reflected on various shreds of evidence wherein Christian-converted Khasis were stripped off their rights on inheritance, lineage etc.²²

The traditional marriage system slowly eroded with the marriages often solemnized in the Churches. The Christian marriage laws governed the erstwhile Khasi customary laws. Special marriage laws governed between Khasis marrying non-Khasis and vice versa.

The Sixth Schedule and Khasi Marriage

The history of the Sixth Schedule can find its traces in various British legislations to govern the tribal areas of North East India. Some specific legislations include the ‘Government of India Act, 1919’ wherein autonomy was provided to the Governor General under section 52A (2) to identify and declare ‘backward areas’. These areas are exempted from various legislations but at times enacted based on some modifications.²³ Later, the ‘Government of India Act, 1935’ was enacted to refurbish the outlook of being tagged a ‘backward area’. The legislation aided in renaming it to ‘excluded areas’ or ‘partially excluded areas.’²⁴ Khasi Hills was placed under the head of partially excluded areas.

Post-Independence the drafting committee aided in drafting the Sixth Schedule with primary points of identifying the customary practices and codifying such custom to enshrine as the tribe’s law. Secondly, the idea was to provide a scope of assimilation with other tribal cultures of India.²⁵ The Sixth Schedule is also known as the ‘Mini Constitution’ as the powers of legislative, executive and judiciary are granted in the Sixth Schedule of the Indian Constitution.

The Autonomous District Councils were empowered under Paragraph 3 of the Sixth Schedule to draft laws on various subjects, one such subject is ‘marriage’ stated in Paragraph 3(i) of the Sixth Schedule.²⁶ The critical analysis of the various Acts drafted by the Khasi Autonomous

²¹ C. Khonglah, *Khasi Women and Indigenous Question*, pg-170 (Saraighat Publishers 2002).

²² *Supra* at 18.

²³ Sec 52A (2), Government of India Act, 1919.

²⁴ The Government of India Act, 1935.

²⁵ KHADC, Constituent Assembly debates on the Sixth Schedule,

https://khadc.nic.in/acts_rules_regulations_bills/misc/Constituent%20Assembly%20Debate%20relating%20to%206th%20Schedule_excerpts_.pdf

²⁶ Para 3, Sixth Schedule, The Constitution of India, 1950.

District Council is disappointing in protecting the culture and traditions of the Khasi custom of ‘marriage’ and ‘dissolution of marriage’.

The only codified legislation that can be related to the issue of marriage is the ‘Khasi Social Custom of Lineage Act,1997’²⁷. The Act in section 3 states the criteria for the eligibility of offspring to be termed as ‘Khasi’²⁸. Likewise, section 5 of the Act states the conditions and restrictions of granting the Scheduled Tribe Certificate.²⁹

The Autonomous District Council has drafted two other laws on Marriage which are as follows:

- 1. United Khasi-Jaintia Hills District (Christian Marriage) Act,1954**
- 2. Indian Divorce Act,1869.**

The first act is a three-page law allowing the solemnisation of Christian Marriages in the Khasi societies. The Act under section 3 allows the application of the Indian Christian Marriage Act,1872 which is a general umbrella law for all the Christians in India.³⁰ The lacunae of the Act is that no attempt has been made to identify and preserve the rich Khasi culture of Marriage. The Act is biased to one religion and leaves out the traditional Khasis of Meghalaya. The purpose for which the Autonomous District Council was created which is to identify custom and codify such custom has not been done. It shows the failure on the part of the Autonomous District Council which is also the failure of the Sixth Schedule in place. Similarly, the Indian Divorce Act,1869 is a blanket law for all native Indians. The Autonomous District Council has made no efforts to protect the customary practice of dissolution of marriage as well.

Recent bills drafted by the Khasi Autonomous District Council titled, ‘The Khasi Social Custom Bill 2018’³¹ and Revised 2022 punish its own Khasi females if they have an offspring with a non-Khasi man by not recognizing their offspring as Khasi. The laws framed are in total violation of the fundamental rights of the Indian Constitution. Even though the District Council put forward an argument claiming to protect the Khasi tribe from non-Khasi people but it is to be realized that the Khasi Social Custom of Lineage Act,1997 lays down the parameters of eligibility of the offspring to be a Khasi. The bill if accepted will be repugnant in nature.

²⁷ The Khasi Social Custom of Lineage Act,1997.

²⁸ Section 3, The Khasi Social Custom of Lineage Act,1997.

²⁹ Section 5, The Khasi Social Custom of Lineage Act,1997.

³⁰ Section 3, United Khasi-Jaintia Hills District (Christian Marriage) Act,1954.

³¹ The Khasi Social Custom Bill 2018 and 2022.

Role of 'Maintenance' in Khasi system

The Khasi custom of marriage follows the matrilineal structure of inheritance wherein the property is inherited from the youngest female (Khadduh) to the other youngest female of the clan or family. The groom comes from the mother's house and resides in the bride's house wherein his role in acquiring property is minimal. The problem arises when the husband is told to leave the house or the husband elopes with another female. Whether the male will provide maintenance to his wife?

There is a Khasi customary saying "*Ki Shynrang ki dei jong ka pyrthei*". It means the Khasi man is free to cohabit with as many women as he pleases.³² Plato in his book 'Republic' has envisioned a similar society where cohabitation is limitless among each other and highlighted the common responsibility of people to take care of all children and the females.³³

According to A S Khongpai's book, '*The Principles of Khasi*', the children and grandchildren have the responsibility of providing for the family in Khasi culture. The kur, which is made up of brothers, sisters, and uncles, also has an obligation to care for their parents and grandparents, who may have aged or become unable to support themselves without any fault of their own, regardless of whether they have property or not.³⁴

In the Khasi community, it is customary for children to not ask their father for financial support. Nothing goes with the father who abandons or departs from his wife and kids. The question of requesting maintenance from the father does not come up because all of his marital income has stayed with his wife and kids. On the other hand, in the case of a divorce or separation, the father provides his kids with '*ai bai bam*', or maintenance. However, the children do not claim this; instead, it is left up to the father's wishes.³⁵

Historically, the role of maintenance is accepted more as a moral need rather than a right. It is not necessary to force maintenance or make maintenance claims; however, the moral power is eroding over time. These changes may also be caused by changes in work patterns. Since their father has separated from their mother, the children are beginning to ask their father for maintenance, particularly if he works in a reputable government office.³⁶ The role of

³² Perna Katiyar, 'Meghalaya's Matrilineal Society: Single mom struggles to make ends meet', The Economic Times (Feb 25, 2023), <https://economictimes.indiatimes.com/news/elections/assembly-elections/meghalaya/single-moms-of-meghalaya/articleshow/98238189.cms?from=mdr>.

³³ Plato, *The Republic* (Penguin Publishers 2007).

³⁴ AS Khongpai, *Principles of Khasis*, pg-76 (1974).

³⁵ Ibid.

³⁶ Jeuti Barooah, *Customary Laws of the Khasis of Meghalaya*, pg-41 (Law Research Institute 2007).

maintenance in Khasi society is almost negligible. The Women State Commission of Meghalaya in the statistics figured out that only 53 cases were filed for maintenance by the women.³⁷ The problem lies in the non-registration of marriages which creates a barrier for the women to claim. The reason is increased cohabitation which Khasis claim to be an unproved custom but is denied by the Government. The recent introduction of the ‘Compulsory Registration of Marriages’ to recognize a marriage is a prove of such non-acceptance of cohabitation as a custom.³⁸

Social Evils of Khasi Cohabitation

Live-in relationships, which were formerly frowned upon in many communities, are becoming more and more commonplace globally and are upending conventional ideas of marriage and family. In the Khasi Hills District of Meghalaya, where custom and cultural values are deeply ingrained, the occurrence of cohabitation offers a singular point of convergence between history, contemporary culture, and the law. The future notion of a live-in relationship is firmly rooted in the values of autonomy and privacy, but it is weakly grounded in the concepts of responsibility, empowerment, and conflict resolution.

The evils of such a concept have led to Meghalaya's 10% adolescent pregnancy rate which is far higher than the national average of less than 3%, and has raised concerns about teenage pregnancy in the state.³⁹ The single mothers due to non-registration of marriage have to fend for their siblings. In a survey conducted in the 12 districts of Meghalaya, 46.2% of the women were illiterate and only 28.4% had their primary education.⁴⁰ Ngo Impulse has recorded a whopping 70,000 child labourers in Meghalaya which can be related to the single mother's failure to take care of their offspring.⁴¹

The Government of Meghalaya has started the Social Assistance Scheme for single mothers but registration of marriage is a mandatory requirement to prove the validity of marriage. This is a problem in itself for single mothers.

³⁷ MSCW, Exploratory Study on the Socio-Economic Status and Problems of Single Mothers in Meghalaya, pg-28.

³⁸ Compulsory Registration of Marriage Act, 2012.

³⁹ Correspondent, Teenage Pregnancy rates in Meghalaya, <https://theshillongtimes.com/2022/11/13/high-child-marriage-teenage-pregnancy-rates-in-meghalaya/>.

⁴⁰ Ibid.

⁴¹ Editor, Child labour rampant in Meghalaya, Shillong times, <https://theshillongtimes.com/2022/06/14/child-labour-rampant-in-meghalaya/>.

Conclusion

Even though the Sixth Schedule is in place with the powers being given to the Autonomous District Councils to draft laws on marriage and dissolution of marriage but without the support of the codified law, the customary laws on the dissolution of marriage fall short of preserving the culture. The KHADC should initiate a village-wise gathering of customary practices of marriage and dissolution of marriage and codify such custom with the harmony of the religion prevalent for various believers. The traditional Khasis should be included in the codified laws of marriage and dissolution of marriage.

Even though the law of 'Compulsory registration of Marriage' is prevalent but hardly people are using the law to register marriages. A special draft should be enacted by the KHADC so that the grassroots level governance i.e. the Dorbar Shnongs are empowered to execute the process.

The concept of restorative justice should be applied while dealing with teenage pregnancy cases, child marriages etc which will aid in identifying more such cases in the rural areas. There should be more POCSO Courts all over Meghalaya so that more cases are brought to the limelight.

Lastly, the matrilineal system is in a vulnerable state all over the world. Nayars, another matrilineal society have vanished in South India which is unfortunate as it can be deciphered that often matrilineal system succumbs to the patriarchy in place. The codification of tribe culture especially marriage and dissolution of marriage is the need of the hour.