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CUSTOM AS A SOURCE OF LAW

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ABSTRACT

Customary law is a source of law that reflects the traditions, practices, and social norms of a particular community. It is developed over time through shared experiences and practices, and it has the potential to be more effective and relevant than other forms of law. However, its use as a source of law presents challenges, including ensuring its compatibility with modern legal principles and human rights standards, and its ability to adapt to changing social conditions. The future of customary law in legal systems will be shaped by ongoing debates and negotiations about its role and value in a changing world.

Keywords: Custom, law, Norms, Traditions.

INTRODUCTION

Custom is a routine behavior pattern that people consistently and voluntarily follow. In practically all civilizations, custom plays a significant role in regulating how people behave. It is one of the first sources of legislature fact. However, as society advances, customs progressively fade away, and legislation and legal precedents take their place as primary sources. People develop custom by unconsciously adopting a particular code of conduct whenever a similar issue needs to be solved, and custom only has legitimacy if it has been used and accepted by the public for an extended period of time. Custom is a type of unique law that has been observed for all of recorded history. Customary law is defined as a law that is founded on custom. Studying custom as a source of law entails looking at a number of its facets, including its nature and origin, significance, justifications for its recognition, classification, numerous theories, how it differs from prescription and usage, and the requirements for a legally binding custom.

RESEARCH PROBLEM

Custom can simply be explained as those long established practices which have acquired binding. In ancient society, custom was consider as the most important source of law; in fact it was consider as the real source of law. With the passage of time and the advancement of the civilization these practices are diminishing and the importance of custom as source of law is also diminishing. Other source like judicial precedent and legislation gained importance.

HYPOTHESIS

Custom is a valuable source of law as it reflects the traditions and social norms of a community. However, its effectiveness depends on its compatibility with modern legal principles, ability to adapt, and scrutiny to ensure fairness and justice. Custom must not be used to justify harmful practices or discrimination.

RESEARCH QUESTIONS

1] How was custom added in source of law?

- It is clear to distinguish between a genuine custom with legal authority and a customary practise that lacks this authority. If it is not shown that a certain sect is outside of the custom's purview and there is no agreement over it, the custom shall be enforceable.

2] What are the conditions for custom to become a law?

- It is clear to distinguish between a genuine custom with legal authority and a customary practise that lacks this authority. If it is not shown that a certain sect is outside of the custom's purview and there is no agreement over it, the custom shall be enforceable.

RESEARCH METHODOLOGY

There are two major sources of collection of data. The data gathered through inquiry and investigation is referred to as primary data, since they are founded on first-hand information. Secondary data are those that are acquired and processed by another organisation. The researcher used and examined a variety of secondary sources, such as research reports, publications, books, journals, and other materials, for the purpose of this research. The Doctrinal Method of Research was applied throughout the duration of the research. There is no first-hand data offered that is static. In this study, descriptive research is predominantly used.

LITERATURE REVIEW

Custom is an important source of law and it is desirable to define the same. Custom has been defined by various jurists as per their notion, understanding, philosophy, views and opinion. The different jurists also defined custom on the basis of source, validity, practice, history &utility. Some of the important definitions of custom are as follows:

- As per Sir John William Salmond, “custom is the embodiment of those principles which have commanded themselves to the national conscience as principles of justice and public utility.” In his book
- C.K. Allen defines custom as “legal and social phenomenon growing up by forces inherent in society—forces partly of reason and necessity, and partly of suggestion and imitation.”

- J.L Austin defines custom as "Custom is a rule of conduct which the governed observe spontaneous and not in pursuance of law settled by a political superior."
- David J. Bederman says "Can custom be law, even before it is recognized by authoritative legislation or precedent?" In his book custom as a source of law.

HISTORICAL DEVELOPMENT OF CUSTOMARY LAW

Customary law refers to a system of unwritten legal rules and practices that have developed over time within a particular society or community. It is typically based on long-standing customs, traditions, and practices that have been recognized and accepted by members of that society as binding and enforceable. The historical development of customary law varies widely from one culture to another, but some general patterns can be identified.[1]

Oral Tradition: In many societies, customary law was passed down orally from generation to generation. Elders and community leaders would gather to discuss disputes and make decisions based on the customs and traditions of the community. This oral tradition allowed for flexibility and adaptation to changing circumstances.

Religion: In some cultures, customary law developed in conjunction with religious beliefs and practices. Religious leaders would interpret religious texts and apply them to the specific circumstances of the community, creating a set of customs and traditions that were considered binding.

Colonialism: Many customary legal systems were disrupted or displaced by colonial powers, which imposed their own legal systems on the societies they conquered. This often led to the erosion of traditional customs and practices, although in some cases, elements of customary law were incorporated into the new legal systems.

Modernization: In the 20th century, many societies began to experience rapid modernization and social change. This often led to the erosion of traditional customs and practices, including customary law. However, some communities have actively sought to revive and preserve their customary legal systems as a way of maintaining their cultural identity and autonomy.

Today, customary law continues to play an important role in many societies around the world, particularly in rural or indigenous communities. While the historical development of customary law varies widely, it remains an important source of legal authority and social cohesion for many people.

[1] "CUSTOM AS A SOURCE OF LAW", Research Paper, http://law.uok.edu.in/

VALID CUSTOM

Law cannot be used to impose any custom. Before they can become enforceable by law, they must be proven in court just like any other matter. Some judicial standards were developed for custom in order for it to be legally recognised by the courts and gain the force of law. The following are the tests:

1. Immemorial Antiquity**:** A valid custom must first pass the immemorial test. It must be historic or ancient and cannot be recent. According to Allen, Paton, Salmond, and all other jurists, it is necessary to establish the custom's immemorial age or origin before the law will recognise it as valid.[2] Allen stated that "nobody presumes that a mere habit, practise, or fashion which has survived for a number of years is Ipso facto a necessary custom; antiquity is the only credible indication of resistance to the changing conditions of different ages." Dr. G. William, however, has disputed it since the claim lacks merit. As long as the human mind does not contain any opposite memories, a customer must have been followed for order for it to be valid and binding, according to Blackstone. Ancientness was a requirement for the recognition of custom in ancient Hindu law as well. "Immortal custom is transcendental law," declared Manu.
2. REASONABLENESS**:** A custom is valid if it meets three criteria: It must be reasonable, it must benefit society and it can't be irrational. A prevailing custom's power is never absolute, but it is effective if it complies with the standards of fairness and public utility. The onus of proof is with the person contesting a custom to prove that it is unjust.

   According to Sir Edward Coke, a custom is against reason if it conflicts with the moral standards of justice, equity, and good conscience. Salmond has correctly argued that before a custom is denied legal status, it must be determined if the harm caused by its execution outweighs the harm caused by the multiplication of the people's natural expectations.
3. **MORALITY:** The third requirement for a genuine custom is that it cannot be immoral. It is accepted practise that a custom should not conflict with morals and decency. A custom cannot conflict with the public interest in justice, equity, or morality. The Bombay High Court ruled in Mathura Naikin v. Esu Naikin that the practise of adopting girls for

[2] *id*

immoral reasons, such as dancing, is forbidden because it was created to support this line of work.

4. **CONTINUANCE:** A genuine custom must have been observed continually and without any breaks, which is the fourth need. As a general rule, it is assumed that a custom didn't exist at all if it hasn't been practised consistently and regularly for a long time. In the case of Muhammad Hussainforki v. Syed Mian Saheb, it was determined that there is no custom until there is continuity. It must have existed and been accepted by the society without a break for as long as may be considered to be reasonably long under the circumstances. A custom may be abrogate, and if it does, the abrogated custom is rendered obsolete. The interruption of the "right" and the interruption of the simple "possession" are distinguished by Blackstone. The demise of the custom is brought about by the cessation of the "right," however brief. It means that if ownership for a while is disrupted but the right to continue enjoying the custom is not renounced, the custom still exists. The custom shall stop upon the cessation of the right, even for a day.
5. PEACEABLE ENJOYMENT**:** The clients' enjoyment must have been peaceful is the second crucial criterion. The presumption that a custom originated with consent, as most customs do naturally, will be disproved if it has been contested for a long period in a court of law or other setting. Therefore, it is required to demonstrate that a custom has been practised without interruption or conflict in order for it to be upheld. A custom is built on habit or consent, and we cannot say that one was founded on the widespread consent of the populace unless there was an uninterrupted existence of the custom.
6. CONSISTENCY**:** A custom must comply with the law in order to be considered valid. It shouldn't be in conflict with the legislation as written. In cases where a custom conflicts with a statutory provision, it must necessarily give way. In England and other nations that adhere to English law, including India, this norm is recognised as a good legal principle. However, this norm is not followed by the systems of continental law or the Roman law. In his corpus juris, Justinian lists a number of laws that were later rendered obsolete by a different norm. In other words, regardless of their origins, the later norm takes precedence over the earlier one, and legislation has no intrinsic advantage over custom in this regard. A subsequent custom may override or alter a previously passed law, and vice

versa. Saving commented on this aspect and [3]noted that customs and statutes are placed on an equal footing with regard to their legal efficacy. Customary law may also complete, alter, or repeal a statute, as well as create a new rule to replace a statute that it has repealed. A legislation may become obsolete in Scotland and ancient Grace due to later, opposing custom. The Indian Supreme Court decided the same thing in the case of "Darshansing v. Naimum NisaBibi," hence the position is clear in India that custom cannot conflict with the law. Of course, a freshly passed law cannot be revoked by custom. For instance, the recently passed legislation addressing such issues has abolished all conventional practises of marriage, adoption, succession, and property among Hindus. So, it is impossible to use an outdate, inconvenient, or unfair tradition to challenge a statute of law.

7. CERTAINTY**:** A legitimate custom must meet the essential requirement of certainty. But even an old custom shouldn't be vague or ambiguous. A custom must be specific and not ambiguous, according to Wilson v. Willes. It is impossible to discern a custom that is nebulous or undefined. More than anything else, it is a rule of evidence. The existence of custom as a matter of fact or as a presumption of fact must be clearly demonstrated to the satisfaction of the court. In one instance, the plaintiff asserted a customary easement interest over the shade cast by tree branches hanging over the neighbor's field. There cannot be a custom relating to tree shadows, according to "Mr. Justice Pandalai of the High Court of Madras." It cannot give birth to any customary rights because it is so ill-defined, vague, and fleeting.
8. COMPULSORY OBSERVANCE**:** A custom must be followed as a right in order to be considered lawful. It indicates that tradition had to be followed by everyone involved without the use of force and without the need for their consent or that of those who are negatively impacted by it. Those who will be impacted by it must view it as a binding or necessary code of conduct rather than just an optional one. A practise cannot be regarded as customary law if it is left up to individual preference. JURIDICAL NATURE**:** A custom must have legal status. Legal relations must be mentioned in a custom. A simple

[3]Hayek, F.A., Law, Legislation and Liberty, integrated 3 vol. ed. (London 1982), I, 73Google Scholar (vol. I, *Rules and Order*, was first published in 1973).

voluntary behaviour that is not thought of as being based on any law or rule of duty does not qualify as a legal custom.

9. PUBLIC POLICY**:** A custom is legal if it does not violate morality, public policy, or the rules of justice or equity. In the case of B danso v. Faturr, it was determined that it was against public interest to allow a woman to remarry while her husband is still alive without any established laws requiring the dissolution of the marriage to the first spouse before the second marriage is contracted.
10. NOT BY ANALOGY**:** Analogy does not permit the extension of custom. It can't be established a priori, and it needs to be demonstrated inductively, not deductively. The issue must always be one of actuality rather than ideology. It is also impossible to infer one custom from another. Fundamental rights cannot also be weighed against custom.

THEORIES REGARDING TRANSFORMATION OF CUSTOM INTO LAW: There are two ideas that explain how custom be come's law, and they are as follows[4]:

1. Historical theory**:-** "Karl Von Savigny, Puchta, Sir Henry James Summer Maine, and Blackstone" are the prominent proponents of this viewpoint. Savigny asserts that custom itself constitutes law. According to him, law is built on custom. A custom has its own inherent reason. Puchta asserts that the custom is separate from the legislation of the sovereign. It exists independently of any statement or acceptance by the government.

   Sir Henry Maine believes that formal law originates from custom. "Custom is transcending law," claims Manu. In addition, J.C. Gray argues that a significant number of laws were passed both against the wishes of the vast majority of the populace and against their wishes. Allen further emphasised that not all practises can be traced to a general understanding of the population.

   This view holds that no one person's arbitrary will has any bearing on the development of law. Custom is a product of people's collective consciousness. It is born out of an internal sense of justice. The general desire of the people is where law derives its existence.

   Paton has questioned the historical approach, saying that "most conventions did not develop as a product of deliberate thought, but rather of hesitant practise."

2 Analytical theory**: -** Austin is the principal advocate of this viewpoint. He contends that while custom is a source of law, it is not law in and of itself. A practise won't be considered a law if it is not acknowledged by the law and endorsed by the courts. Additionally, Gray asserts that the

[4] Aishwarya, "CUSTOM AS SOURCE OF LAW", Blog, https://aishwaryasandeep.com/

judges' rulings represent the actual law. Sources of law include legislation, cases from the past, traditions, and morals.[5]

Holland claims that customs are not laws when they first emerge but are instead generally transformed into laws by State recognition. A custom is only legally binding to the extent that, and beginning with the moment the sovereign approves it. He views custom as a source of law and a legal document. Salmond concurs with this viewpoint. Gray also acknowledges that although custom is one of the origins of law, it is not the only one.

Allen has questioned the analytical theory, saying that it is mistaken to judge its legitimacy only by the element or express sanction granted by courts of law or by another determining authority because customs emerge via behaviour.

CLASSIFICATION OF CUSTOM

Custom can be classified into two types:

1. Custom without sanction
2. Custom with sanction

Custom having sanction can be classified into two types:

i. Legal Custom
ii. Conventional Custom

1. **Custom Without Sanction**: These are the customs that are optional. Because of the public's presence, they are all observed. Positive morality is the Austinian word for them.
2. **Custom Having Sanction:** These are the customs that the government imposes. These traditions are sanctioned.

These customs have two types which are as follows:

i. **Legal custom: -** The legal customs are those with unwavering, unqualified legal authority. These traditions function as a binding law. They have been accepted by the

[5] "Theories regarding transformation of customs into law", Blog, https://www.sociologyguide.com/

courts and incorporated into national law. The courts carry out their enforcement. Legal customs are in two varieties:

a. **LOCAL CUSTOM**- A local custom is one that is practised in a specific locale, such as a town, district, or region. However, they don't just suggest a certain location. There are occasions when particular families or groups carry their traditions with them wherever they move. Local customs is another name for them. Local customs in India can thus be classified into two categories: geographic local custom and personal local custom. Only for a specific locality, set, or family do these customs constitute law. Halsbury defined local custom as a specific rule that has existed in reality or ostensibly since the dawn of time and has become law in a particular locale, even though it is in conflict with or inconsistent with the common law of the realm. "For a local custom to be considered lawful, it must be enduring, rational, ongoing, and permanent, and it must not conflict with any existing legal provisions.

b. **GENERAL CUSTOM-** A general custom is one of the main sources of national law and is practised across the entire nation. It used to be believed that common law was the same as the widespread custom that had been observed in the realm since ancient times, but that is no longer the case. Today, the sole sources of common law are statutes established by the British parliament and case law. Keeton contends that for a widespread custom to be a source of law, it must also meet a number of requirements. It must have existed from the dawn of time, be reasonable, be observed and recognised as binding, not clash with national statute law, and be reasonable.

ii. CONVENTIONAL CUSTOM- Usage is another word for a traditional custom. It is an accepted practise whose validity is contingent upon acceptance and incorporated into the agreement between the parties to whom it applies. Simply put, a customary custom is conditional, meaning that it will only be enforceable against the parties if they have agreed to it and incorporated it into their agreement. Because it has been explicitly or implicitly incorporated into a contract between the parties, a customary custom is binding on them rather than existing because of any legal authority. When two parties enter into a contract, the conditions are typically not completely stated explicitly and a significant portion of most contracts is inferred. The customary law that is followed in the trading community can be used to determine the parties to the contract's intentions. A typical custom could be regional or universal. A

conventional custom must also meet all of the criteria for a legitimate custom in order to be considered legal. That is, it must be timeless, not in conflict with the law, logical, and consistent with morality and public policy. In "Asarabulla v. Kiamtulla[6]," it was decided that a common custom or usage that is in conflict with any express condition included in a contract shall not be enforced by law. This is a crucial issue to note.

FUTURE OF CUSTOMARY LAW IN LEGAL SYSTEMS

The future of customary law in legal systems is likely to be shaped by a range of factors, including globalization, changing social norms, and evolving human rights standards.[7]

On one hand, the increased interconnectedness of the world may lead to greater recognition and respect for the diversity of legal systems, including customary law. This could result in the incorporation of customary law into formal legal systems or the creation of hybrid legal systems that combine elements of customary and modern law.

On the other hand, changing social norms and evolving human rights standards may also pose challenges for customary law. In particular, practices that are seen as discriminatory or harmful may come under increased scrutiny and be subject to legal challenge. This could lead to the erosion or reform of certain customary practices, or to the development of new customary practices that are more compatible with modern legal and ethical norms.

Overall, the future of customary law in legal systems is likely to be complex and dynamic, with ongoing debates and negotiations about the role and value of customary law in a changing world. However, it is clear that customary law will continue to play an important role in many communities around the world, and that its development and evolution will be shaped by a range of social, cultural, and legal factors.

CONCLUSION

The most significant, and in some circumstances the only, source of law in a young community is its customs. The cornerstone of the entire legal system is made up of customs. They emerge along with the development of society. The ritualised behaviour of a primitive civilization is called a custom. A custom is a law or behavior that has been observed by a people since the beginning of time. Legal regulations rationalise, embrace, and embody customs. Any legal system can be shown to be influenced by custom Roman law's innovative magistrate system, English law's equity judges system, a galaxy of great legal writers from Bracton to Blackstone, and Hindu law's Smritikars, Commentators, and Privy Council rulings all had a significant impact on the form as well as the content of customs. A legitimate source of law is custom. The practice, however, must be legal. "Immemorial antiquity, reasonableness, continuity, peaceful

[6] AIR 1937 Cal 245

[7] Chuma Himonga, "The Future of Living Customary Law", Research paper, https://www.researchgate.net/.

enjoyment, certainty," conformance with public policy and regulations, morality, and other elements all contribute to a custom's validity and legality.