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JURISPRUDENTIAL HISTORY BEHIND THE CUSTOMARY LAWS

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ABSTRACT

What is law? This question is a highly debatable one. lawmen talks in the terms of Positive Laws, Natural laws, Customary Laws, Physical or Scientific Laws and others. This article explores the jurisprudential history of customary laws. Customs is a valid source of law and held an important place in history however with time its importance dwindled. Different schools of jurisprudence such as Historical, Analytical and Anthropological put forward different theories relating to customs and customary laws. Customs have the binding force of law, however not every custom can become law. there are a number of tests of validity discussed in this article.

KEYWORDS: Custom, Customary Laws, Law, Valid Customs, Volkgeist

INTRODUCTION

For a layman, whether law-abiding or not, Law is normally a set of rules or code of conduct developed by a certain body, a government, or a society presiding over a territory. A layman's view of law is restricted to the statutes, rules, By-laws, ordinances, Acts, Bills, etc which he can know via different means in his daily life such as news broadcasts, newspapers, or articles that his government is passing, amending, and sometimes repealing. Or what he sees around him in society. Any more understanding of Law than that is not found in most laymen. However, for a Law Student or a Lawyer, a Judge, or Law officers working in different sectors i.e., the professionals involved in the legal field Law is not just a mix of different rules, statutes etc. For a lawman, the question "what is a law?" is full of debates. Understanding of law is many steps ahead of just some statutes, but there are principles, customs, standards, maxims, doctrines, ideals, the scope of interpretation etc. Lawmen talk about law in the terms such as Positive Laws, Natural laws, Customary Laws, Physical or Scientific Laws and others. It is this Customary law, which is the subject matter of this article. So, what exactly are the customary laws?

I. WHAT IS CUSTOMARY LAW?

The term Customary law is hundred per cent related to customs. According to Sir John Salmond, customary law means "any rules of action which is actually observed by men. i.e., any rule which is the expression of some actual uniformity of voluntary action.".[22] According to black's Dictionary, customary laws are Laws consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. Customary laws point towards the long-prevalent standards of society. It is a sort of unofficial law, not coded but a body of practices and beliefs that we found as a binding moral code of conduct. Customary law originates from customs. So, at first, we need to understand what exactly the word custom means. What is the scope and extent of the term custom?

A. CUSTOM

Ordinarily 'custom' means a tradition or a practice or a certain way of doing things. It can be described as something which is usual, habitual and

[22] John Salmond, Jurisprudence, (London: Stevens and Haynes, 1902)

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There was once a time when the state didn't exist, but people followed certain customs. These customs developed spontaneously and regulated people's life. Custom is something that has always been done and that doing is so integrated in behaviour that it is accepted as law. Custom is considered as one of the oldest sources of laws. Historical school of jurisprudence flagged by Carl Von Savigny and volkgeist theory is its strong supporter. According to John Salmond, Custom is to society what law is to the state. [23] Customs are principles approved by society rather than the state.

The word 'custom' is a middle English word derived from the old French word 'coustume' which in turn is based on Latin word Consuetudo. In Sanskrit, words 'riti' or 'pratha' is used to express the same meaning. It is long-standing established convention of society.

B. CUSTOMS VS PRESCRIPTION

Both custom and prescription denote long usage however the difference between custom and prescription is that custom is long usage as to the source of law while prescription is long usage as to the source of rights. Prescription is personal and individualistic in nature i.e., such a custom which is for one distinct person, his ancestors and successors. It is to be noted that prescription talks about an individual person, and not a place. It is not the same as local customs. Prescription is a smaller circle within the bigger circle of custom.

however, is every custom a law? the answer is off course not. Then what makes any custom a law?

II. CUSTOM TO LAW: THEORIES.

It is non-disputable fact that modern codified law is something that has evolved from ancient times to till date. Custom is found in the content of law rather than the formal structure. Not every school of jurisprudence have given the formal structure centre position however there are theories of transformation of custom to laws.

A. HISTORICAL SCHOOL OF JURISPRUDENCE.

Out of all the schools of jurisprudence, it's the Historical school of jurisprudence that has given the most importance to customs. Friedrich Carl Von Savigny, the German Nobleman who was responsible for halting of codification of laws on the line of code napoleon, was conservative in nature and hated revolution. According to him, the nature of any particular system of law was a reflection of the spirit of the [24]people who evolved it. This is what that was later termed as 'Volkgeist' by Georg Friedrich Puchta, Savigny's most devoted disciple. According to the Historical school of jurisprudence, Volkgeist is the broad principles of the system that are found in the spirit of people and which became manifest into customary rules. It says that any law should follow the course of historical development.

B. ANTHROPOLOGICAL SCHOOL OF JURISPRUDENCE.

The anthropological school of jurisprudence is distinct from the Historical school in the sense that anthropologists study the history and nature of primitive society just to study not to implement it in modern times. Sir Henry Maine, the greatest scholar of anthropological school set out four stages of the development of societies in terms of the law. The first stage, according to sir Maine, is that the laws enacted by monarchs as divine inspiration. It's the second stage which talks about customs. The society then progressed towards the second stage i.e., developing customs. The commands of the monarchs crystallized into customs. People became habitual and the commands became customary and part of their conduct. The third stage talks

[23] John Salmond, Jurisprudence, (London: Stevens and Haynes, 1902)

[24] Friedrich Carl von Savigny, On the vocation of our age for legislation and jurisprudence,(2nd ed trans A Harward)

about the minority having control and power which is followed by the revolt of the majority resulting in codification.

C. ANALYTICAL OR POSITIVE SCHOOL OF JURISPRUDENCE.

The main proponent of the imperative school of jurisprudence is John Austin. Although most of his works followed the footsteps of his teacher Bentham, Austin is the more popular one. For Bentham customary laws are never complete. According to the analytical school of jurisprudence, Law is a command of a sovereign, a command from a political human determinate superior to political inferiors who habitually obey him. Custom cannot find any space in this definition. But Austin provides formal criteria to answer what is a law and what is not law. If custom conforms to that formal criterion, then it can be law. In the Austinian world custom needs the approval of the ruler or legislature, or the courts which are subordinate to the sovereign to have the binding force of Law.

III. CLASSIFICATION OF CUSTOM

A. CUSTOM WITH SANCTION VS CUSTOM WITHOUT SANCTION.

The customs enforced by the state have legal sanctions. They are obligatory in nature and in the case of non-compliance they impart liability of punishment unto the non-compiler. They act like strict rules and are binding in nature. they have the force of law.

Customs without Sanctions do not carry legal obligations with them. they are not compulsory and do not make the non-compiler liable. They are mere social obligations and are what Austin calls Positive Morality, part of law improperly so-called.

B. LEGAL CUSTOM VS CONVENTIONAL CUSTOM.

Legal custom and Conventional custom are further classification of Customs with sanctions.

Legal customs are those which are recognised by the courts or through legislation and are a part of the law. They are enforceable in courts and operate as binding rule of law. These are those customs that are not against the will and interests of the nation and have legal sanctions in case of non-compliance.

Conventional customs are those customs that fail to achieve the force of law and hence cannot operate as a source of law. In common terms, conventional customs are called usage. It is something that is binding not because it has legal authority but because it is being incorporated and accepted by the parties in question. Otherwise not operative directly as a source of law can have legal authority when supported by an additional body. A conventional custom can take shape of law if it fulfils the test of validity.

C. GENERAL CUSTOM VS LOCAL CUSTOM.

Legal customs are divided into two parts, General customs and Local customs.

Local customs as the word local suggests describe those customs which are specific to a certain place or a geographical area. The General customs are those which are not limited or specific to a certain place but are obligated by the whole nation or state.

IV. TEST FOR VALID CUSTOM

It is a fact that customs are a binding source of law and can take shape of law. However not each and every custom can be law. Custom, in general, lacks legal authority and in modern days this authority is provided by the legislation and courts. It is not an easy task to pick and choose, through the course of time several standards have come forward conforming to which a custom can achieve the force of law. There are not one or two but a handful of tests.

A. TIME IMMEMORIAL

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First and foremost, to be a valid custom and have the force of law, the custom must be from time immemorial. i.e. it must be ancient, old and not of recent origin. It must have antiquity. Whether it be western jurists like Allen, Paton, Salmond, Austin or our Ancient Indian texts antiquity is an essential feature to be custom. According to Manusmriti "An immemorial custom is transcendental law". After all a modern custom can not be made law . Such act will create chaos.

B. REASONABLE

Another important essential is Reasonableness. A custom must not be unreasonable, otherwise, it won't have the force of law. An unreasonable custom is invalid and not binding. This feature is exclusive in nature, i.e. a custom is excluded to be a valid one if it is unreasonable. What is reasonable and what not is reasonable? A new question arises. The test of reasonability does not have a posteriori answer but that custom should not be valid which does more evil than good. Sir Edward Coke says that a custom is contrary to reason if it contradicts the principles of justice, equity, and good conscience. Normally we regard a custom as reasonable if it contradicts fundamental principles of morality and ethics, the law of the state, legislation, and of justice, equity and good conscience. This test is better left to the courts to ascertain.

C. MORAL

Something immoral cannot be law. The rule of natural law is also implemented here to make a required condition for being a valid custom. 'Malus usus est abolendus' i.e., an evil custom is to be abolished. A valid custom cannot be ethical. Many customs are prohibited in our country because them being immoral. For example, marrying one's granddaughter, sati pratha, the practice of adopting of girls for purposes like dancing or prolonging the profession, the practice of divorce against the other party's wish for a pre-decided fee.

D. CONTINUITY

A custom that has been discontinued for a period of time then continued, and later again discontinued cannot be a valid custom. A valid custom demands constant and uninterrupted exercise. If any custom comes to a halt then it ceases to be a custom at all.

E. OBLIGATORY

A valid custom cannot be optional it needs to be obligatory. If a custom can be disregarded at will then it is not a valid custom at all. It should be 'Opinio necessitatis'.

F. NON-DISPUTING

Salmond says that customs are the expression of those principles that have advanced to the nationalistic principles of justice and public utility. [25]Hence customs must be non-disputing. Such customs cannot be valid if they create disputes, debates and violence. As custom id based on habitual practice and enforcement hence a disputable custom cannot be a valid one.

G. CONFORMITY

Another test for valid custom is conformity. Conformity with existing statutes and laws. Though different scholars have different views on this matter. According to Coke "No custom or prescription can take away the force of an Act of parliament" however According to Bernherd Windscheid "the power of customary law is equal to that of statutory law. It may, therefore, not merely supplement but also derogate from the existing law." Carl von Savigny gives more importance to customs in

[25] P.J. Fitzgerald, Salmond on Jurisprudence (Universal Law Publishing Co. Pvt. Ltd., 12th ed. 2010)

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comparison to the legislature, According to him custom not only precedes legislation but also is superior to it.[26] However, the teat of conformity stays and to be a valid custom it must be followed.

H. CERTAINTY

A valid custom needs to be certain too. Without certainty, it cannot have the force of law. Even if a custom needs to be antique but it also needs to be definite and certain not vague, there must be clear proof of its certainty whether as a legal presumption or as a matter of fact. It is held by the court that an uncertain, ambiguous and transitory custom cannot give rise to any customary rights.[27]

V. EXAMPLES OF CUSTOMARY LAWS.

I. STATUTES.

In India customs have a significant part in the functioning of society. Customs had dominance over the ancient legal systems and administration. In modern India, the perfect example of customary laws in our legislation is Hindu Personal laws. Whether it be the Hindu Marriage Act (1955), the Hindu Minority and Guardianship Act (1956) or the Hindu Succession Act (1956); though they eliminate various prevailing customs such as child marriage, not remarrying widows, no rights for daughters etc, they are nothing else than codified customary laws. The text of these acts even leaves space for recognition of customs if proven. They recognise various tribal and local customs.

Indian constitution through article 13, provides for customary laws, it states that a custom or usage if proven would be law in force. Not only Hindu Personal laws but recognition of customary rights can be found in other statutes such as the Indian Evidence Act (1872). A pro-independence act. Section 13 of this act talks about the facts relevant to the proof of customary laws. Section 57 of this act empowers the court to take judicial notice of those customary rights which have the force of law. The Indian Forest Act 1927 also mentions the right to pasture and forest produce for those who had relied on them from time immemorial in its sections 12 to 16.

II. JUDICIARY.

Courts have long ago embraced customary laws. it can be even said that it is the courts that give the status of law to the customs through their judicial decisions and make them customary laws. In many judgements to adjudicate justice, courts have taken shelter under customary laws. In a matter of family law in *Smt. Ass Kaur (Dead) By L. Rs vs Kartar Singh (Dead) By L.Rs. & Ors*[28], the Apex Court has taken the view that customary law will prevail over statutory law in cases where the legislation is silent on the issue as statuary laws do not prevent or exclude the applicability of the customary laws. However, the judiciary also has the duty to judge whether the custom in question should be given the status of law. In *Balusami v. Balakrishna*,[29] regarding the custom that allows Avunculate marriage, it was held that a custom revolting all the principles of morality, decency and eugenics cannot be accepted in any civilised society. In another famous verdict, the case of *Indian Young Lawyers' Association v. State of Kerala*[30] also known as the Sabarimala verdict, the apex court adjudicated against the custom full of patriarchal notions.

[26] R.W.M Dias, Jurisprudence (Lexis Nexis 2013)
[27] High Court of madras.
[28] (2007) 5 Supreme Court Cases 561
[29] AIR 1957 Mad 97
[30] 2018 S.C.C. OnLine S.C. 1690

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CONCLUSION.

In early societies, customs were given much more importance than now. It can be said that customs are something that existed before the existence of the state and existed after the emergence of the state. Its influence is present in every legal system, be it ancient Indian Legal systems, Modern Common Laws or any other. They are found in the building blocks of the laws. However, its importance is diminishing day by day. Even so, we cannot refute that custom is a valid source of law. Legislation in various ways has given customary law place in statutes. Courts also help in enforcing customary laws when needed. To have the force of law, the custom needs to be a valid one. to test the validity of customs there are a number of tests.

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