

Shri J. R. Kapoor : Unless specially saved.

Dr. Deshmukh : I fully agree with the amendment notice of which has been given by my friend Mr. Sahaya. Since you put these words here, so long as you legislate on the subject of marriage and divorce, as far as I can understand, it would not be possible to recognise any custom or usage.

Dr. Ambedkar : We are saving some things.

Dr. Dsehmukh : Not unless the saving is put down.

Dr. Ambedkar : The clause begins with the words “Save as otherwise expressly provided”.

Dr. Deshmukh : So far as my view of the matter is concerned, as regards marriage and divorce, custom should have the play. We have the instance of the Punjab, which is being governed more by custom than by specific legal provisions.

Dr. Ambedkar : We want to raise the people of the Punjab to our standard.

Dr. Deshmukh : From that point of view I have tabled an amendment to omit the words “any custom or usage” so that any custom or usage which does not contravene or which answers the requirements of clause 3 should prevail and continue. If this is not done, I am afraid, any other provisions in the subsequent clauses will not help us. According to my understanding, if part (a) of clause 4 is adopted as it is, even where it is the wish of the House that custom and usage should be recognised side by side with the provisions of the law, it will not be possible to clothe them with that recognition. Therefore it would be best to omit the words “any custom or usage”. Some of my friends have gone to the extent of saying that it should override the provisions of the law everywhere, as has been suggested by Pandit Bhargava. That would probably be something which is absolutely contrary to clause 4. It would be tantamount not only to the omission of the clause but would be putting it in the opposite direction.

Shri J. R. Kapoor : It would be a negation of the Code itself.

Dr. Deshmukh : I agree that it would be a negation of the Code. My submission is that there would be ample room for the continuance of any recognised customs and usages so long as we do not bar them by this enactment. I do not think it would be correct to leave the sub-clause (a) as it is. The original clause was to the effect that any custom or usage or any other law in force immediately before the

commencement of the Code shall cease to have effect as respects any of the matters dealt with in this Code. From that we have modified the position slightly, so long as we limit the law only to marriage and divorce. I would like that usage and custom should be allowed to prevail because it has stood the test of time, it is more convenient and less expensive, and it is likely to be less oppressive to the people. I submit there is everything to be said in favour of the amendment I have moved.

Sardar Hukam Singh : I have moved my amendment whose purport is identical with the amendment Dr. Deshmukh has moved. I entirely associate myself with what my learned friend has just now said, but in addition to that I have to submit certain other points. In clause 3 we have just defined custom and usage; how we have exalted it and dignified it is apparent from the words used :

“the expressions ‘custom’ and ‘usage’ singly any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy”.

I beg to submit that when we have laid down a definition and have restricted what actually a usage or custom is for it to be recognised, immediately after that we deal a fatal blow to it in clause 4.

An hon. Member : There is saving.

Sardar Hukam Singh : There is saving—everywhere, in every clause you say, save something which is deemed proper. But I look at it the other way. It should not mean that for every clause wherever an exception is deemed necessary a saving clause should be added saying that such-and-such a custom should be saved. Why not save it absolutely when it has the status of law? It cannot be imagined that it is so vague, so uncertain or so indefinite that you cannot reach at it or find it out. It is not only on the lips or in the hearts of the people in general, but I lay claim to this fact also that it is already laid down in public documents and it cannot be changed arbitrarily. If somebody were to say that it might lead to litigation, then I can lay the counter-charges that even in codified laws there are always disputes, even in registered documents and registered facts there are disputes. I might read from Mayne :

“The *Rivaj-i-Am* is a public record, prepared by a public officer in the discharge of his duties under Governmet rules. The statements therein may be accepted even if unsupported by instances. Manuals of customary law in accordance with the *Rivaj-i-Am* have been issued by authority for each district.”

So, those customs are not carried orally that there can be dispute about them; they are contained in public documents. At each settlement they are revised and scrutinised to see that everything is correct according to the custom that prevails. There is no danger about it. My fear is that we have been governed so long by a very simple law. We are told that it is now too late in the day that Punjabis should rise up and say that they are not governed by Hindu law. Of course, that is our claim. The Punjab Laws Act, clause 5, does define that we have been governed by customary law in preference to the Hindu law. Everybody knows the customary law and understands it well.

Dr. Ambedkar : This is much simpler than customary law.

Sardar Hukam Singh : We are told in one breath that we have so long been governed by Hindu law—well and good—but in another breath we are told that that was not the proper Hindu law. Hindu law is now rediscovered and a Code is being brought and thrust upon us. The law-giver says that this is the Hindu law. Where is the guarantee that this discovery might not lead to another after a few years and we may not be confronted with the statement that the law then being propounded was the correct one and everybody else who went before it had made a mistake. If it is progressiveness, we claim that our customs are more progressive than the law which is being proposed now. If progress is to be the criterion, then I say : don't touch us. If you wish to move forward, we are already in advance of you. Come after us. Even in regard to marriage and divorce, we are far in advance of you. Do not pull us back. Laws should reflect the stage to which the society has advanced and if the law-giver now thinks that we have advanced to this stage only now, then he is mistaken. If it is only for the sake of bringing about uniformity, then too I am afraid he would not succeed. The variations in the customs and usages, in the cultures and languages, cannot be blended together in so short a time.

An appeal was made to the Sikhs yesterday that they should forget the old days and try to become part of the nation. That is a thing that we would cherish. We are not opposed to it. but if Dr. Ambedkar cares to listen to me ...

Sardar B. S. Man (Punjab) : He is talking to somebody, he does not bother to consult us. He does not bother about our opinion.

Sardar Hukam Singh : I find he has turned to me now.

We were reminded yesterday and an appeal was addressed to us yesterday that we should try to become part of the nation ; that we should have no tendencies to remain separate. That was very good of him and I thank him wholeheartedly. We are prepared to come forward and meet him more than half way but I would just remind him, as I did yesterday, that he should begin at the Government and at the Cabinet itself, he ought to advise the President that he should not make discriminations when he issues orders, and I particularly referred to the Scheduled Castes Order of 1950,

Dr. Ambedkar : I think my hon. Friend may legitimately criticise the Government, but I think he ought not to bring in the President, because whatever the President does he does on the advice of the Ministry and I would be quite prepared to bear all the criticism that he wishes to direct against me.

Mr. Chairman : I think this point has been made clear on a former occasion when the Deputy Speaker told the House that the President's views are not to be canvassed or criticised on the floor of the House.

Sardar Hukam Singh : Perhaps I have not been heard. I said that Dr. Ambedkar should 'advise' the President. I think I am within my rights in saying that. I am not criticising the actions of the President. I am only requesting Dr. Ambedkar to advise the President. He has been advised by Dr. Ambedkar and other Ministers, and I am requesting Dr. Ambedkar to advise him. My appeal to Dr. Ambedkar is that he should beg at home.

Sardar B. S. Man : On a point of order, Madam. Some doubt has arisen in my mind. Since the actions of the President are under the advice of the Government, supposing that an action of the President is such that it gives rise to a complaint in the House, particularly at this moment when the Punjab is being governed directly by the President, is it not open to me to question the advisability or validity of certain orders of the President which to my mind are unjust ? In that case it will not be possible for me to question the actions of the President as such.

Dr. Ambedkar : I am quite certain about it. Even if my hon. friend has an occasion to criticise any of the orders that have been issued by the President, it would not be open to him to criticise the President. he can censure the government if he likes.

Sardar B. S. Man : Even when the orders are issued directly by the President ? Of course, the constitutional presumption is there that these orders are issued on the advice of the Cabinet. The situation in the Punjab is that it is governed directly by the President. Of course the responsibility for any orders issued by him would fall on the Cabinet, but when the orders of the President are to be discussed, how can I refer to them except as orders of the President ?

Mr. Chairman : The Constitution very definitely says that everything that the President does shall be on the advice of his Council of Ministers and that explains every act of the President.

Sardar B. S. Man : Suppose I want to refer to the orders made by the President in relation to Punjab, I can only refer to them as the orders of the President, though the presumption remains that they are made by the President on the advice of his Cabinet. I would like to have a clear ruling from you on that point.

Mr. Chairman : I think the point has been made clear already by Dr. Ambedkar and whatever explanation he has given applies to this category of orders as well, to which the Hon. Member has just referred.

There are two positions; one is that the President are not to be criticised, the other is that the President, whatever he does, does it on the advice of his Cabinet. If these two are taken into consideration, the conclusion will be that even though his actions are based on the advice of the Cabinet, yet they are not to be criticised.

Sardar B. S. Man : Even if they are unconstitutional—even if they are bad ? I can always say that this advice which has been tendered to the President is bad advice.

Mr. Chairman : We have accepted the provision in the Constitution that the President's actions are not to be criticised.

Sardar B. S. Man : We can even move a no-confidence motion.....

Dr. Ambedkar : You can move a no-confidence motion in the Government, not the President.

Shri Damodar Menon (Travancore-Cochin) : Has not this House a right to impeach the President ?

Dr. Ambedkar : That is a separate matter altogether.

Mr. Chairman : I would, in this connection, refer the House to clause (VI) of Rule 159 of our Rules of Procedure which says :

“A member while speaking shall not—,

* * (vi) use the President’s name for the purpose of influencing the debate;”

Sardar B. S. Man : In fact, it is the Government that is using the name of the President. When I criticise certain actions of the President, the odium attached to them may be of the government or the advisers of the President. It is up to the people to pass it on to wherever it belong. But when the orders issued are of the President, criticism ought to be in the name of the President. Because, at present in the Punjab we are being governed by the President, am I to forego the right of criticism ? It may close the door for all future time to come. That is my point.

Mr. Chairman : My own personal feeling is that if Hon. Members are not prevented from criticising, as they are doing it in the House, they may direct their criticism to the government who are giving bad advice—if it is bad advice in their opinion. If the Government is at the bottom of the President’s action, if in their opinion it is not the President who is acting but it is the government which is tendering bad advice, it is absolutely open to the Members to criticise the Government on their actions without bringing the name of the President.

Dr. Deshmukh : Can we also say that we are not criticising the President and that we are criticising the Government ?

Mr. Chairman : Therefore, where is the difficulty? When the Members are free to criticise the actions of the Government and there is absolutely no bar to their expressing their views frankly and openly, they need not feel or suffer from the trouble that they are not able to bring in the name of the President directly.

Sardar B. S. Man : We are not bringing the name of the President but the actions of the President, as they are the actions of the Government. It is for you to presume just as it is for me to criticise.

Mr. Chairman : I think I have made the point quite clear. If it is in their mind that it is the Government that is at the bottom of the President’s action and that is not advising properly, if the Government is the subject matter of the attack, they are absolutely free to attack the Government. Nothing bars them.

Sardar Hukam Singh : I am sorry that my appeal has been lost in this discussion that took place over the question whether we can

criticise the President or not. But my purpose is not to criticise the President at all. He is not to blame so far as my point is concerned. I bring the charge directly against Dr. Ambedkar, because he made an appeal to me and other Sikhs that we should not think in such separatist terms. But the blame lies on the other side. He has started this game and kept us at a distance when he was advising the President to make that order about scheduled castes. That is my complaint. Before he makes an appeal to me that I should change my mind, he should begin from his own sphere and remove that injustice. That was my first point.

The second point is when we submit that custom in Punjab is much simpler and much more easily understood by the average citizen, we are confronted with this question whether we want monogamy or not. That is not the question. Monogamy we do want. We support and welcome it. Everybody wants monogamy. Nobody is against it. Already public opinion is so strong that now normally all people are for monogamy. Moreover the economic condition of the country is such that nobody can now bear the burden of more than one wife. There is no denying the fact that it is not possible for an ordinary man now, except those that are placed in a privileged position like our Doctor himself, to have a second wife. Therefore no question arises about monogamy. Even if it comes we are not against monogamy, we welcome it. But the question is that there are other things that will follow. There are prohibited degrees. There are other ceremonies. So far as Punjab is concerned, our prohibited degrees are much fewer. You are contracting it by this Bill and you will have to contract it further. Though we are not passing the provision relating to inheritance at this moment, it is contemplated to pass it in the near future. If

1 P.M. you want that the girl should have a share along with her brother, then this long list of prohibited degrees cannot remain. Obviously we would be compelled to contract it more and more unless you give inheritance to our cousins and sisters and others (*Interruption*) like Muslims certainly. Both the things have to go together and already in the Punjab custom, there is a list of prohibited degrees which is recognized and permitted by custom and if you are doing anything against that progress which you claim you are helping to proceed, surely you are bringing us back when we have gone so far forward. (*An Hon. Member* : Leading). Yes. We are leading the whole of India.

(MR. DEPUTY SPEAKER *in the Chair*).

So far as the other things are concerned, a short while ago the question arose when my esteemed friend, Pandit Thakur Das Bhargava moved his amendment that along with the adopted son, the appointed heir should be added, and this was opposed on the ground of certain objections and interruptions. The adopted heir is as good as an adopted son as in any other part of India. The only advancement or progress that is there is that no particular ceremonies are observed. The age is not restricted and so far as relationship is concerned, that is not restricted also.

Dr. Ambedkar : Did not we decide that we will take the case of the adopted heir at a later stage ? I thought that the House agreed to that. When we were discussing clause 3 on the definition of son, Pandit Thakur Das Bhargava raised that question and I submitted to the house that this was a matter which may be considered later on at the appropriate stage either when we come to the conclusion

Mr. Deputy Speaker : When we were in the definition.

Dr. Ambedkar : My hon. Friend is referring to the adopted son. We have not come to that yet. I am only saying that we can save the time and get through clause 4.

Mr. Deputy Speaker : We agreed to put it off till Part VII. We can discuss this at a later stage when this matter comes up.

Sardar Hukam Singh : This interruption of the Hon. Minister has created an apprehension in my mind that he is not following or I am not able to make myself clear.

Dr. Ambedkar : I am following and I have caught this point that the whole of Punjab is very progressive as against all others.

Sardar Hukam Singh : That he has caught all right but if I am giving the reasons and instances, he would not care to follow. I am giving an instance where the usage or custom is so necessary and I am saying.....

Dr. Ambedkar : This part of my education will be better left out now. I will receive it at a later stage.

Babu Ramnarayan Singh : That you will have to learn.

Sardar Hukam Singh : It is not only the doctor himself who is to be educated, but there are others also. If I have to request Hon. Members to give their vote for me, I have to convince them

Dr. Ambedkar : Later on.

Mr. Deputy Speaker : What is now suggested is that this discussion should be blocked. But in another place when the same

matter was raised in clause 3 it was suggested with regard to the definition of a son that an adopted heir must also be a son. When we come to clause 7 where the prohibited degrees are narrated, it may be considered whether it should be included, or an explanation added. Let us take up this when we come to clause 7.

Sardar Hukam Singh : I am extremely sorry that I have not been understood. What I wanted to say was this. I am only advocating that usage and custom should continue to override the law. In advocating that I am explaining the utility of usage and custom, the progress that it has made over law and why it should be retained and what differences there are between custom and other laws. In that connection I am referring to the son ; I am not trying to define 'son' or other people. That was my object. But, if the Doctor Saheb says that I should not continue, I will stop.

Dr. Ambedkar : I was only saying that we may discuss this later on.

Mr. Deputy Speaker : We may discuss that later on.

Sardar Hukam Singh : Then, I was submitting, Sir, that so far as custom and usage in the Punjab is concerned, it is recognised and well understood. It has continued to override the Hindu Law as was understood by the common man or even by lawyers and law-givers. There is no reason why, when it has been overriding Hindu Law for such a long time, has stood the test of time, has stood the test of scrutiny of judicial pronouncements and other tests, it should now be abrogated because a new law has been discovered and that is being given by another law-giver it should continue. It has been definite. It is reasonable. It has stood the test of time and has been uniform. As I have already submitted it is contained in public documents and can easily be ascertained. There can be no ambiguity about it. Therefore I submit that these word 'usage or custom' should be omitted from this clause.

Mr. Deputy Speaker : Pandit Thakur Das Bhargava.

Dr. Ambedkar : If I may plead. Sir, I would like this clause to be put to the House before we disperse, if the House permits.

Some hon. Members : No, no ; this is a very contentious clause.

Mr. Deputy Speaker : I am giving opportunity to the Members who have moved amendments. First Dr. Deshmukh, then Sardar Hukam Singh, and then Pandit Thakur Das Bhargava; there are then Mr. Naziruddin Ahmad and Mr. Jhunjhunwala. I am afraid it will not be possible with the best of intentions.

Some hon. Members : This is a very controversial clause.

Mr. Deputy Speaker : I think we must sit tomorrow. We shall be sitting tomorrow also.

Some hon. Members : Yes, yes.

Some hon. Members : No, no.

Capt. A. P. Singh : Tomorrow we must have a holiday.

Mr. Deputy Speaker : There is so much of work in the Order Paper. We have not even finished clause 4. There are 55 clauses in all, in this chapter. In these circumstances, I am afraid we will have to sit tomorrow.

Capt. A. P. Singh : We have got to study so much about this Bill and about so many other things. We should have some time.

Mr. Deputy Speaker : There are no questions tomorrow. I have no objection to sitting from 9-30. We will sit at 9-30 a.m. This will be the only work tomorrow.

Some hon. Members : Yes.

An hon. Member : Up to ?

Mr. Deputy Speaker : 1-15 as usual.

An hon. Member : 9-30 to 2 O'clock.

Pandit Maitra (West Bengal) : Up to 12 O'clock, Sir. We have got other work.

Pandit Thakur Das Bhargava : This is the most contentious clause in the whole Bill (*interruptions*). Sir, I was submitting that clause 4 is the most contentious clause in the whole Bill. As a matter of fact while we were considering clause 2 which took so much time of the House, the contentions were really such as appertained to clauses 4. Human nature as we know it, loves its own customs. In societies where the law-making power is not fully evolved the conduct of the people is governed by customs, and custom gets fixed in the affections of the people and its seat is deep in the hearts of people to such an extent that people love it in preference to imposed law. Therefore, the question which is put to us when we go out into the country is "Are our customs to be safe or not?" a few days ago I was in the house of one of my friends who happens to be a Minister of the Government of India and his orderly asked me. "What are you doing, Sir, with regard to the Hindu Code?" I told him that the Hindu Code Bill was being discussed and some portions of it will be passed. The very next question that he puts me is, "Will it do away with

our divorce custom ? “that was the question that he asked me. I told him, “Well, it is likely that the divorce provision will be passed and so far as the customs were concerned, those, customs would be recognised only if they stand a special test and all customs would not be continued. He was not happy. He wanted that his own custom whether it be reasonable or not, may be recognised and fully given effect to. Sir, that is really what is in the minds of the people now. All the same, so far as this House is concerned and so far as the representatives of the people are concerned, we are anxious that custom should come into this law only to a certain extent. We want that such customs as have gone very deep in the affections of the people should be continued. So far as South India is concerned we know that there are certain connections and manages there which are regarded as very objectionable in North India, but they are considered right and proper in South India. They should not be interfered with. Similarly, Sir, there are some customs or well-established practices in other parts of India and no person would say that they should be interfered with. In this connection I would illustrate my point by reference to a custom that is very widely prevalent among the agricultural classes in the Punjab and which is going to be disturbed by some of the provisions that we are making here. There a certain kind of marriage is performed called the *Kareva* marriage. If a man dies his widow is married to his younger brother or to any person who is of the same status as a brother even though this brother may be of the same age or younger than the woman. In some sections she is married to the elder brother also, but that is not the practice in other sections. Now, in that form of marriage you do not have the usual marriage procedure, the “*Sapta pada*” and all that. They just go through a customary rite and the marriage is considered as having been performed. The final result of this practice is that neither the property nor the woman goes out of the family and also the children from the previous husband are properly looked after. And this custom has been prevailing among these people from very ancient times. The upper-class Hindus are now adopting gradually this custom of widow-marriage. This sort of widow remarriage which is practised by the agriculturists in the Punjab is being adopted by the upper-class Hindus also. So the custom now is that even if the younger brother of the deceased has a wife living, he will have to marry the widow of his elder brother and they live as husband and wife. This is practically a case of bigamy according to the Hindu Code.

Mr. Deputy Speaker : How ?

Pandit Thakur Das Bhargava: The younger brother may have his wife living and according to custom the widow of the elder brother is married to the younger brother even though he may have a previous wife by marriage. (*Interruptions*).

Mr. Deputy Speaker: There are certain customs prevalent in particular parts which according to them are valid and not unusual. Let us not show any kind of derision or disagreement by any visible representation such as laughter lest we should wound their feelings. I only put the question for the purpose of knowing the details of it so that the House may understand the position.

The hon. Member may continue his speech tomorrow.

The House then adjourned till Half Past Nine of the Clock on Saturday, the 22nd September, 1951.

* HINDU CODE—*contd.*

***Pandit Thakur Das Bhargava :** (*English translation of the Hindi speech*). Sir, an hon. Member has expressed the desire that I should speak in Hindi. In deference to that I wish to express myself through the medium of that language.

As I was submitting yesterday before the House, our customs are of very heterogeneous character. They are so different from one another that a custom considered to be good in one part of the country may be thought of as a very reprehensible one in another. So we should proceed about this Bill very cautiously. Yesterday I mentioned the *Kareva* form of marriage at which some hon. Members had laughed. This custom is prevalent to a great extent in Punjab and Oudh and it is not a matter of laughing. If you judge it from the point of view of high ideals of Hindu society, it is possible that some of the hon. Members may not like the *Kareva* form of marriage because according to the ancient standards the wife of the elder brother is to be treated as mother. According to Ramayana when Lakshmana's mother gave her consent to his going with Rama in his exile, she said :

*“Ramam Dasharatham viddhi, mam viddhi Janakatmajam;
Ayodhyamatvim viddhi, gachhtat yathasukham.”*

She asked Lakshmana to look upon Rama as his father and Sita as herself i.e., like his mother, and think that the jungle was Ayodhya. Such was the high ideal of our society. How many young men are prepared to go in exile at the orders of their fathers? How many men respect an elder brother like a father? Such behaviour is ideal. As far as the customs prevalent in society are concerned, even our Shashtras have ordained that the younger brother of the husband is *Dwivar* the second, prospective husband. In many cases the Shastras have permitted men to marry the wives of their elder brothers, after their (brothers) death. There is nothing surprising in that. I am conversant with the customs prevalent in Madras and other States. I toured the whole of India in the capacity of a member of the Age of Consent Committee and enquired into the various customs. That is why I say that we have a number of customs of different character and I need not dwell over their intricacies. One should not inquire the feelings of a sect, the feelings which form the basis of a particular custom. I want to submit that there is no good reason to laugh at this *Kareva* system of marriage. In fact, many advantages accrue from

this system and those communities that have followed this custom for many centuries have benefited from it to a great extent. For example, in old days and even now in India, when a girl is married in a certain family, she becomes a member of that family, though she is married to one individual. Whatever share of property she gets becomes a part and parcel of that family's property. An effort is made to retain the property and her share in the family, and after her husband's death the responsibility of bringing up her children devolves on the family as a whole. This is the basis of the *Kareva* system. By following this, she by getting married to her husband's younger brother or his cousin continues to be a member of the family even after her husband's death. In this way her children by her first husband are brought up with the same love as before and are not inconvenienced in any way. The hon. Members are aware that such popular customs have been recognised in India. According to Section 2 of the Widow Remarriage Act, 1856, if a widow marries again she loses all her rights in her husband's property. I would invite the attention, specially of Hon. Dr. Ambedkar, to the fact that after remarriage a widow loses all her rights pertaining to maintenance or to her share in her former husband's property. The obvious reason for this is that after remarriage, a widow becomes a member of another family. But by following *Kareva* system i.e. marrying her husband's brother after his death, she retains her share in her former husband's property. This custom is prevalent to a great extent in Jat Sikh communities in the Punjab. When the widow continues to be a member of her husband's family by marrying his younger brother after his death, she does not lose her right over land.

The Minister of Law (Dr. Ambedkar): Would this not be more relevant when we deal with the clause on marriage? Now we are dealing in a general way. I have said that whenever each clause comes, to whatever extent it may be necessary that clause may be made subject to custom. I would only suggest to my friend that probably his remarks would be more relevant when we come to that part.

Mr. Deputy Speaker: I have also been thinking of it. The amendments he has tabled seek that only those portions of the Bill must prevail where they are not inconsistent with custom, Then he wants certain customs to be saved. So far as these customs—which will be saved—are concerned, they may be more specifically referred to when we come to the relevant portion on marriage and divorce. With reference to the general question as to whether this should operate

where there is inconsistency or whether it should generally operate where it deals with the matter, this is a matter which may be dealt with when we come to details.

Dr. Ambedkar: Would the difference be very great? supposing we say that any custom which is not inconsistent will be safe or we say “subject”, I think the effect would be the same.

Mr. Deputy Speaker : The hon. Member need not go into the customs *in extenso*. A general indication of the custom is enough. We may dwell on the details when the relevant clause comes up.

Pandit Thakur Das Bhargava: I realize the force of Hon. Dr. Ambedkar’s objection.

Dr. Ambedkar : I do not object. All I say is that it will be more relevant in the other context.

Pandit Thakur Das Bhargava : I will not dwell upon the details of any custom. As the Hon. Deputy Speaker said all the four amendments moved by me contradict one another. One of them is that custom should over-ride all laws and even prevail upon the Hindu Code Bill. I gave an example of our customs in order to impress upon this House that if we agree to the principle underlying this amendment, we lose our stand. I do not want that my amendment, saying that custom should override laws, be passed. It should be eliminated. I mentioned *Kareva* system in order to bring out the nature of our customs. Sir, I submit that I do not want that the House should try to keep this custom intact, I shall not press the House for the saving of those customs which I do not consider to be proper.

Mr. Deputy Speaker : Would it not go against the very spirit of the Code? (The object of this Code is to gather the varied customs and put them into a single Code). Hitherto, customs have not been codified. Some customs have been upheld by the courts and if we go on making exceptions, the whole law will become nebulous. The purpose of the Code itself will be frustrated. I think the Code seeks to incorporate the customs which have been upheld by courts and a presentable document is placed before the country which can be the basis for further additions, if necessary. But it will go against the very grain of this Bill if all the customs are exempted. Only in exceptional cases, special provisions should be made in regard to customs. I am not ruling the hon. Member out of order. Now that we have accepted the principle that we must codify certain matters, it follows that any custom which is inconsistent with this law must go.

Pandit Thakur Das Bhargava : With all respect I beg to submit that I support each and every word of what the Hon. Deputy Speaker has said, because it is right and it tallies with what I mean by my remarks. For many a year, decisions have been made on the customary laws and customs of the Punjab, decisions which are in conformity with justice, equity and good conscience. Thousands of suits have been fought on the issue of our customs. So we should take them as a basis and follow such customs.

Sir, you remarked that if we were to go on making exceptions in the case of every custom we would enter a nebulous state of things and the Code would become useless. I go a step further and submit that we should make exceptions in the case of those prevalent customs only which are considered to be right, such as the *Kareva* system which should be allowed to remain in operation for some time. In Madras and Bombay Acts there is a provision that customary dissolution of marriage would remain operative wherever it is prevalent. Where such customs are provided for, all customs should be either allowed to remain operative or be done away with. I take codification to be an attempt at improving bad customs. The hon. Dr. Ambedkar does not agree with me. He wants to codify all customs. I appeal with all sincerity that while codifying we should retain only good things and leave out the bad ones. I am opposed to that kind of codification which would include even bad customs. It is not our intention to perpetuate bad customs through codification. (I want to make it clear from my amendment, that customs should prevail. I have also proposed that universal laws and principles should be given due importance, a scrutiny should be made with the purpose of judging as to what is needed and all advantages and just universal laws, usages and customs should be retained.

If we want to codify our usages and customs, (I would like to point out that the most important of our customs is that we should not allow divorce). But we are going to give our women the liberty of divorce, because the Constitution and the sense of justice do not allow that women should lack this liberty. Go ahead and give them this right but bigamy is an established custom. It has been in vogue for many centuries and it is prevalent in some sections of our society. After the passage of this Bill and the enforcement of monogamy a person would not be able to marry another woman by the *Kareva* system as long as his first wife is alive.

Mr. Deputy Speaker : The only point is this. In so far as the *Kareva* custom is concerned, it allows bigamy in particular circumstances. I think when we come to monogamy we can deal with that. But on general principles, the hon. Member can only say that this Code should be applied to all cases except that he may refer to some cases here and there by way of illustration to show that they may be exempted.

Pandit Thakur Das Bhargava : I have not touched upon any particular custom. I want only to show what is the place of custom in this code. Only to illustrate this, I mentioned the example.

Mr. Deputy Speaker: I think the sponsor of the Bill feels that he has looked into all the customs and he has included all customs that, according to him, must have the sanction of law. Other hon. Members may feel that certain other customs prevail and exception must be made for them in the body of the Bill. If that is so, it should be done at the appropriate stage. At present we are on the general provision which says that any custom that is unwholesome and therefore inconsistent with this Code will go. Should we not make a provision like that saying that in so far as matters regulated by this code are concerned, such a custom shall not prevail and shall not have force? What is relevant therefore on this clause is the general nature of the custom and a few illustrations here and there. Even if there be a single custom which has to be abrogated by this Bill, such a clause is necessary. We are now going into the root of the matter. As to whether a custom has been enjoying uniformity, continuity or is of ancient nature—those are matters which certainly can be looked into and if some additions are suggested by hon. Members those can be considered.

Pandit Thakur Das Bhargava : Had we been discussing the whole of the Code this clause would have been absolutely necessary. But we are going to pass only a chapter in which at every step it is provided that custom will prevail in such and such case. That is why I mentioned an example to show that such a custom has been prevailing for many centuries.

Mr. Deputy Speaker: Even if there is a single unwholesome custom relating to marriage and divorce, this clause is necessary. For instance, the sponsor of the Bill feels that whatever might be the exceptions, a maternal uncle marrying his niece, that is a brother marrying his sister's daughter should not be exempted.

Dr. Ambedkar : We shall deal with that matter at the relevant stage.

Mr. Deputy Speaker : Let us assume that the Law Minister feels that such a custom ought not to have the force of law, then we should have a general clause like this here. There are customs even with respect to marriage and divorce which have to be provided against, if they are unwholesome or opposed to public morality, or public interest or public policy. I do not see how you can get out of a general clause like this in some shape or form.

Pandit Thakur Das Bhargava : Sir, if you look into the list you will find that I have not given notice of any amendment with regard to the omission of Clause 4. But I have mentioned it and have given an example in order to know as to what place would we assign to custom in this general clause. I agree with Mr. Mayne when he says that custom is the first rule of decision.

Mr. Deputy Speaker: The arguments are not confined to the restrictions that have to be made so far as clause 4 is concerned.

Pandit Thakur Das Bhargava : I beg to submit with due deference that clauses 3 and 4, where custom is defined, overlap each other. Yesterday, while I was discussing clause 3, Dr. Ambedkar quoted clause 4 in reply. Clauses 3 and 4 are overlapping and the mention of one leads to the mention of the other on account of similarity of context.

As *Sutras* and *Smritis* say

“Vedah vibhinnah smrityo vibhinnah naiko muniryasya vacha pramanam, Dharmasya tatvan nihitam guhayam mahajano yena gatah sa pantha.”

[*Sruti* says something and *Smriti* another. There is no sage whose word can be taken as final. The secret of Dharma (Duty) is very deep. Follow the path traversed by the great.]

I submit that custom has a special place and personal law has no meaning without custom, as is evident from clause 5 of the Punjab Laws Act, 1872. There are many rulings to the effect that custom has a place in personal law. I think while making personal laws we should assume custom to be there. Sir, in the Punjab, in the last one hundred years, all suits pertaining to agricultural communities have been assumed to be governed by agricultural customs. In a suit between urban parties, it is assumed that it would be governed by personal law. In fact, according to decisions of the Punjab Chief Court (107 of 1887, 100 of 1906 and several others), it has become a sort of

law that there is no general custom except where the parties to a suit belong to the agriculturists communities and even in that case the onus of proof of a certain custom falls on the person who alleges it. Viewing the Hindu Code from this point I am of opinion that there should be no undue interference in any custom. Sir, yesterday I submitted that Hon. Dr. Ambedkar was preparing to adopt the customary basis of divorce as provided in Madras and Bombay Acts. I want to oppose this move. You should not spoil our divorce law by adopting that basis as it is the first time that we are making a divorce law. You are interfering in the social economy of upper class Indians. I am in favour of the divorce law. I have no hesitation in saying that we should have a single divorce law for the whole of the country. (I am with you in your efforts for the unification of the country). I know that in Punjab, to which I belong, and other parts of the country, about which I know something, divorce is so easy that there is a saying— “When the parties agree, they need no decree.” I do not want that divorce may be had just for the asking ; that will be highly unjust, there is a custom according to which the woman pays up the amount spent by her husband and gets a divorce. I am entirely against this custom, because this seeks to destroy our morality. I am taking up your time to voice my opinion, Hon. Dr. Ambedkar is not listening to me and is busy with his work. You should make a provision for some common and uniform grounds of divorce. Do not allow any custom to interfere in the matter of grounds of divorce or we would be in for a calamity.

I would not countenance the provisions of the Bombay and Madras Acts. I am raising my voice against them not because I am an opponent of the Bombay and Madras Acts for so far as bigamy is concerned, I am as much against it as they are. The amendments of which I have given notice have only one purpose in view, that is, I am not ready to give go-by to the good principles that are contained in our laws relating to marriages, Dr. Ambedkar asked for acceptance of customary basis but every prevailing custom should not be accepted because if that were done, as has been done in this Bill, the whole purpose of the Hindu Code Bill would go to pieces. I want that there should only be one basis for divorce. If the responsibility lies with the husband, he should be required to provide for her expenses till the time of her remarriages. You will find from the Bill that although there is no customary basis for them yet it has been found pertinent

to make many rules that are in accordance with the rules prevailing in foreign countries. We have no quarrel with the rules of other countries. But I am against inclusion of every custom for there are unreasonable customs also. While customary basis has been so much command, I find three words —justice, equity and good conscience— absent. The customs that were immoral have been declared void by our High Courts for they were not just. If there are customs under the refuge of which a divorce is effected under pressure and if it is so proved, the High Courts would declare it as immoral although these customs exist together with others. But these very things that are not in fact based on justice and morality want to come through the backdoor under clause 4. Effort is being made for admittance of customs that would take out the very life of the Hindu Code. We are in no case going to accept them. We must put an end to these things of course. I have no objection for good and useful customs and those that may be very deep-rooted as, for example, the South Indian custom which you just referred, I have thus no objection to Aliyasanthanam Act which has been incorporated in 24(a). But the customs that have harmful effects should be given no place. The Hindu Law says that customs should be followed. In fact, customs are for Archaic society ; but for the advanced society, that keeps pace with the progress of the world, there are some universal principles which the Legislature embodies in the form of Acts and they should be our basis. This is why I emphasize that customs should not be brought in unnecessarily. That is what my amendment seeks to do. The purpose of my amendment No. 446 is to show at what dangerous spot would we reach if that clause were adopted. Otherwise, I have given notice of that amendment merely for discussion and not for acceptance. The rest of my amendments I have already placed.

Under these circumstances I would emphatically request Dr. Ambedkar and the House that justice should be done and nobody should be put to unnecessary trouble. The Hon. Minister may do whatever he likes on the basis of justice, equity and good conscience— he may leave open as much field as he chooses on that basis. But whatever new legislation is enacted, it should be just. Of course, customs should have their proper place there ; but bad customs going against the fundamental principles should not be countenanced. We want to give customs their due place. We want to respect them so far as they are against those customs that lead us to immorality because