

CUSTOM AS A SOURCE OF LAW

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Introduction

The word 'custom' derives its origin from the old French word 'Coustume'. In Hindi, the word 'custom' signifies 'reeti', 'vyavhar', 'rasam', or 'reewaj'.

Customs is a potpourri of a habitual course of conduct that is congruent with the norms existing within a particular social arrangement. The practise of wearing a black and white dress in England and India respectively during a funeral ceremony is a typical example of customary practice. **Saptami**¹ is one of the renowned examples of custom as a source of law which has been. It has a regulatory feature of human conduct in society. Customs have contributed to the most ancient sources of law-making. The current scenario is, however, not the same and stands changed. The legislation and judicial precedents are contemplated as the main source of law-making, taking over customs as the main source of law concerning societal set-up and advancement. The various dimensions of human behaviour have stipulated societal signals as the conceptual armature of customs. It is considered as one of the gadgets of social control which instructs or directs human beings to live in a certain way in the society to allow the growth of society and to a perpetual through generations. Carter asserted that custom is nothing but the consistency displayed in the comportment of the population of a given area under like circumstances.² While in line with Holland, the custom is an itinerary observed course of conduct.³ In the language of English law, the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as usage. Usages are not contemplated as laws **ex proprio vigore**.⁴

Custom and Law

¹ Section 7 of the Hindu Marriage Act, 1955

² Dr. V.D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY, 254(Eastern Book Company, Lucknow 2007).

³ Ibid

⁴R.W.M DIAS, JURISPRUDENCE, 192 (Aditya Books Private Limited, New Delhi, 1994).

Custom is contemplated as the third source of Hindu law and in the ancient times it was also deemed to be the highest 'Dharma'. Customs are considered to be the cardinal source and are positioned next to 'Shruti' and 'Smritis'. The Hindu Code describes custom and usage as any rule which has been practised incessantly and uniformly to be observed for a long time, thus, obtains the force of law...in any local area, tribe, community, group or family, if it is certain and not unreasonable or opposed to public policy.⁵ Custom is also acknowledged as a major source of law under the velarium of Indian Legal System. Article 13(1) of the Constitution substantiates that when Constitution entered into force, all previous laws that were inconsistent with the Constitution were considered void. Customs is the most persuasive force which has helped us mould the ancient laws and thus, regulated the society to embody only those customs which were deemed to be right for the sake of laws to take over command in the state as to what custom was in society.

INDISPENSABLE ELEMENTS OF A VALID CUSTOM

The crucial elements of a valid custom can be broadly categorised into – Formative essentials and Operative essentials. Certainty, Continuity/ Uniformity, Conscious acceptance, Antiquity etc form the Formative elements of a valid custom. Customs fulfilling the above essentials are valid at **prima facia** although it may be unenforceable even if it is opposed to public policy, morality or unreasonable. The aforementioned features happen to be the faulty and infirm elements of a valid custom. Therefore, to have a validating effect custom must be reasonable enough to not oppose public policies, moral policies and express enactments of a legislature. The above stated are the Operative essentials. Hence, a valid custom must not vitiate from the above-mentioned Formative and Operative essentials.

- ANCIENT

The word ancient signifies that the custom must hold some antiquity. The term ancient is equivalent to the expression from time immemorial.⁶ As stated by Blackstone, a custom, so that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary.⁷ Custom can be called long, if it was introduced within ten or twenty years, very long if it dates from thirty years, and ancient if it dates from forty years.⁸The court opined

⁵ Section 3(a) of The Hindu Marriage Act, 1955.

⁶Umrinath Chaudhari v. Goureenath, 13 MIA 542, 549 (1870).

⁷ Dr. V.D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY, 269 (Eastern Book Company, Lucknow 2007).

⁸ .W.M DIAS, JURISPRUDENCE, 188 (Aditya Books Private Limited, New Delhi, 1994).

in the case of *Urminath Chaudhari v. Goureenath*, that a custom practised for a hundred years establishes sufficient antiquity to call into attention to itself as ancient. A valid custom must qualify the above quintessential features to be recognised in society. In the case of *Rajothi v. Selliah*⁹, the H.C held that in modern times no one is obligated to create any rules as they fall under the subject matter of Legislature to entertain as their function.

- UNIFORMITY AND CONTINUITY

By the **de facto**, the custom is ancient. It must fall in with the stipulated uniformity and continuity clause, for these are the element which substantiates its establishment with its time-honoured use. If there is any kind of variation in its cultivated practise since the time-honoured use then it vitiates the above title of being uniform and continuous thus, defeating the purpose of stability. A custom must be followed continuously and uninterruptedly from the time dating back to the ancient period. If the custom goes unpractised even for a small period due to any accidental or intentional belief or due to any reason it amounts to its desertion. Blackstone pointed out that one custom cannot be framed up in adversary to another. For if both are customs then both are of equally antique, and both were established as a product of **consensus ad idem**, which to say of contradictory customs is absurd. Therefore, if one man prescribes that by the authority of custom, he has a right to have windows peering into another's garden, the other cannot be entitled to claim a right by custom to occlude or halt those windows: for these are paradoxical customs and cannot both be neither good, nor both stand together.¹⁰

- CERTAINTY

To gain validity, a custom must be certain and definite. The customs should be vivid in terms of what it insinuates or presupposes. Any amount of obscurity or uncertainty will lead to confusion thus, defeating one of the essential ingredients of a valid custom. The validity of a custom obtains force from the intensity of its clarity with which is practised to its potential. Any non-confirmation or non-compliance with the same renders it invalid.

CONSCIOUS ACCEPTANCE AS A RIGHT

The Latin phrase, **Opinio Juris sive necessitates**, translates to an opinion of law or necessity. Customs are to be enjoyed audaciously unrestrained by propriety with the full knowledge of

⁹ 2 MLJ 40 (1966).

¹⁰ *Ibid*, 272.

public or community and must not be a subject of secret practise. Also, it must conform to a matter of right.

- Reasonable

Customs must be reasonable **prima facie**, to be admitted in the laws and should not be a subject of more mischief than good. If it vitiates the aforementioned prerequisites then it is to be discarded. Customs should not be a matter of debate to indecency and unreasonableness. For example, a custom allowing marriage with the daughter's daughter or the practice of Sati, the customs like these should not see the light of the day on the grounds of being unreasonable at the first instance from its very inception. However, it is not mandatory or obligatory that customs must derive their foundations from logic. Customs, unlike recipes, does not require an exact amount of salt and spices as ingredients. They are based on the wisdom of the masses which is influenced by the social values, inculcate through the societal changes and advancement. The reasonableness of custom is stipulated by the contemporary values of every society, though there have had been a lot of instances wherein the customs which did not meet the above-stated conditions were discarded on the grounds of being unreasonable.

Unopposed to Morality, Public Policy or an Express Enactment

A valid custom must qualify to morality, public policy or an express enactment and must be following the enactments of the legislature. There is no straight-jacket formula laid down anywhere to help us define immorality or to judge immorality in anyways. It is the courts upon whose wisdom the question of immorality is left to be sorted for the public good. The long-life span of the morality practised does not necessarily guarantee the custom, moral or reasonable. And hence, does not ensure its enforcement by the court of law. In the leading case of *BalusamyReddiar v. Balkrishna Reddiar*¹¹, marriage with the daughter's daughter was held illegal as being abhorrent to morality though there were existence and operation of such a custom in the Reddiar community of Tirunelveli district. The custom by which the marriage ties could be dissolved by either husband or wife against the wish of the divorced party on payment of a sum of money was also held immoral.¹²

Custom can be declared void, on the ground of opposing to public policy. With the allusion to prevailing values, customs having the propensity to interfere with the public interest or public

¹¹ AIR, Mad L.J 97 (1957).

¹² *Keshav Hargovan v. Baigundi*, 17 BOMLR 584 (1915).

welfare, are opposed to public policy. Also, the customs should not interfere with the statute of law. In the words of Coke, no custom or prescription can sequester with the force of an Act of Parliament.¹³

TYPES OF CUSTOM

Customs can be broadly categorised into two types: -

1. CUSTOMS which are UNSANCTIONED: - Customs which cover lesser important aspects of our social lives are sheltered under this topic. Therefore, these are also called customs without binding obligations. For example, it is a custom in India to not wear black dresses in any auspicious or festive occasions like marriage ceremony, Diwali etc or not allowed to wear vibrant coloured clothes in funeral ceremonies as a way to respect the departed. No man is under any kind of obligation or irresistible urge to perform them. However, these are practised by individuals in a society in the fear of social outcaste and maybe not by their desire. These have been followed by individuals due to the peer pressure of public and their opinion restricting the individuals from its non- performance because the non- performance of it will lead to its extinction. Hence, these are also called SOCIAL CUSTOMS.

2. CUSTOMS which are SANCTIONED: - This category classifies customs which is a more explicit and in a demanding sense are contemplated as the specific duties and obligations of men. Such customs may modulate the accountability of marriage and the nurturing of children, the transfer of property at death, or the modes of consummating and executing agreements. Such customs do not go along with the realm of social formalities, outward decorum, or aesthetics; rather, they are perturbed with the serious walks of life, the work that must be accomplished to establish and assure adequate conditions for collective life.¹⁴ These customs have sanctioned or acquired certain standards or have qualified certain tests which have earned or credited them the legal character. The violation of the same will lead to legal consequences. As they have a binding or obligatory nature.

2.1CUSTOMS which are SANCTIONED can be further classified into: -

¹³ Dr. V.D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY, 272 (Eastern Book Company, Lucknow 2007).

¹⁴ EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW 300 (Harvard University Press, U.S.A, 1966).

- **LEGAL CUSTOMS-** The authority derived from a legal custom is absolute and **Proprio vigore** possesses the force of law to be enforced. Legal customs are sanctioned ones and their enforcement is backed up by legal obligation which binds the individuals or groups to perform the legal obligations what is called as LEGAL CUSTOMS as they are not just laid on the foundations of mere faith or time survived practised.
- **CONVENTIONAL CUSTOMS-**According to Salmond, conventional customs are those which derive authority upon the condition of its acceptance and absorption of the same in the agreement between the parties to be obligated by it. He further avouched that the English law termed custom was something more commonly incommensurable to legal custom exclusively, while conventional custom was identified as usage. Usages were not laws **ex Proprio vigore**.¹⁵ These customs have not self-arisen. They are basically, a product of long practised conducts or norms which have been established because of its implied or expressed conditions stipulated in the contract between the involved parties.

Legal customs can be further classified into: -

- a. **GENERAL CUSTOM:-** Customs which prevail throughout the country and composes one of the main laws of the land. It encompasses its circle all over boundaries of the state and is observed by the population.
- b. **LOCAL CUSTOM: -** Customs which are observed and practised within a limited circle of locality, district, town or an area are contemplated as local customs. But they do not implicit any geographical confinement only. According to Salmond, the term custom in its incipacious sense means local custom exclusively. In India, these customs are further sub-categorised into Geographical local custom and Personal local customs. Many thinkers have defined Local customs as a particular set of rules which existed in reality or presumptively from time immemorial and has obtained mandate the law, in

¹⁵ Dias, R M W, "Jurisprudence", First Indian Reprint (1994), Aditya Books Private Limited, New Delhi, at p 192.

a particular locality or a particular defined geographical area/ boundary, although it is contrary to or not consistent with the common realm of law.

CUSTOMS to gain validity should be sustainable, reasonable, continuous, and permanent. Also, it should not be in contrary to any existing law of the Statute.

CUSTOM AND USAGE

Customs and usage though sound similar but differ in the various perspective of commercial law. Hence, it is essential to draw the line of difference between the given two of the above. Usage is the repetitiveness of acts whereas customs or customary laws are these general rules which are due to these repetitions. Usage is not a **sine qua non** to custom but customs are a **sine qua non** to usage. Usage derives its enforceability from the agreement between the existing parties whereas customs derives its enforceability from its adoption into law which is binding regardless of the assent or consent of the parties. However, two of the above are often misunderstood and confused.

CONCLUSION

In the primitive stage of the evolution of society, customs were considered as the sole source of law. They form the foundations for all the legal systems. They saw the light of the day to regulate the conduct of the humans and to bind them to a common set of practices in a society. Customs are repeated practises observed by the masses since time immemorial which are rational and embodied into the legal rules. The roots of customs and its traces are laid deep down in the history of mankind. The customs are granted validity only when it fits the above-discussed criteria's of a valid custom and it is after the fulfilment of the essentials it is sanctioned and its effect is rendered obligatory in the society by law.



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