Akshat Jha & Shubh Sahai, *A Fine Balance: The Relevance of Section 2(2) of the Hindu Succession Act in an Age of Judicial Innovation and Changing Aspirations*, 8(2) NLUJ L. REV. 93 (2022).

A FINE BALANCE: THE RELEVANCE OF SECTION 2(2) OF THE HINDU SUCCESSION ACT IN AN AGE OF JUDICIAL INNOVATION AND CHANGING ASPIRATIONS

*~Akshat Jha & Shubh Sahai**

ABSTRACT

Changing times and an evolving constitutional morality apply continuous pressure on 'ancient' customs to adjust according to evolving notions of righteousness. But tension is created between such evolutionary tendencies and those methods that seek to protect and promote the traditions of the past, many of whom are often discriminatory. A typical example of such tensions is Section 2(2) of the Hindu Succession Act, 1956 (HSA), which protects tribal customs from the general emancipatory and egalitarian undertones of HSA. This paper problematizes this provision and argues against the logic of protecting tribal customs, such customs that entail unequal and inequitable treatment – particularly towards women. Since the colonial experience of codification drastically changed the customs that were subjected to it, tribal customs of present times are generally inauthentic. It is also erroneous to believe that Scheduled Tribes exist in a different epistemic context – one that does not value rights in

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property. Failing all, the courts and modern law are sites of social change and have an emancipatory obligation towards vulnerable groups. An overarching argument for an expansive conception of constitutional morality follows, which must override local considerations of preserving unjust tribal customs.

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I. INTRODUCTION

A perusal of the Constituent Assembly Debates shows the deep concern that the leaders of the newly independent nation had for its tribal populations. The Assembly was cognizant of the treatment and exploitation that had been meted out to tribals under British rule, and so, it overwhelmingly favoured a state policy to protect the traditional cultures and customs of tribes.[1] A paradigmatic example of such protectionist sentiments is Section 2(2) of the Hindu Succession Act, 1956 [*hereinafter* "**HSA**"].[2] The provision of concern provides that:

> "*Nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.*"

The result of this clause is that in matters of inheritance, members of Scheduled Tribes would continue to be governed by their traditional customary laws. In contrast, for most other Hindus,[3] the HSA replaced customary laws as the governing law on inheritance. Of course, the HSA considers "*Hindus*" as not only those who identify themselves as Hindus but also "*any other person who is not a Muslim, Christian, Parsi or Jew by religion*".

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[1] Speech of Prof. Shibban Lal Saxena, *Lok Sabha Secretariat, Constituent Assembly Debates, Vol. VIII*, 942 (June 16, 1949), https://eparlib.nic.in/bitstream/123456789/763278/1/cad_16-06-1949.pdf (last visited Aug. 29, 2021); INDIA CONST. art. 46.
[2] Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 2(1) (India).
[3] *Id.* § 2(1).

It must be noted that the rhetoric for the HSA (like other Hindu Code Bills) was fashioned as a contest between modernity and traditions. The avowed legislative effort was to overhaul the notoriously discriminatory Hindu traditional customs, and in turn, make way for provisions that were (more) gender equitable. Naturally then, parliamentary debates on the Bill were an acrimonious affair. Then, in so far as Section 2(2) *saves* customary laws, this provision is seemingly antithetical to the rest of the Act. Nevertheless, Section 2(2) was passed without objections, amendments, and debates.[4] No one *even* sought to ask the reason why Scheduled Tribes must be left out of Hinduism's march to equality.

Therefore, the specific legislative objective behind Section 2 of the HSA is not explicitly available. But given the contemporaneous Constituent Assembly Debates, it is difficult to discern a policy objective behind Section 2(2) other than the objective to *preserve* – above all considerations – the traditions and customs of tribals. This paper seeks to question and problematize these protectionist sentiments. The authors argue that no point is served by way of Section 2(2) of the HSA; and in so much as Section 2(2) seeks to preserve inequitable customs, it seemingly elevates itself above the constitutional morality that provides for liberty and equality for all citizens. Privileging customs over such foundational humanist principles is again without reason.

[4] *Hindu Succession Bill—contd.,* LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/56073/1/lsd_01_12_02-05-1956.pdf (last visited Aug. 29, 2021).

Within this paper, the Part II recounts the problems of colonial codification, and Part III problematizes the logic of Section 2(2). Part IV notes the judicial interpretations of Section 2(2), and the Part V presents a case against it, while Part VI reflects on the dichotomy in constitutional morality. The paper ends with Part VII which provides concluding thoughts and the way ahead.

II. CODIFICATION AND ITS PROBLEMS

As Bernard Cohn observes in his authoritative study of the codification process, initial British administrators, like Warren Hastings and William Jones, perceived ancient *shastric* laws as a system of law comparable to English laws.[5] Consequently, early in the British reign, the colonial government decided that Hindus (and Indians in general) were to be administered by their personal laws.[6] Subsequently, "*in all matters arising out of succession to lands, rent,s and all matters of contract, and dealing between party and party, were to be determined by reference to the local 'laws' of Hindus and Muslims and…other customary usages*."[7]

Immense work has already been done in analyzing the colonial efforts of codification and administering to Indians their '*own'* personal laws, and how these efforts changed the personal laws themselves. It will be fitting here to briefly summarise the existing literature.

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[5] BERNARD S COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE 58-75 (1996) ("**COHN**").
[6] *See* Warren Hastings' Judicial Plan of 1772, § 23.
[7] UPENDRA BAXI, TOWARDS A SOCIOLOGY OF INDIAN LAW 11-45 (1986) ("**BAXI**").

In the colonial judicial design, although the law to be administered was indigenous, yet it was to be administered by English judges (and) in an English system.[8] This mismatch was grave, not just for those subjects who were to be administered by this hybrid but also for the erudite English judges who had to familiarise themselves with a new system of laws, written in an alien language. While initial recourse was to have Pandits as 'court experts,' however, translating the ancient *sastras* into English was always inevitable.[9] The effect of such translations was disastrous: words were often incorrectly translated, and on many occasions, merely defining indigenous terms in English often changed the underlying structure of rights.[10]

However, notwithstanding the changes due to translations, *shastric* law underwent still more changes when it was administered in colonial courts. This is because the *shastric* law, as traditionally administered, was unsuitable for the British adversarial system. It had historically consisted of a system of 'fire-side equities' where compromises and face-saving mechanisms were more prominent than determinations of guilt.[11] As J.D.M. Derrett observed, "*the sastra…offered the judge, not only in the choice of a [sic] rule of law from permissible alternatives but also in*

[8] Michael Anderson, *Islamic Law and the Colonial Encounter in British India, in* INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER (Davis Arnold & Peter Robb eds., 1993); COHN, *supra* note 5.
[9] COHN, *supra* note 5.
[10] *Id.* at 68-72.
[11] Marc Galanter, *Displacement of Traditional Law in Modern India*, 24 J. OF SOCIAL ISSUES 4 (1968) ("**Galanter**").

manipulating judicial procedure, e.g., in the admission of witnesses."[12] However, this expansive judicial discretion and flexibility, which lay at the heart of *shastric* law, were intolerable for the British.[13] Additionally, colonial judges in administering personal laws relied extensively on precedents. However, regard for precedents was (again) foreign to the Hindu system. Adherence to the doctrine of *stare decisis* reduced Hindu law's inherent flexibility by ruling out innovations to meet changes in community sentiment.[14] As Galanter notes, with its innovative techniques stripped away, *shastric* law *changed* into a system that was exceedingly rigid and archaic.[15]

The effects of colonial intervention in customary laws were perhaps even more transformative. Ironically, while colonial *intervention* changed the textual *shastric* laws, it was a *lack* of intervention that contributed to the changes in customary laws. Upendra Baxi notes that though official policy explicitly provided for the preservation of customary law, yet in practice, the administration of customary law was illusory.[16] The only exception to this general trend was the Bombay Presidency where customs were given due recognition as an important source of law.[17] However, even this experiment had a short life; and after the unifying measures post-1857, the

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[12] J.D.M. Derrett, *Justice, Equity and Good Conscience*, *in* CHANGING LAW IN DEVELOPING COUNTRIES (J.N.D. Anderson ed., George Allen and Unwin 1963).
[13] COHN, *supra* note 5.
[14] Galanter, *supra* note 11.
[15] *Id.* at 74-77.
[16] BAXI, *supra* note 7.
[17] Flavia Agnes, *Personal Laws*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhary et al. eds., 2016) ("**Agnes, *Personal Laws***").

Bombay Presidency's treatment of self-governing groups and customs was brought in line with those of the other presidencies.[18]

Derrett finds practical policy considerations behind the choice of excluding customs. If the colonial government had backed customary law, hundreds of different systems of law would have emerged.[19] But, even when customary law was *sought* to be administered, then just as with *shastric* law, the mere process of applying customs in a common law setting radically transformed it.[20]

In administering traditional laws, the Englishmen faced yet another problem; they could not reconcile local notions of justice and morality with their British sensibilities. Nicholas Dirks finds English newspapers and official communique to be replete with instances of traditional customs being called "*barbarous*."[21] Paradigmatic of this problem is the change in the realm of *stridhan*. For instance, the decisions of the Privy Council granted women only limited rights over their own *stridhan* property, and upon their death, the *stridhan* property was reverted to the male heirs of the husbands.[22] This was in contrast to most scriptural dictates whereby women were provided full ownership over their *stridhan* property, and a separate

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[18] *Id.* at 905.
[19] J.D.M. DERRETT, INTRODUCTION TO MODERN HINDU LAW (1963).
[20] Galanter, *supra* note 11.
[21] Nicholas Dirks, *The Policing of Tradition: Colonialism and Anthropology in Southern India*, 39 COMP. STUD. IN SOC'Y & HIST. 182, 182-185 (1998).
[22] Devi Prasad v. Mahadeo, (1912) 39 LA. 121; Janki v. Narayansami, (1916) 43 IA 207.

line of succession to it through female descendants.[23] As Flavia Agnes observes, "*the British administrators, familiar with the system of denial of property rights to married women in England, could not grasp the complex system of stridhan property and caused great harm to women's rights.*"[24]

Vasudha Dhagamwar notes that the Englishman did not know much about India. He sought to make laws for the country based on general ideas gathered in England. This was, she observes, "*as true of the philosopher recluse Bentham as it was of men of action*."[25] The foregoing discussion posits a contrast to Dhagamwar's observations. In the case of personal laws, the Englishman *did* seek to make laws on what he thought were ideas gathered in India. Nevertheless, what he only ushered in was "*English law as the law of India*."[26]

III. 'AUTHENTIC' TRIBAL CUSTOMS IN THE POST-COLONIAL STATE

The introductory section draws in detail the overriding state policy to protect tribal customs and culture. But contemporaneous with the attempts of the Indian state to protect tribal populations and customs, there also exist numerous accounts that chronicle material dispossession and

[23] Debrati Halder & K. Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval and Modern India*, 24 J. OF LAW & RELIGION 661, 669-673 (2008); *See also* Agnes, *Personal Laws*, *supra* note 17.
[24] FLAVIA AGNES, FAMILY LAWS AND CONSTITUTIONAL CLAIMS (2011).
[25] VASUDHA DHAGAMWAR, LAW, POWER AND JUSTICE: THE PROTECTION OF PERSONAL RIGHTS IN THE INDIAN PENAL CODE (1992).
[26] COHN, *supra* note 5.

forced acquisitions of land, and tales of human trafficking among tribes of post-colonial India. Quite notable has been the migration of tribes from their native lands to industrial settlements and towns in search of economic opportunities.[27] Such changes in material conditions brought about changes in conceptions of private property, nuclear families, and individual-oriented eco-systems. Such changes were accelerated in the post-globalization world, where private capital dictated a change in social structures. M.N. Srinivas observed the decay of caste rituals and traditional customs in cities[28] – an observation that the present paper borrows to depict the changing times in which 'stagnated' customs in Section 2(2) are envisioned. Individual wealth in the modern world has increasingly come to define one's access to social goods and the assumption that 'authentic' customs still serve a social purpose is fallacious. Thereby, Section 2(2) provides a few reasons why such outdated customs must not be changed.

Another factor contributing to the redundancy of Section 2(2) in the status quo is the colonial historical experience. Colonial codification bought along with itself strict procedural and evidentiary requirements. The problem with colonial administration of customary laws is best described in Upendra Baxi's observations about the colonial era, "*customary rules were subjected…to the requirement of the common-law burden of proof: customs to be a source*

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[27] MINISTRY OF TRIBAL AFFRAIRS, REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH: 'TRIBAL HEALTH IN INDIA' BRIDGING THE GAP AND A ROADMAP FOR THE FUTURE 2 (2018) ("**REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH**").

[28] M. N. Srinivas, *Mobility in the Caste System*, *in* COLLECTED ESSAYS 185, 187-199 (M.N. Srinivas ed., 2005).

of law must be proved to be ancient, uniform and invariable."[29] The Colonial codifications changed the "*authentic*" nature of customs to such an extent that the protectionist sentiment of Section 2(2) is at best preserving the '*English law of Tribals*' and not the '*Tribal law*'.

Moreover, regarding changes in customary laws of Scheduled Tribes, numerous studies note that inheritance rights among tribals have historically been equitable – at least for women. However, contemporary studies show that with growing exposure to Hindu ideas (and subsequent efforts to conform to Hindu traditions), previous trends of gender equality have been reversed in numerous tribal communities across India.[30] Accordingly, practices like patriliny, early marriage, widow celibacy, dowry marriage, preferences for male children, low priority for female education, and total economic, political and social dependence of females on males, have found emerged among tribal populations.[31] A similar revival of Hindu customs and religious practices has also been seen among tribal women.[32]

These accounts of tribal customs have at least two important implications. *Firstly*, that tribal cultures and customs are changing and in a constant state of flux. Given this dynamic nature, questions are bound to

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[29] BAXI, *supra* note 7.

[30] CHRISTOPH VON FURER-HAIMENDORF, THE CHENCHUS: JUNGLE FOLK OF THE DECCAN 140 (1943) ("**FURER-HAIMENDORF**"); G.S. GHURYE, THE SCHEDULED TRIBES OF INDIA (1980).

[31] G.D. Brennan, *Sanskritization as Female Oppression in India*, *in* SEX AND GENDER HIERARCHIES (B.D. Miller ed., 1993); *See also* FURER-HAIMENDORF, *supra* note 30.

[32] Aparna Mitra, *The Status of Women Among the Scheduled Tribes in India,* 37 J. OF SOCIO-ECONOMICS 1202, 1202-1217 (2008).

arise about the logic of a policy that seeks to preserve an original state of customs. Is not such a policy against the very customs it seeks to protect? *Secondly*, as the preceding discussion shows, tribal customs, in many instances, are continuously devolving into practices that create new gender inequities. In so far as Section 2(2) may also potentially preserve such new inequitable tribal customs, the merits of a provision like Section 2(2) may be questioned.

But even if it were assumed that certain "*authentic customs*" qualified the need under changing material circumstances, and that these customs have survived the onslaught of colonial codification; nevertheless, Section 2(2) does not protect them in a meaningful sense. It is inherently difficult for Indian courts to adjudicate disputes on the basis of customs, and in the absence of reliable authoritative texts and minimum legal thresholds like fundamental rights. For example, problems arise even on the judicial acknowledgement of tribal custom. It has been held that a custom may, by frequent proof in courts, become so notorious that the courts take judicial notice of them.[33] The result is that such a custom is then essentialized, which reduces the space for pluralism within Tribal law, thereby rendering Section 2(2) of little practical usage. The authors acknowledge such harms are inevitable because when statutory law is applied, the space for pluralism in Tribal law is diminished. However, as the authors argue later in this paper, such a uniform statutory application would be in sync with modern standards of equity and the surrounding changes in material circumstances.

[33] Ujagar Singh v. Jeo, AIR 1959 SC 1041.

Summarily, this Part notes the difficulty in the logic of Section 2(2) given that tribal customs have undergone radical changes in the post-independence era, specifically due to changes in material conditions and the legacy of colonial codification. The Part concludes by acknowledging the diminishing space for pluralism in tribal legal ecosystems but argues that if such diminishing is inevitable in both Section 2(2) and the exercise of "*modern law*", then the latter is preferred because of its benefits in relevance and advantages in equity. As the authors argue later in the paper, even in instances where a custom is proved to be unchanged and continuous, if the custom of concern is discriminatory, then the tribal individuals for whom the custom is discriminatory ought to receive a remedy under equity.

IV. NAVIGATING SECTION 2(2) OF THE HSA

Section 2(2) of HSA provides that the HSA shall not apply to Hindus who are members of the Scheduled Tribes. However, a distinction must be drawn: the Section does not provide that the Scheduled Tribes who followed Hindu law before codification will now necessarily be excluded from HSA; it merely provides that such Scheduled Tribes, who do not follow Hindu law, will have the agency to retain their indigenous arrangements. Here, it is impliedly accepted that the laws of Scheduled Tribes are different since Scheduled Tribes do not share the same structures of family, kinship, and normative values which the corpus of Hindu law embodies.[34] What follows in this Part is a history and analysis of cases on

[34] Bhabananda Mukherjee, *The Structural Feautures of the Tribal Families in India, in* THE FAMILY IN INDIA 75 (George Kurien ed., De Gruyter Mouton 1974); and POONAM PRADHAN SAXENA, 2 FAMILY LAW LECTURES 313 (2019).

the exclusion provisions of Section 2(2). Based on that analysis, the authors aim to trace both, the previous and existing trends on the issue. The final aim of such exercise is to show the evolution of the final rule of constitutional morality.

In *Butaki Bai v. Sukhbati* [*hereinafter* "***Sukhbati***"],[35] the Chhattisgarh High Court was approached to adjudicate upon the inheritance rights of a daughter belonging to the Halba Scheduled Tribes. The Plaintiff/Claimant, Sukhbati, argued that her mother had inheritance rights in her father's ancestral property as they were governed by Hindu Law, and the latter provides for daughters to be coparceners in the ancestral property. This argument was contested by the Defendants who claimed that Halba are Scheduled Tribes, therefore, HSA would be inapplicable to them because of the provisions of Section 2(2) HSA. The High Court accepted the contention of the Defendants and ruled that Plaintiff had no claim on her maternal grandfather's property as her mother herself was not eligible to receive such estate. Moreover, the High Court observed that the parties would be governed by their own customs, which did not provide for daughters to inherit property from their fathers.

Perhaps more interestingly, the learned High Court reasoned that an additional test to determine whether members of a particular Scheduled Tribe are governed by Hindu law, is to ascertain if the tribe had sufficiently adopted "*Hindu customs*" and undergone "*Hindu-isation*".[36] However, the

[35] Butaki Bai v. Sukhbati, AIR 2014 CHG 110.
[36] *Id.* ¶¶ 18-24, 26-27, 30, 38.

High Court also held that it was immaterial whether such *Hindu-isation* had occurred before the passing of the HSA. Seemingly, according to the High Court, the *Hindu-isation* could occur for a tribe that was not following Hindu customs when the HSA was passed (*i.e.*, in 1956) but adopted Hindu customs in a period after the passing of the HSA.

Accordingly, the process of *Hindu-isation* was a question of fact that had to be determined on a case-to-case basis, and no general guidelines could be made. Such observation articulates that parties who are Scheduled Tribes, but "*sufficiently Hindu-ised*", will be governed by provisions of Hindu law (even if they adopted Hindu customs only post-1956). Of course, the explicit text of Section 2(2) itself does not provide for such a provision. Therefore, it is the contention of this paper that judicial innovation had begun to percolate spaces of inheritance law as judges were looking to propound equity even in iron-clad exclusions like Section 2(2).

In *Ramdev Ram v. Dhani Ram*,[37] the Chhattisgarh High Court was again approached to answer a question such as the one in *Sukhbati* (and on similar facts). In a relatively simple verdict, the High Court accepted the ratio of *Sukhbati*. But the High Court, in this case, faced a specific problem. The Defendants in the case had claimed that they followed a specific custom called "*Ghar Jinha*". In the custom of *Ghar Jinha* as claimed by the Defendants, if the son-in-law, along with his wife, lives in the wife's maternal home, then the wife could inherit the estate from her father. But the problem with specific customs like *Ghar Jinha* was that there existed no

[37] Ramdev Ram v. Dhani Ram, AIR 2016 CHG 107.

authoritative text or directives which specified the elements of such customs. A factor that further disparaged customs as primary carriers of equity was the difficulty parties faced while producing evidence regarding the observance (or non-observance) of such custom. Even if the parties agreed to the performance of a custom, its legal effect was often in dispute. A definite lacuna existed in law.

However, two years before *Sukhbati*, the same court had ruled differently in *Sarwango v. Urchamahin*.[38] In the latter case, women belonging to the Gond Scheduled Tribes claimed a share in the estate of their deceased father. They accepted that Gonds were Scheduled Tribes but pleaded that Gonds had long back adopted Hindu customs to the extent that succession within Gonds would be governed by the HSA. The Defendant, on the other hand, contended that since Gonds were Scheduled Tribes, Hindu succession laws would be inapplicable, and that succession would occur in accordance with the customs of the Gonds. Additionally, such customs did not provide for daughters to inherit from their fathers.

But unlike in previous cases, no party could conclusively prove their contentions. It was neither proved that the Gonds followed customs of Hindu law where daughters were allowed to inherit the father's share of the property, nor was it proved that customs of Gond precluded daughters from inheritance. There was also an absence of authoritative texts that could conclusively determine the customs followed by the Gonds. In answering the present question, the learned High Court sought justice,

[38] Sarwango v. Urchamahin, AIR 2013 CHG 98.

equity, and good conscience – in the absence of either party being able to prove the customs, the land would be divided, keeping in mind justice, equity, and good conscience.[39] Accordingly, the daughters were entitled to their father's share following the provisions of HSA. Judicial innovation had peaked again, and the High Court had made a substantive change in its approach in such cases.

In the case of *Sukhbati*, the test of *Hindu-isation* was an additional test that the Court must use to determine the applicable law. That is, if the Claimants could not prove *Hindu-isation*, the Court would exclude the Claimants, virtue of Section 2(2). This was because it was the general assumption that the law of Scheduled Tribes was the norm and *Hindu-isation* a case exception. But the principle in *Sarwango v. Urchamahin*, yielded an opposite balance of power. So, while parties had to demonstrate the presence or absence of a specific custom regarding daughters inheriting an estate, if such exercise was inconclusive, then the Court would apply justice, equity, and a good conscience and grant the daughter rights in the estate. It follows that justice, equity, and good conscience had become the norm, and disputing parties had to prove a custom in Scheduled Tribe law to disallow such inheritance. It is not immediately clear why the High Court in *Ramdev Ram v. Dhani Ram*, when faced with the problem of non-conclusive customs, took to *Sukhbati*, when it could have reaffirmed *Sarwango v.*

[39] *Id.* ¶ 10.

Urchamahin – that in cases of non-conclusive customs parties would need to follow principles of constitutional morality.

In *Bahadur v. Bratiya*,[40] the Appellant-Plaintiffs belonging to the Gaddi Caste contended that daughters could not inherit property as Gaddis were Scheduled Tribes to whom Hindu law was inapplicable, and no custom within the Gaddis allowed for daughters to inherit property from the father. The daughter disputed the contention by arguing that her family belonged to the Rajput Gaddi Caste, and the latter had undergone sufficient *Hindu-isation*. Furthermore, the customs of the Rajput Gaddis allowed daughters to inherit from their fathers. However, none of the parties could conclusively prove their contentions. Considering such facts, the Himachal Pradesh High Court ruled the exclusions of Section 2(2) of HSA would be inapplicable to them. The learned High Court observed that notwithstanding whether the family belonged to the Gaddi Scheduled Tribe, nevertheless, the Plaintiff-Appellants had failed to prove that a custom that disallowed daughters from inheriting a property was prevalent among the Gaddis.

Crystallizing the principle in *Sarwango v. Urchamahin*, the High Court observed that the negation of rights cannot be based on a presumption that such rights do not exist, but that for rights to be negated, their specific non-existence must be conclusively proven in that case. Building on further, customs that disallow such inheritance rights must be essential and

[40] Bahadur v. Bratiya, AIR 2016 HP 58.

continuous, and practices that do not satisfy this criterion shall not be considered as customs that have any legal implication.[41] Accordingly, the Court disallowed the appeal and held that Bratiya could inherit the concerned estate, as the Hindu Succession Act applied to her family.

V. AN EXPANSIVE CONSTITUTIONAL MORALITY AND THE CASE AGAINST SECTION 2(2)

The Himachal Pradesh High Court in *Bahadur v. Bratiya*, in no uncertain words, breached the exclusions of Section 2(2) of HSA by laying stress on the customs followed by tribes – and not merely the fact that the contesting parties belonged to a Scheduled Tribe. This was not the courteous equity, justice, and good conscience of *Sarwango v. Urchamahin* and neither was it the implicit reference to equitable inheritance in Hindu law in *Sukhbati*. It was a decisive break from the past that showed a lasting commitment to equity. However, the Himachal Pradesh High Court had one more reason to rule what it ruled, and here is where the true potential of *Bahadur v. Bratiya* culminates.

The High Court noted the provisions envisioned in Articles 15, 38, 39, and 46 of the Constitution of India [*hereinafter* "**Constitution**"] and the commitment to gender equality and anti-discrimination practices which they embodied. Several equal rights frameworks such as the Convention on the Elimination of All Forms of Discrimination against Women

[41] *Id.* ¶¶ 22-23, 31.

(CEDAW)[42] and the Human Rights Act,[43] were also used by the Court to substantiate its reasoning. In short, the Court used constitutional morality to justify its verdict of holding HSA to be applicable.

But there exists a contortion – in the case at hand, the Court used constitutional morality to guide its verdict when specific customs were not available. However, the Court remained silent on the usage of constitutional morality when such customs were available and proven to be essential and continuous. Due to the nature of constitutional morality and its commitment to equity and justice, there exists a limbo. That is, since constitutional morality is a pervasive test that sets the spirit of the law, it is uncertain how equity may be reconciled with customs that are not equitable but are protected by the exclusions of Section 2(2) HSA.

However, critics of the above-mentioned approach may argue that if constitutional morality were to be applied to the laws of Scheduled Tribes, it is conceivable that tribal customs would be straight-jacketed to resemble the HSA. This outcome is probable as the courts have, in numerous instances in the past, been unable to appreciate the socially persuasive force of local customs.[44] At any rate, as noted in the previous sections, preservation of tribal customs (and hence, prevention from such 'straight-jacketing') was the reason for which Section 2(2) HSA was instituted. The critics would rightfully observe that an expansive interpretation of

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[42] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
[43] The Protection of Human Rights Act, 1993, No. 10, Acts of the Parliament, 1993.
[44] WERNER MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 24-25 (2003).

constitutional morality would also wholly deplete the one-way valve devised in *Sukhbati* that allowed Scheduled Tribes to be governed by Hindu law if they were sufficiently *Hindu-ised*, but at the same time, resisted enforcement of Hindu law in case Scheduled Tribes wished to continue with their customary laws. That is, if all customs are subject to constitutional morality, only a few customs will remain.

The response to the critics is that if constitutional morality is not applied, there arises a strange conclusion where the constitutional anti-discrimination guarantees are only available when there are no customs. But in the presence of customs, these constitutional guarantees recede in the background. This paper contends that constitutional morality is not a notion which fills the vacuum of law, but that it defines the bounds within which general laws may exist. Holding constitutional morality as a distant second to customs means inequitable customs take precedence over considerations of justice, an idea that is antithetical to the spirit and purpose of the law. What the Himachal Pradesh High Court meant when they read constitutional morality in *Bahadur v. Bratiya* may perhaps be only clarified by the Hon'ble Court. However, notwithstanding, this paper contends for a more expansive conception of constitutional morality (vis-à-vis tribal customs) for the following reasons:

A. AN ERRONEOUS PRESUMPTION OF AUTHENTICITY

Referencing Part II of the paper, the authors argue that Section 2(2) cannot be treated in a narrow sense and must be subject to constitutional morality – even in the presence of customs. This is because of several reasons. *First*, as noted before, Section 2(2) does not reflect the original and

authentic customs of the Scheduled Tribes. The process of colonial codification of laws, customs, and governance of tribals pervasively altered the 'authentic' customs of the tribals. As was previously sought to be made evident, colonial codification greatly damaged the property and inheritance rights of women, as the primary aim of such exercise was to create instrumentalities of rule and not a genuine code for the rights of Scheduled Tribes. Even if it is assumed that the position of women before colonial codification was uncertain, nevertheless, the process of colonial codification permanently altered the authenticity of the customs of Scheduled Tribes. In this context, there exists no legitimate reason why customs must be shielded from constitutional morality on the presumption of authenticity when the customs in question are greatly tampered with and *inauthentic* to begin with.

B. AN ERRONEOUS PRESUMPTION OF EPISTEMIC CONTEXTS

Secondly, even in the post-Independence era, customs of Scheduled Tribes were excluded from reformation but for the protectionist sentiments that Indian law bestowed upon the identity, customs, and usages of Scheduled Tribes. Exclusions of the type of Section 2(2) are premised on the logical limitations of modern law that were termed by Lon Fuller as "*states of nature*."[45] The term is used to depict a situation in which the force of modern law or law of '*civilization'* becomes unpersuasive as the reasoning behind such law ceases to exist. Section 2(2) may be justified by its proponents as a progressive idea of sorts which protects the Scheduled

[45] Lon L. Fuller, *The Case of The Speluncean Explorers*, 112 HARV. L. REV. 616 (1999).

Tribes from the "*civilizing march of modern law*" and allows marginalized communities to retain control over their identity and structure of society by formulating their own laws. The idea here is that law originates from an epistemic context, and its functions and roles are determined by the circumstances in which it is used and the normative values the epistemic ecosystem desires. Of course, the silent presumption is that '*modern law'* shall be a '*civilizing march'* for the Scheduled Tribes.[46]

However, such presumptions are erroneous for three reasons. *First*, to say that all modern law is a mere '*civilizing march'* is both, simplistic and uncharitable. Modern law brings with itself a stronger commitment to dignity, equality, and anti-discrimination practices. It remains uncontested that the transformative powers of law have greatly helped the causes of the marginalized. An example of such emancipatory powers is the increased inheritance rights accorded to women in 'modern' Hindu law. For the longest time, daughters were denied coparcenary rights, widows only given limited shares post-demise of their husbands, and property rights of mothers were contingent on such factors as the number of sons and whether her husband was alive at the time of partition. It was only through laws such as the Hindu Women's Right to Property Act 1937,[47] the Hindu

[46] BAXI, *supra* note 7.

[47] Hindu Women's Right to Property Act, 1937, No. 17, Acts of Imperial Legislative Council, 1937 (India). The Act entitled a widow to the limited interest over the property of her deceased husband which was termed as the widow's estate.

Succession Act 1956,[48] and the Hindu Succession (Amendment) Act, 2005,[49] and cases such as *Vineeta Sharma v. Rakesh Sharma*[50] that succession among Hindus became relatively equitable in aspects of gender.

Second, Scheduled Tribes do not exist in a fundamentally different epistemic context that warrants protection from modern law. It is submitted in detail how rapid economic expansion into underdeveloped areas and ecosystems during the post-independence period brought several Scheduled Tribes within the fold of the '*modern world*'. Especially since the advent of globalization and rampant increase in private investment and industrial activity, an increasing number of Scheduled Tribes have come to occupy small towns and industrial settlements for work.[51] There is little doubt that, for a sizeable number of Scheduled Tribes, globalization was accompanied by dispossession from native lands and ecosystems. But however much that dispossession may be regrettable, the material damage that resulted from it is – for all practical purposes – irreversible. In a related context, the problems of identifying relevant evidence in tribal property disputes, and the dilemmas faced by the courts in relation to the admission of evidence have already been noted. Moreover, the Courts have also

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[48] Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 14. The Act empowered women to obtain and retain property as an absolute owner, distinct from the earlier position that women only had a limited interest in the property.

[49] Hindu Succession (Amendment) Act, 2005, No. 39, Act of Parliament, 2005 (India). This amendment granted coparcenary rights prospectively to daughters. In divisions of the coparcenary property, the discrimination between daughters and sons was formally ended.

[50] Vineeta Sharma v. Rakesh Sharma (2020) 9 SCC 1. In this landmark case, it was held that the 2005 amendment to the Hindu Succession Act, which gave coparcenary rights to daughters, could be applied retroactively.

[51] REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH, *supra* note 27.

struggled to find the resting phase of specific tribal communities as customs have differed radically across regions.

In that light, because of guaranteed enforceability, definite evidentiary standards, and a clearer description of rights and obligations; perhaps, the most equitable remedies available to such vulnerable populations are under statutory laws. The parties to the dispute, as well as the court, would find it more expedient and efficient if the HSA were applicable to Scheduled Tribes. This is primarily because all concerned parties would be aware of evidentiary requirements vis-à-vis the obligations the statute puts on them. Such an approach was already seen, rather informally, in *Bahadur v. Bratiya*, when the Himachal Pradesh High Court accepted the *prima facie* presumption of tribal women having property rights – and the burden to prove otherwise was cast on the party seeking protection of a custom. And a formal recognition of the High Court's principle – by making HSA applicable to Schedule Tribes – would be beneficial for reasons of efficiency and clarity about the standing position of law.

An assumption of different epistemic contexts is also particularly untrue in relation to women members of Scheduled Tribes for two additional reasons. *Firstly*, the mere fact that a case has come to the court reflects that the litigants are aware of a potential violation of their legal rights and that they view the court as a legitimate entity to remedy the same. *Secondly*, ideas of private property and inheritance are shared between modern law and the laws of the Scheduled Tribes. As evident from the previous Parts, several cases arose in the High Courts, where women from

Scheduled Tribes wished to claim their shares in their father's estate. The fundamental assumption that Scheduled Tribes have different epistemic priorities from 'modern law' collapses here, as we witness an increasing number of tribal women contesting their inheritance rights (and wishing for shares in their fathers' estates). As the inheritance of estates becomes increasingly essential to a capital-oriented society, parallelly, the logic for disallowing women their inheritance rights becomes progressively fickle.

It is also exceedingly important to note that allowing women to inherit property preserves an opt-out mechanism. So, if tribal women do not wish to claim their inheritance rights, they may simply renounce their shares or not approach the courts. But the presumption that tribal women do not wish to inherit because they exist in such different epistemic contexts where the property is unvalued, is unreasoned and fallacious. Then, the wisdom of disqualifying the claims of such women members of Scheduled Tribes, who wish to inherit their ancestral estates, is seemingly indefensible.

C. LAW AS A SITE OF SOCIAL CHANGE

Most important, however, is the observation that inheritance rights of tribal women are overshadowed by customs and only evolve with judicial interventions. Myriad accounts from history provide that possibilities of organic change within social institutions are mostly illusory, for dominant classes lack incentive to distribute power and rights more equitably. Subsequently, it is interventions of modern law that guarantee sustainable conceptions of liberty and dignified life. Particularly, in relation to the

present issue, while modern law had emancipatory effects on inheritance rights of Hindu women,[52] comparatively, recognition of inheritance rights among tribal women remains bleak and unconvincing.

Therefore, courts become indispensable sites of social change which, under considerations of equity, justice, and changing priorities, usher social systems into evolution. Then, the idea that judges must dismiss claims of tribal women, even when such women identify with different epistemic priorities, is principally unreasoned for it proscribes popular conceptions of Scheduled Tribes upon such stakeholders who do not identify with such prescriptions. This paper argues that considerations of justice are inherent to any court, and reflections of that are evident in the cases that were discussed previously. In many of those instances, the High Courts, motivated by proclivities for justice, pierced the veil of Section 2(2) by innovating techniques of statutory interpretation and let constitutional morality guide their verdict to harbours of fairness and equity.

VI. THE RULE AND INTER-JUDICIAL BORROWING

The primary task before the authors now is to consolidate the rule of constitutional morality. Accordingly, two issues are of immediate relevance. The *first* issue concerns the prescribed substantive content of constitutional morality vis-à-vis personal laws and customs. Intimately

[52] Hindu Women's Right to Property Act, 1937, No. 17, Acts of Imperial Legislative Council, 1937 (India); Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 14 (India); Hindu Succession (Amendment) Act, 2005, No. 39, Act of Parliament, 2005 (India). *See also* Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1.

connected with this issue, the *second* issue relates to the extent to which such rules of constitutional morality may be enforced.

With regard to the first issue, it is imperative to briefly describe the relationship between customs and personal laws, and Fundamental Rights embodied in the Constitution. In *State of Bombay v. Narasu Appa Mali* [*hereinafter* "***Narasu Appa Mali***"],[53] the Bombay High Court held personal laws to be outside the ambits of Part III of the Constitution. This was because they did not qualify as "*law in force*" under Article 13 of the Constitution. The decision meant that personal laws could not attract challenges for violations of Fundamental Rights. The High Court reasoned that the Constituent Assembly had wilfully excluded personal laws from Article 13, and the Court found little reason to overturn such consensus. In the years subsequent, the exclusion identified in *Narasu Appa Mali* became the reason for Indian Courts' indifference towards regressive religious practices. The decision of the Supreme Court of India [*hereinafter* "**Supreme Court**"] in *Sri Krishna Singh v. Mathura Ahir*[54] is an example of that trend. Here, in deference to the decision in *Narasu Appa Mali*, the Supreme Court allowed a custom that prohibited a member of the Sudra community from entering an ascetic order.

On the specific question of the customs of tribals, in *Madhu Kishwar v. State of Bihar*,[55] the Supreme Court recognized the numerous precedents

[53] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[54] Sri Krishna Singh v. Mathura Ahir, 1980 AIR 707.
[55] Madhu Kishwar v. State of Bihar, 1996 AIR SC 1864.

that had held customs to be law under Article 13. Hence, "*customs inconsistent with or repugnant to the constitutional scheme must always yield to fundamental rights*."[56] Accordingly, tribal women were allowed to succeed to the estates of their male relations. Nevertheless (and crucially), the Supreme Court refused to declare the tribal custom of concern in the case to be inconsistent with Article 14, for doing so "*would bring chaos in the existing state of law*."[57] This reasoning is superficial, for "*chaos*" is no principled reason why a remedy of Fundamental Rights must be extinguished – especially when the Court recognized the merit of such a remedy. Fundamental Rights are conceivably fundamental only when not subjected to the whims of public policy. Additionally, never would a situation arise where a State-imposed change in customs shall not bring "*chaos*". There is thus no logic in upholding discriminatory customs in the present, only so that they may be declared to be violative of Fundamental Rights at some future, more opportune time. This is a colloquial band-aid that must be ripped off at some point.

But whatever the case may be, *Madhu Kishwar v. State of Bihar* identified a new line of reasoning – much different from *Narasu Appa Mali*. However, a dichotomy is present in the idea that the customs which are inconsistent with Fundamental Rights are invalid, but personal laws that regulate identical issues of inheritance are not put to the test of Fundamental Rights. In this context, it is an argument of this paper that the law in *Narasu Appa Mali* must be reconsidered. Such was also the

[56] *Id.* ¶ 30.
[57] *Id.* ¶ 13.

observation of the Supreme Court in *Indian Young Lawyers Association v. State of Kerala* [*hereinafter* "***Sabarimala***"],[58] where the Court disallowed the use of *Narasu Appa Mali* as a persuasive precedent.[59] It was opined that *Narasu Appa Mali* must be reconsidered, especially in light of the ratio in *Shayara Bano v. Union of India* [*hereinafter* "**S*hayara Bano***"].[60] In *Shayara Bano*, the Supreme Court adjudicated on *Talak-ul-Biddat* (or Triple Talaq), a practice in Muslim personal law that was then held to be unconstitutional – and therefore a legally untenable form of divorce. In relevant aspects, *Shayara Bano* may be juxtaposed against *Narasu Appa Mali*. The latter stated that personal laws are not laws for the purposes of Article 13. Then, in comparison, the Supreme Court's verdict in *Shayara Bano* is a logical product of the Court circumventing the observations of *Narasu Appa Mali*. *Shayara Bano* could be considered as a lost opportunity where the courts had a chance to adjudicate personal laws as laws under Article 13, but the Court refrained from answering this question, and gave a judgment on the specific practice of *Talak-ul-Biddat* itself.

In *Sabarimala*, the majority of the Supreme Court, and particularly Chandrachud, J., opined that such discriminatory customs of independent religious denominations that violate Fundamental Rights, are void to the extent of the contravention. The Supreme Court found no compelling

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[58] Indian Young Lawyers Association & Ors. v. State of Kerala, (2018) 8 SCJ 609.
[59] *See* Sruthisagar Yamunan, *Sabarimala Case Gives the Supreme Court the Chance to Set Right Its Inconsistency On Personal Laws*, SCROLL.IN (July 24, 2018) https://scroll.in/article/887626/sabarimala-case-gives-the-supreme-court-the-chance-to-set-right-its-inconsistency-on-personal-laws.
[60] Shayara Bano v. Union of India, (2017) 9 SCC 1.

reasons for the exclusion of personal laws and customs from the definition of Article 13.

However, from the perspective of constitutional theory, the application of constitutional morality to personal laws remains a contested idea. These contests come in two forms, both of which reiterate the logic of Section 2(2) from a constitutional perspective. *Firstly*, as part of the 'essential practices' doctrine under Article 25 of the Constitution. This idea finds a compelling representation in Malhotra, J.'s dissent in *Sabarimala*. In the specific circumstances of the case, Malhotra, J. noted that every religion has a right to formulate its own practices under Article 25.[61] An assertion to the contrary, the dissent specifically argued, denies religious groups the agency to identify with the religion.[62] As a result, only the concerned sect may have a right to define the specifics of its religious practice – subject *only* to the restrictions of Article 25.[63] For example, in those particular facts, the act of allowing menstruating women into the temple would pollute the deity, which would reduce its significance for the worshippers.

Accordingly, for Malhotra, J., challenging practices of Sabarimala, along the lines of constitutional morality, was untenable as the courts were limited from reading rationality into questions of faith.[64] Additionally, the dissent opined that should an aggrieved person from within the religious sect press their claims in courts, only then may the court entertain such

[61] Indian Young Lawyers Association v. State of Kerala, (2018) 8 SCJ 609, ¶ 450.
[62] *Id.* ¶ 450-472.
[63] *Id.* ¶ 457, 461.
[64] *Id.* ¶ 452.

questions.[65] In extending Malhotra, J.'s logic to the present instance, of course, a distinction exists between religious practices and tribal customs, nevertheless, it may be argued, that the questions of agency in both instances remain the same.

However, even if Malhotra, J.'s conception of constitutional morality was true, this paper argues that tribal women, who are faced with discriminatory customs, ought to receive remedy, notwithstanding whether the concerned customs are proven to be essential and continuous. The foregoing Parts provide a sufficient basis for such an argument. Additionally, it is exceedingly important to note that the challenges to discriminatory tribal customs have come from tribal women themselves – that is, from *within* the Scheduled Tribes. Accordingly, tribal customs – at least those of concern in this paper – may be read along with Malhotra, J.'s restrained constitutional morality.

A second objection to expansive constitutional morality challenges the essentiality test under Article 25. Prof. Faizan Mustafa lays great emphasis on the redundancy of the essentiality test, but for, he argues, religion must be evaluated in its entirety. Select practices should not be termed as essential (or non-essential),[66] and he criticizes the Supreme Court for imposing its sensibilities upon the practice of religious freedoms.[67] Prof.

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[65] *Id.* ¶ 445-451.
[66] Faizan Mustafa, *Not a Holy Book*, THE INDIAN EXPRESS (Nov. 1, 2018) https://indianexpress.com/article/opinion/columns/sabarimala-temple-verdict-constitution-of-india-5428002/.
[67] *Id.*

Mustafa provides extraneous justification for such claims – though constitutional morality is a laudable goal, nevertheless, we are not ready for it.[68] At the cost of some repetition, it must be reiterated that the question regarding an appropriate time for establishing an expansive constitutional morality remains unanswered to date.

VII. CONCLUSION AND THE ROAD AHEAD

This paper began with an attempt to highlight the problems of the colonial codification process. It was sought to be demonstrated how, the British, in attempts to preserve traditional customs and personal laws, radically changed the very objects of preservation. Subsequently, changing material contexts and their impact on the relevance of tribal customs were elucidated. The paper then analysed the judicial interpretations of Section 2(2) of the HSA. Thereafter, the authors advocated for tribal customs to be subject to an expansive interpretation of constitutional morality. The central idea throughout was that precluding tribal women from contesting discriminatory inheritance customs is antithetical to considerations of justice, equity, and logic.

The assessments of this paper, however, do not limit their relevance to merely Section 2(2) of the HSA. It is pertinent to note that provisions identical to Section 2(2) also exist in the Hindu Marriage Act, 1955,[69] the

[68] *Id.*
[69] Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955, § 2(2) (India).

Hindu Adoptions and Maintenance Act, 1956,[70] and the Hindu Minority and Guardianship Act, 1956.[71] Section 3 of the Indian Succession Act 1925 [*hereinafter* "**ISA**"] similarly provides that a State Government may "*exempt from the operation…of this Act…members of any race, sect or tribe in the State.*"[72] As the form and effect of these provisions and Section 2(2) of HSA are similar, it follows that the central tensions of this paper also extend, coextensively, to discussions about customary law provisions in these other statutes.

Furthermore, though not regarding tribal customs, numerous studies note the effects on Christian women due to the initial exclusion of Keralite Christians from the application of ISA. Cases like *Solomon v. Muthiah*[73] and *D Chelliah Nadar v. G Lalita Bai*[74] are paradigmatic examples of the way exclusion clauses under ISA were used to preserve and enforce local customs that accorded inferior inheritance rights to Keralite Christian women. And though *Mary Roy v. State of Kerala*,[75] by overruling these judgments did bring some equity, yet in striking resemblance with *Madhu Kishwar v. State of Bihar*, the Supreme Court merely provided for supersession of local customs – on the grounds of a technicality. PN Bhagwati, J. categorically declined to go into the merits of arguments based on Article 14. This paper, when suitably extended, takes 'the road not taken' by

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[70] Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956, § 2(2) (India).
[71] Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956, § 3(2) (India).
[72] Indian Succession Act, 1925, No. 39, Acts of Imperial Legislative Council, 1925, § 3, (India).
[73] Solomon v. Muthiah, (1974) 1 MLJ 53.
[74] D Chelliah Nadar v. G Lalita Bai, AIR 1978 Mad 66.
[75] Mary Roy v. State of Kerala, (1986) 1 SCR 371.

Bhagwati, J., and argues that there exists no merit in preserving local customs that offend sensibilities of equity.

The arguments presented in this paper are similarly relevant for such groups as Khojas and Cutchi Memons, whose customary practices are relatively amorphous, having shades of both Hindu and Muslim customs. The Supreme Court has observed that for Khojas and Cutchi Memons, depending on their place of residence, the community's customary practices hold much weight in the determination of inheritance rights.[76] However, regarding customary practices of the Khojas and Cutchi Memon communities that grant women unequal inheritance rights, the contentions of this paper provide that such customs should not be allowed because they do not accord with fundamental rights.

As courts have often sought to maintain a distinction between customs and personal laws, extending the contentions of this paper into the domain of personal laws is more suspect. Nevertheless, this must not take away from the urgency of imposing a spectre of Fundamental Rights upon personal laws; not least because the distinction between customs and personal laws is that of thin walls, and hence, inequitable customary laws may take the tag of personal laws to escape the scrutiny of Fundamental Rights. At any rate, it must be noted that arguments against interventions of constitutional morality in the sphere of personal laws have often taken support of policy rather than substantive legal logic. However, if the central point of this paper is accepted, then there is seemingly no justification why

[76] Controller of Estate Duty v. Haji Abdul Satta, (1973) 1 SCR 231.

constitutional morality should not also pervade personal laws, and subject them to the spirit of fundamental rights.

In the end, the contentions of this paper must be distinguished from an argument for Uniform Civil Code. Indeed, it must be noted that subjecting customs to Fundamental Rights only unifies all customs in the sense that no custom can be inequitable or unjust. The paper appreciates the role of customs and traditions in community life, however, all that is contended is that such enjoyment must not occur at the cost of another individual's liberty. Therefore, till the Parliament specifically makes an amendment to include Scheduled Tribes as subjects of HSA, it is argued that courts have a legitimate objective in reading constitutional morality into such cases.