

Custom And Law

¹Akash Chatterjee
¹Student
¹Amity University Kolkata

Abstract - The origin of the vast discipline of law lies obscured in the presence of a number of theories that simply keep on opening up renewed perspectives in front of us rather than leading us to a conclusive end. Nevertheless in our quest we have deciphered that not one but many different erstwhile codes of conduct or governing rules have cumulatively set up what law is at present. These codes of conduct have often originated as a solution to pertaining problems of the society. Being developed into customs, they embody commonly accepted standards of morality and proposed legality that calls for conformity of people bound by it. The paper attempts to analyse how these customs in turn act as those foundations on which legal systems have originated.

keywords - CUSTOM, LEGALITY, SOCIETY, CONFORMITY

HYPOTHESIS: HOW FAR IS CUSTOM THE ORIGIN OF LAW AS PER ITS SIGNIFICANCE IN LAW?

AIMS OF THE STUDY

1. To predetermine the authority of customs and their capacity of being followed,
2. To adjudge the significance and rationality of customs in the present domain of law,
3. To ascertain the origin of law as customs depending on the present significance it enjoys in law.

MODE OF RESEARCH

Doctrinal Research was conducted, a range of data was collected and analysed, classified, significantly used, books and journals were consulted and a study of some common customs were made as well.

THE WORD CUSTOM,

From the old latin terms, *con* and *suescere* came the word *consuescere* or *accustom*. From that word came the French word *coustume* and successively *custom* in English.

CUSTOM.

Defining the word would be-

A traditional and widely accepted way of behaving or doing something that is specific to a particular society, place or time. Customs represent antiquity and they lie deeply embedded in the fabric of the society. According to Vinogradoff, "Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the households and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of judicial and expert authority."¹

Law is a governing principle on which an organised society sustains itself. There was no sudden discreet or abrupt development of this law. It has come into being by means of a proper evolution. This evolution had no fixed starting point to be designated as the point ZERO but for sure this evolution had a congregated set of beliefs coalescing around the nucleus of peace that ultimately paved the way for a governing statute called law. Custom being a fabricated social product and an intricate part of the social mechanism had invariably influenced a significant control over the ways of tribes or clans or further developed communities. Hence discerning a similarity between the two might be possible but determining an interrelationship is quite a challenging task for researchers. However a detailed study of customs provides all necessary clues towards the origin and dynamic evolution of law.

The Hindu Code defines custom and usage as "Any rule which, having been continuously and uniformly observed for a long time, has obtained 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."²

ORIGIN OF CUSTOMS.

Regarding the origin of customs there have been many and divergent views given by scholars of different times and ages. Historical jurists of Germany believe that they originate from the common consciousness of people; another view is that they have come into existence due to the necessity or convenience of people living together. Many others believe that man's nature of imitation has served the main cause behind the existence of an organised system of rules embedded in the social matrix as customs.

¹ *Historical Jurisprudence*

² Section 3(a) of The Hindu Marriage Act, 1955; - also section 3(a) of The Hindu Adoptions and Maintenance Act, 1956.

However there are several other theories as well. Maine in his theory of legal evolution says that in the beginning, the judgements of the kings made under the divine guidance and sacred books served as essential guidelines for other several courts of law including the local village courts and other kings' Courts as well.³ Gray too says that custom often arises from judicial decisions.⁴ But there are some obvious criticisms to these assumptions. Firstly customs are obviously results of some tentative practices and secondly solutions are found out to problems as and when arisen.

Holland's view also talks of a habitual course of action or the path "taken"⁵. He also believed in the existence of examples or followed paths even before the existence of states or any other organised statehood.

Salmond provides a strong viewpoint on the reasons for recognition of customs. A question which very frequently arises is why customs are so recognised and why do they essentially form a source of law or are otherwise considered a significant part of law⁶. This is because firstly customs are embodiments of those principles which represent a larger national conscience or public utility as well. Secondly the usages of customs serve as future references as well as these can be referred as and when required and there is no specific time period for their reference value. Hence when society has upheld a particular practice for long and in the eyes of the public good, then it obviously gets enacted as the law as people would always end to obey it.

In *Hur Prasad v. Sheo Dayal*,⁷ custom has been defined as '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 law.'

Some dominant characteristics of Customs are as follows;⁸

- 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.
- It means repeated practice.
- It is the whole body of usages, practices, or conventions that regulate social life.
- It means frequent repetition of the same act; way of acting common to many ordinary manner; habitual practice; usage; method of doing or living. It means a long established practice, considered as unwritten law, and resting for authority on long consent, usage, and prescription. It means familiar acquaintance or familiarity.
- It means to make familiar or to accustom.
- It is a tradition passing on from one generation to another
- It means a usual, habitual practice, or typical mode of behaviour.
- It means long established habits or traditions of a society.
- It is a long established collectively habit of a society.
- It is a long established convention of a society.
- It means established way of doing things.
- It is a specific practice of long standing.
- It is a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time. It means whole body of usage, practices, or conventions that regulate social life.
- It is a thing that one does habitually.

CUSTOMS IN VARIOUS LEGAL SYSTEMS

ROMAN LAW

We find the existence of customs in ancient Roman legal system as well. Customs had their importance in the system prior to the formation of the code. After the formation of the code they give only secondary importance to customs but it is interesting to note that they did not wipe it out completely and rather recognise it as an essential part of their legal system. Roman system does not recognise customs on the basis of any time period but only on the parameters of antiquity and reasonableness.

HINDU LAW

Customs have been incorporated into the legal system since immemorial times. Smritis form an important part of legal traditions of India. These Smritis are primarily based upon customs or commonly followed practices of the clan. All the local practices were cumulatively embodied into customs. Like for example conquering of the lands, treatment of prisoners, general rules of the land were all based primarily on customs. The overwhelming importance of customs has also been recognised by the British during the colonial period of India. Privy Council was made to overstate the importance of customs in Hindu Law. Their Lordships in the Council observed that in Hindu law "the clear proof of usage will outweigh the written text of the law"⁹

MOHAMMEDAN LAW

³ B.N Mani Tripathi , Page;192

⁴ The Nature and Sources of Law.

⁵ Jurisprudence.

⁶ B.N.Mani Tripathi,Page; 190

⁷ 26 W.R. 55 (P.C.); cited in, Tondon, M. P., "Jurisprudence (Legal Theory)", (2010), Allahabad Law Agency, Faridabad, at p 167.

⁸ Custom As A Source Of Law, Shodhganga, http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5_last visited on 23/10/2018

⁹ *Collector of Madura v Mootoo Ramlinga*, (1868) 12 M.I.A 397

Although Mohammedan law gives a very inferior place to customs but still it is not free from it or can not either exclude it wholly as well. It was on the basis of such customs that the sects of Islam religion differently interpreted the provisions of the Holy Koran.

CLASSIFICATION OF CUSTOMS.

In order to facilitate a complete understanding of customs it becomes imperative to chart out a classification of the same.

LEGAL CUSTOMS

It is a broadhead of classification. The legal custom is one whose legal authority is absolute and possesses the force of law *pro prio vigour*.¹⁰ This custom always has a binding force on the people whether or not they want to refer to it. They are further divided into two kinds – local and general customs. While local customs exercise their control over a small area or locality, general ones are applicable universally.

CONVENTIONAL CUSTOM OR USAGE

A conventional custom is one whose authority is conditional on its acceptance and incorporation in the agreement between the parties to be bound by it. A conventional custom is an established practice which is legally binding because it has been expressly or impliedly incorporated in a contract between the parties concerned.¹¹ An usage is always essential in some ways :

1. It reflects the prevailing social set up of a region or state or a locality that is actually the reaction of resident's reaction to the prevailing circumstances .
2. Usage always signifies commonly bound interests of people or a tribe or a community. So when deciding on a particular dispute, these have to be kept in consideration.
3. Usages always need to be given special consideration in judging facts of a case as all acts of people are indirectly outcomes of the way they are socialised with customs.

Initially usages are taken into consideration only when explicitly mentioned in the cases on contracts or when parties mention that they would be obeying to follow the particular custom. After that the weightage of the custom increases when different cases and in all similar cases a particular custom has been similarly referred to. After that the Courts quite naturally recognise customs and if the legislation feels then it may codify it into law. This had been witnessed in the case of Sale of Goods Act, Marine Insurance Act.

Custom and Usages are also widely different. While a custom is naturally always considered, a usage is considered only when parties agree to it. Customs can override common law depending on the circumstances but usages require to be allowed by common law to be used. A custom to be valid should have antiquity but that is not the case with customs.

THE LAW MERCHANT

The law merchant is an accumulated product of merchants to which sanctions have been given by the decisions of the courts.¹² The courts consider them as conventional customs as they exist to satisfy the interests of the trading communities who have their own set of disputes and they need to be decided from their point of view in which case the courts need law merchants. But if however a law is explicitly governing the issue then merchant cannot be considered, it only operates in other situations .

LEGAL CUSTOMS

It is further divided into two types of customs :

1. Local Custom.

A particular practice that is followed at a specific place which is unique to that place and rarely followed elsewhere. They are basically used by private owners in their own domains of authority. They take the form of customary rights of inhabitants of a particular region, for example designating a particular place for some activity and the rest. Since this type of custom is region and locality specific, hence it needs to have some features as essential pre-requisites, like firstly it should be reasonable and justified, secondly it should not be opposed to any statute law, thirdly its immemorial antiquity which clearly designates it as a profoundly followed practice, and lastly the local custom should have been openly followed by the regional inhabitants, any considerations or specifications or it being subject to the whims of people. The local custom is hence judged on its authority enforced on the locality.

2. General Custom.

These are customs generally prevailing throughout the territory of the state¹³, although customs are naturally recognised as belonging to a specific locality but in this case customs transcend the narrow local geographical boundaries and are found to be followed by a larger area usually a country as a whole. It also constitutes as one of the sources of law of the land. In the case of England it can definitely be seen that customs have got codified into common laws of the domain.

In case of the antiquity of these customs there are some debates. While at one side immemorial customs do exert authority and can easily get codified but on the other hand such an action might hinder the growth of new customs. If it is done then a basic nature of the origin of customs will be neglected, that is the reaction to the contemporary needs and problems. If antiquity is to be considered then many new customs and trade practices coming up can never make their way into the fold of

¹⁰ Jurisprudence and Legal Theory, V.D Mahajan.

¹¹ Jurisprudence and Legal Theory, V.D Mahajan

¹² Ibid at page 235.

¹³ Jurisprudence, The Legal Theory, B.N Mani Tripathi.

customary law. While Salmond supports the former view, Parker agrees with the latter conception. When a general custom gets codified it cannot be changed or disobeyed. In this case a subsequently new practice is difficult to be superimposed on the previous one so it can be added on to it as an amendment.

According to Keeton the general customs should be in accordance with common and statute laws of the country and it must exercise a binding force on people.

REQUISITES OF A VALID CUSTOM

1. ANTIQUITY

It refers to the fact that a custom must have been quite old and should be traced back to an immemorial antiquity, it should have been a practice of the ancient past and should have the authority of history. An old custom definitely assumes significance as the very fact that it lasted through the ages make it significant in the public interests.

2. CONTINUITY

The very fact that makes any practice a custom is its continuity of being followed irrespective of getting discontinued or a discreet past to it. A custom should have been maintained over the period of time by the people and in no way should there be any rejection of obedience. The fact of continuity is highly significant as it shows how people have always adhered to it and that it has been satisfying to the local needs at the particular moment.

3. ACCEPTANCE

Any arbitrary practice cannot become a custom, hence the main quality to be considered here is acceptance by the people for whom the custom serves a purpose. Acceptance is that virtue which proves that people following the particular custom recognise that the customary practice is needed by them, they will have a benefit by following the particular custom, and that the obedience towards the custom will give the group a unique identity of following it.

4. OBLIGATION CONTENT

The particular custom must be bound to be followed by all irrespective of personal or individual preferences and choices of the people. It must exert a binding force on the people of the territory in which the custom is followed. The significance of a custom can at any point of time be proved by the fact that people have no choice but to follow it at any cost. This virtue of obligation shows the authority of custom.

5. CERTAINTY

A custom is definite and certain. Certainty of a custom is with respect to its features and its nature which cannot be dubious and should be constant. A custom becomes a custom and gets elevated from the position of an ordinary practice by this simple fact that it does not change day by day. It is static both in its constitution and the effect it produces for the followers.

6. CONSISTENCY

Consistency means that no two customs should be opposing to one another and should not come into conflict with each other as well. In this way each custom retains its uniqueness and consistency. It is only because of this fact that customs are often considered to be codified into laws.

7. REASONABLE

This is the toughest test which a custom needs to go through as it is in this field that all the considerations come forward and a true evaluation or a judgement about customs is made. A custom is reasonable in the eyes of a society so all the considerations of public goodwill are applied on it, it is evaluated in terms of consequences of practising it, and also if that particular custom will advance interests or hamper them of the particular community following it.

8. CONFORMITY

The particular custom to be considered must be in conformity with the statute laws and the common laws of the state, it should never be opposing to them. The customs should be conforming with the rules in promoting public good or else they cannot be considered.

LAW AGAINST THE CUSTOMS-DEFEAT OF CUSTOMS

CASE STUDY; SABARIMALA TEMPLE CASE

Although customs are the binding force of laws, the skeletal structure on which a particular legal provision is developed and modelled, but there are instances in which customs have been defeated, their validity and significance challenged by developing modern thought processes. Sabarimala temple case is a notable and landmark case in this sense.

The temple in Kerala dedicated to the worship of Lord Ayyappa had been notoriously famous for preventing the entry of menstruating women and thereby indulging in controversies of gender bias and unconstitutionality of the rules made therein. In recent times, litigation started against that specific rule and the Apex Court has decided to scrap the custom down thereby allowing women to gain an entry into the temple.

The case is significant in explaining another aspect of custom- the fading situational entity. Situations and circumstances trigger application and formation of customary provisions but with those being changed and law being dynamic, the importance of customs fade away.

CONCLUSION

The hypothesis selected for the present study is proved as it can be figured out the way customs provide the basis on which almost all legal systems lay their foundations, and at the same time it can be inferred that their significance changes with changing social scenario giving way to a dynamic evolution of laws.