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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

CUSTOM: A PRIMARY SOURCE OF LAW

(By Nikhil Gangappa Mantur)

ABSTRACT:

A central puzzle in jurisprudence has been the role of custom in law. Custom is simply the practices and usages of distinctive communities. But are such customs legally binding? Can custom be law, even before it is recognized by authoritative legislation or precedent? And, assuming that custom is a source of law.

INTRODUCTION:

In primitive societies, there was no external authority over people, yet people organized themselves in cohesive groups with a mechanism for fairness and liberty. People developed rules and regulations through spontaneous reaction to their circumstances as well as a coordinated conscious decision to arrive at them. Eventually, people started recognizing traditions, practises, rituals which were prevalent in a certain territory or group, and saw how they formed a systematized approach to social regulation. In Britain, Jurists and legislators started studying these patterns, recording their prevalence, usage and applicability. These came to be known as customs, which were then formalized and put into legislation in the Common Law of England[1]. Customs can be described as a cultural idea that defines a regular pattern of behaviour, which is considered a characteristic of life in a social system. They are one of the earliest sources of law. Customs are important for maintaining balance and peace in a society. Even today, customs are a basis of a large number of laws[2]. Customs are the earliest sources of law and form the basis of the English Common Law system as we see it today. They can be described as cultural practises which have become definite and backed by obligation or sanction just by virtue of widespread practise and continue presence[3].

EARLY IMPORTANCE OF CUSTOM:

Customs are the practice of a particular community or a group which regulated the conduct of the society in their relationship with each other. During the early stages of the development of a legal system, customs were an important source of a law. As a legal system grows its importance diminishes. Customs were an important instrument in the development of the English legal system. In England the theory was that whatever was not the product of the

[1] https://blog.ipleaders.in/customs-as-a-source-of-law/
[2] https://www.toppr.com/guides/business-law/introduction-to-law/principle-sources-of-indian-law-customs/
[3] https://blog.ipleaders.in/customs-as-a-source-of-law/

legislation had its sources in custom. Law was either written statute law or unwritten common law or customary law. Judicial Precedents were regarded not as a source of law but only as evidence of the customs which prevailed in the society. But as of date the true soures of the bulk of English law are statute and precedents and not statute and customs and the common law is essentially judge made law and not customary law[4].

According to Paton custom is useful in two ways: It provides the material out of which the law can be fashioned because it usually takes a great deal of intellectual effort to create law de novo. Secondly, psychologically it is easier to seure respect for law, when it is based on a custom which is immemorial[5].

MEANING:

The word 'custom' generally means the following[6]:

a) It means a usage or practice common to many or to particular place or class or habitual with an individual. It is long established practice considered as unwritten law.
b) It means repeated practice. It is the whole body of usages, practices, or conventions that regulate social life.
c) It means frequent repetition of the same act; way of acting commonto many, ordinary manner; habitual practice; usage; method of doing or living.
d) It means a long established practice, considered as unwritten law, and resting for authority on long consent, usage, and prescription.
e) It means familiar acquaintance or familiarity.
f) It means to make familiar or to accustom.
g) It is a tradition passing on from one generation to another.
h) It means a usual, habitual practice, or typical mode of behaviour.
i) It means long established habits or traditions of a society.
j) It is a long established collectively habit of a society.
k) It is a long established convention of a society.
l) It means established way of doing things.
m) It is a specific practice of long standing.
n) It is a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time.

[4] Dr.Veena Madhav Tonapi,"Textbook on Jurisprudence ", Univesal Law publication,pg.no 120
[5] ibid
[6] http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf

o) It means whole body of usage, practices, or conventions that regulate social life.

p) It is a thing that one does habitually.

DEFINITIONS:

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:

According to **Salmond,** "custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility".

Harprasad v. Shivdayal. In this case the judicial committee of the Privy Council observed, custom as a rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of a law.

According To New Shorter Oxford English Dictionary, custom is a habitual or usual practice; a common way of behaving; usage, fashion, or habit; an established usage which by long continuance has acquired the force of a law or right[7].

TYPES OF CUSTOMS:

1 .Customs can be mainly classified into two types which are as follows[8].

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CUSTOMS WITHOUT SANCTION

These are those customs which are merely non- directory. They are altogether seen because of the nearness of the general public beliefs which is contrary to the views expressed by Austin in his positivist theory.

CUSTOMS WITH SANCTIONS

These are the customs which have been implemented by the State. These customs are upheld by authorization by the different courts in their pronouncements.

2. Further, these customs relating to sanction can be classified as follows:

[7] http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf
[8] https://blog.ipleaders.in/customs-source-law/

LEGAL CUSTOMS

The legal customs are those whose legal authority is absolutely unequivocal. These customs work as the coupling rule of law. They have been perceived by the courts and have turned into a piece of the tradition that must be adhered to. They are upheld by the courts in their judicial pronouncements.

CONVENTIONAL CUSTOMS

A conventional custom is likewise called "use". It is a setup whose authority is contingent on its acknowledgement and the organization in the agreement between the gatherings bound by it. In basic words, a conventional custom is a contingent and condition is that it will tie on the parties just, on the off chance that it has been acknowledged and consolidated by them in their agreement. A conventional custom is authoritative on the parties not in light of any legitimate specialist, but since of the way that it has been explicitly or impliedly incorporated in an agreement between the parties so concerned. In the case of **Asarabulla v. Kiamtulla,** the Privy Council ruled that where the terms of the agreement are in contravention to the formed contract or agreement enforceable by law then, the same shall not be enforced by the law.

Before a court of law treats a conventional custom as legally binding, certain prerequisites have to be fulfilled. Those are [9]:

It must be shown that the convention is clearly established and also that the contracting parties are fully aware of it. There is no fixed period before which a convention must be observed before it is recognised as binding.

The convention cannot alter the general law of the land.

It must be reasonable.

Legal Customs have been further classified as follows:

GENERAL CUSTOM/ CUSTOMS FOR ALL

A general custom is what wins all through the nation and comprises one of the wellsprings of the rule that everyone must follow. As indicated by Keeton, 'a general custom should likewise fulfil certain conditions on the off chance that it is to be a wellspring of law'. It must be sensible, pursued and acknowledged as official and ought not to be in contravention with the resolution law of the nation and must be in presence from the time immemorial.

[9] https://www.toppr.com/guides/business-law/introduction-to-law/principle-sources-of-indian-law-customs/

PARTICULAR CUSTOM/ LOCAL CUSTOM

A local custom is that which is practised in some characterized locality**,** that is, to an area, town or then again a zone. Be that as it may, they don't infer land locality as it were. Some of the time, certain groups or families take their customs with them wherever they go. They also are called local customs**.** Consequently, in India local customs might be separated into two classes; Land local custom' and individual local custom**.** These customs are law just for a specific locality, sects or family.[10]

REQUISITES OF VALID CUSTOMS:

In order to enforce a valid, there are some essentials and grounds which will qualify as a valid custom and therefore could be recognized by judiciary and legislature. The grounds of valid custom as follows:

ANTIQUITY

The primary trial of a legitimate custom is that it must be prevalent from time immemorial. It must be old or old and must not be of the ongoing source. Manu stated, "Immemorial custom is supernatural law". Days of ancient times imply in the Civil law in the frameworks inferred consequently and initially implied in England and additional time is so remote that no living man can recollect it or give proof concerning it. In England, a custom must be at the time of the rule of Richard I King of England**"**. That is in England the time period for a valid custom is 1189, for a custom to be viewed as substantial. The year 1189, was the main year of the rule of Richard I. In any case, the English principle of 'immemorial inception' is not followed in India.

In **Gokul Chand v. Parvin Kumari[11],** the Supreme Court ruled and denied to measure the validity of Custom from 1189 AD but stated explicitly that it must be of ancient and historical times.

REASONABILITY/NO ARBITRARINESS

The second significant legal trial of a legitimate custom is that it must be reasonable. It must not be unreasonable. It must be helpful and advantageous to the general public. On the off chance that any parties face difficulties in a custom, the parties must fulfil and convince the

[10] https://blog.ipleaders.in/customs-source-law/
[11] AIR 1952 SC 231

court that a particular custom is unreasonable. This means the weight of evidence lies upon the individual who challenges the custom.

To find out the reasonableness of custom it must be followed back to the season of its inception. The unreasonableness of custom must be great to the point that its authorization results in more prominent damage than if there were no custom by any means. A custom ought to be viewed as adequately reasonable when it isn't against the fundamental guideline of profound quality of the law of the state wherein it exists, standards of equity, morality and arbitrariness. It must not be generally rash, unforgiving or poorly arranged.

The Bombay High Court, in **Narayan v. Living** held that a custom allowing a lady to forsake her better half at her pleasure and marry again without mutual agreement to be shameless and arbitrary on one spouse. The topic of reasonability is one of law for the court. The standard which the courts apply has been characterized by the Divisional Court of the King's Bench in **Produce Brokers co. vs Olympia oil and coke co.,** considered grounds of valid customs as "reasonable and legitimate and for example, sensible, genuine and impartial men".

CONTINUANCE

A custom must be followed with consistency and in continuity from its inception. If it is proved otherwise that there were a break and a pause by a particular community in the following the custom in a court of law, then the court may have the discretion to get the custom annulled. Therefore a custom must be followed in consistency and continuity. In **Hampton v. Hono,** it was ruled that if a custom is not practised for a significant amount of time, then it would cease to exist as a valid custom.

CERTAINTY

The most important test of a valid and essential custom is that a particular custom must be specific and less from ambiguity. If a particular custom is ambiguous, vague and not understandable by the parties then the particular custom will be declared as null and void by the court, the same was ruled by Privy Council in **Wilson vs. Wilson**[12]**.**

NOT OPPOSED TO PUBLIC POLICY

Another test for the legitimacy of custom is that it ought not to be against public policy. This test might be incorporated into the trial of reasonability, as it is extensive term and it might incorporate public policy also. In **Buldano vs Fasir**, a custom, where a woman was allowed to

[12] 33 Cal.2d 107

remarry again during the lifetime of her husband was held to null and void by the court as it was against public policy.

JURIDICAL NATURE

A custom must be of a juridical nature. A custom must refer to legal relations. A mere voluntary practice not conceived of as being based on any rule of right or obligation does not amount to a legal custom.

NO ANALOGICAL DEDUCTIONS

Custom can't be stretched out by analogy. It must be set up inductively, not deductively and it can't be built up by earlier techniques. It can't involve hypothesis yet should dependably involve reality. In like manner, one custom can't be inferred and deduced from another custom. Custom in contravention to fundamental rights will be declared as null and void[13].

PRESENT POSITION OF CUSTOMARY LAW:

In primitive society, custom was the sole source of law. There was no other mechanism to perform that function. However, with the passage of time, the importance of customs began to decline. The judgements of the courts began to cover some of the fields previously occupied by custom. Later on, legislatures began to pass laws dealing with subjects previously coverd by custom. The creative activity of custom is now on the decline and has practically exhausted itself. Most of the customs have become a part of the law of the land. One of the tests of a valid custom is tha it should be ancient. In England, a valid custom must have had its origin at least as far as back as 1189 A.D. This shows that at preent custom cannot be a living and operative source of law. New situation arise in quick succession. Modern society is changing at a very rapid pace. What was ten years ago is not the same today. Modern society cannot wait for generations so that a custom becomes ancient and is recognised by courts. Custom as a source of law has lost its former position and importance. Modern man looks to legislature for enacting laws at a speed which is demanded by the atomic age.[14]

PROOF OF CUSTOM BY JUDICIAL DECISIONS :

A decision in a case of custom is not a judgment in rem. It is only relevant under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom being recognized. A judgment in a question of custom is relevant not merely as an instance under section 13, but also under section 42 of the Indian Evidence Act, 1872 as evidence of the custom. Section 42 of the Act

[13] https://blog.ipleaders.in/customs-source-law/
[14] V.D.Mahajan, " Jurisprudence & Legal Theory", Eastern Book Company,fifth edition, Pg.NO:273-274

says that, judgments, orders or decrees (other than those mentioned in section 41) are relevant if they relate to the matters of public nature, but such judgments, orders or decrees are not conclusive proof of that which they state.

It has been held in **Ram Kishore v. Kabindra**[15] that, a judgment as to existence or non-existence of a custom is a good evidence to prove the existence or non-existence of that custom. Section 42 permits custom to be proved by a judgment, decree or order not inter partes, in which it was recognized. But mere production of judgment, however relevant, is not conclusive proof of custom. Judgments under section 42 are only a piece of evidence of custom. As regards its evidentiary value, much depends upon the nature of the enquiry, the evidence adduced and the decision given thereupon. A judgment given ex parte cannot command the same value as one given after contest, or one suffered on compromise resulting after a contest. All these judgments cannot be placed on the same footing.

The general opinion seems to be in favour of the view that, a decision on custom only becomes relevant instances under section 13 of the Indian Evidence Act, 1872, that such a right has been asserted and recognized. It is always necessary to assert and prove what the custom is. However, to the general rule that all the customs have to be proved, section 57 of the Indian Evidence Act, 1872 provides an exception. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decision is sufficient to prove the custom. In **Ujagar Singh v. Mst. Jeo**[16], the Supreme Court observed that, when a custom has been recognized by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under section 57(1) of the Evidence Act.

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CONCLUSION:

In the early stages of the society the customs are the most important, and in some cases, the sole source of law. The customs lie in the foundation of all the legal system. They come into existence with the existence of the society. Custom is the repeated practice of the primitive society. Custom is a rule or practice which is followed by the people from time immemorial. Customs are rationalised and are incorporated and embodied in legal rules. The influence of custom can be traced in any legal system. In Roman law the creative rule of the magistrates, in English law that of equity judges, and a galaxy of great writers on law from Bracton to Blackstone, in Hindu law that of the Smritikars, the Commentators and the Privy Council

[15] AIR 1955 All 59
[16] AIR 1959 SC 1014.

decisions have materially affected the form as well as substance of the customs. Custom is a valid source of law. But it must be a valid custom. The various factors which make a custom valid and binding are 19 immemorial antiquity, reasonableness, continuity, peaceful enjoyment, certainty, conformity with public policy and statutes, and morality[17].

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[17] http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf