

## TOPIC: CUSTOM AS A SOURCE OF LAW

### 1. INTRODUCTION

Custom is a habitual course of conduct observed uniformly and voluntarily by the people. Custom occupies an important place in regulation of human conduct in almost all the societies. In fact, it is one of the oldest sources of law-making. But with progress of the society custom gradually diminish and legislation and judicial precedents become the main source. Custom is created by the people, by their unconscious adoption of a certain rule of conduct whenever the same problem arises for solution and its authority is based on nothing but its long continued use and recognition by the people. Custom is some kind of special rule which is followed from time immemorial. Law based on custom is known as customary law. Custom, as a source of law, involves the study of a number of its aspects: its origin and nature, its importance, reasons for its recognition, its classification, its various theories, its distinction with prescription and usage, and the essentials of a valid custom.

### 2. MEANING OF CUSTOM

The word 'custom' is derived from an old French word '*Coustume*'. Some says that the word 'custom' is based on Latin word '*Consuetudo*', some says that the word 'Custom' is derived from the word '*Consuetus*', while others say that it is the part participate of word '*Consuescere*' which means 'accustom'. Some says that it is derived from two words 'con' means, 'expressing intensive force' and 'suescere' means 'become accustomed'. In Hindi the word 'custom' means 'reeti', 'vyavahar', 'rasm', or 'riwaj'.

The word 'custom' literally, grammatically, or ordinarily means; tradition, practice; usage; observance; way; convention; procedure; ceremony; ritual; ordinance; form; formality; fashion; mode; manner; shibboleth; unwritten rule; way of doing things; formal; praxis;

style; etiquette; routine; habit; usual; rite; Solemn; unwritten code; conventional social behaviour; etc.

The word 'custom' generally means the following:

- 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.

A custom is a continuing course of conduct which may by the acquiescence or express approval of the community observing it, has come to be regarded as fixing the norm of conduct for members of society. When people find any act to be good and beneficial, apt and agreeable to their nature and disposition, they use and practice it from time to time, and

it is by frequent use and multiplication of this act that the custom is made. Custom is a rule of conduct which is spontaneously observed by the society as a tradition, habit and usage, but not in pursuance of law.

The chief characteristic of the custom is that, it is a generally observed course of conduct. The best illustration of the formation of such habitual course of action is the mode in which a path is formed across a common. One man crosses the common, in the direction which is suggested either by the purpose he has in view, or by mere accident. If other follow in the same track, which they are likely to do after it has once been trodden, a path is made. Custom may be considered as a fact and as a law. As a fact, it is simply the frequent and free repetition of acts concerning the same thing; as a law, it is the result and consequence of that fact.

Custom is a habitual course of conduct observed uniformly and voluntarily by the people concerned. In Sanskrit there are three terms; Achara, means 'rules relating religious observances'; Vyarahara, means 'the rules of civil law'; and Sadachara, means 'the usage of virtuousmen'. The wordSadachara, therefore, has been used for custom which means, 'the handed down in regular succession from times immemorial among the four chief castes (Varna) and mixed races of the country'. Custom is a long established practice. It is ausa that has by long continuance acquired a legally binding force. Custom is some kind of special rule which is in actual existence or possibly followed from time immemorial and which has acquired the force of law in specified territory, although it may be contrary or inconsistent with the general law of the land. Custom may be defined as the uniformity of conduct of people under like circumstances. Custom is a usage observed by the people and adopted by the courts on the fulfilment of certain conditions. It is the habitual conduct of number of persons. Custom may be described in its legal sense, consisting of those rules of human conduct which are established and evidenced by long usages founded upon pre-existing rules sanctioned by the will of the community.

The term 'custom' is used in a variety of senses: local custom, usage, (sometimes known as conventional custom), general custom and the custom of the courts. The first three are solely related to custom; and the fourth relates to precedent or *stare decisis*.

### 3. DEFINITIONS OF CUSTOM

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:

1. **Salmond:** - 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”.
2. **Austin:** - According to Austin, “custom is a rule of conduct which the governed observe spontaneously and not in a pursuance of law set by a political superior”.
3. **Allen:** - According to Allen, “custom as a legal and social phenomenon grows up by forces inherent in society, forces partly of reason and necessity and partly of suggestion and limitation.”
4. **Holland:** - He defined custom as “a generally observed course of conduct.”
5. **Keeton:** - According to him, “customary law may be defined as those rules of human action established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as source of law, because they are generally followed by the political society as a whole, or by some part of it.”
6. **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.
7. **Halsbury laws:** - “A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm.”
8. **Herbert spencer:** - According to him, “before any definite agency for social control is developed there exists a control arising partly from the public opinion of the living, and more largely from the public opinion of the dead.” Thus it is tradition passing on from one generation to another that originally governed human conduct.
9. In **Tanistry case**, it was held that custom is *jus non scriptum* and it is evolved by the people in respect of a place where it is followed. When people find any act to be beneficial and

agreeable to their nature and disposition, they start practicing it from time to time and when it is continued for immemorial time, it obtains force of law.

10. **Carter:** - According to him, “the simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances.”
11. **According to strand’s judicial dictionary of words and phrases**, “custom may be defined to be law or right not written, which being established by long use and the consent of our ancestors, hath bin and daily is put in practice”
12. **According to Webster’s Encyclopaedic unabridged dictionary**, custom means,
  - i. A habitual practice; the usual way of acting in given circumstances.
  - ii. Habits or habit that is so established that it has the force of law.
  - iii. Habits or usages collectively convention.
  - iv. Such habits collectively.
  - v. A customary tax, tribute, or service due by feudal tenants to their lord.
13. **According to Dictionary of Legal Theory** in many societies, widespread or long established custom is an important source of law.
14. **According To Webster’s Third New International Dictionary** custom is;
  - i. Made or performed according to personal order usually to individual specifications
  - ii. A form or course of action characteristically repeated under like circumstance.
15. **According to Mitra’s legal and commercial dictionary**, custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm.
16. **According to the law Lexicon**, custom is a law not written, established by a long usage, and the consent of our ancestors.
17. **According To New Webster’s Dictionary & Thesaurus**, custom is a generally accepted practice or habit, or convention,

18. **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.

#### 4. CUSTOM AND USAGE: A DISTINCTION

Some of the important points of distinctions between custom and usage are as follows:

1. A conventional custom or usage which does not possess absolute authority is clearly distinguishable from a legal custom having a force of law.
2. A custom is binding irrespective of the consent of the parties, whereas usages are binding only when they are not expressly excluded by the terms of agreement entered into by the parties.
3. If a custom is local, it is confined to a particular locality, on the other hand, the usage need not to be confined to a particular locality.
4. As such a 'legal custom' is not to be understood in the sense of 'usage' which is also based on long practice but has not acquired binding or obligatory character nor a usage can be exercised as of right inhering in one individual and binding on the other against whom such usage is claimed.
5. A custom to be valid should have been in existence from time immemorial but it is not so in case of a usage. In other words, unlike custom, a usage, need not to be of immemorial antiquity. A usage of recent origin can be given effect by the courts on the ground that parties had contracted with reference to the usage. In *Noble v. Kennoway*, Lord Mansfield said, "it is no matter if the usage has only been for a year.
6. A local custom can easily derogate from or common law of the realm, but not from statute law. Usage, however, can do so to the extent to which it is possible to exclude the common law by specific and express contract between the parties
7. If in any particular case, common law cannot be excluded by express agreement, it cannot be excluded by usage also. However, custom can override the common law.

8. On fulfilling the necessary conditions, a customs operates as a source of law either for the entire community or the territorial section in which it operates. A usage only adds a term to a contract.
9. A mercantile usage need not establish antiquity, uniformity and notoriety which are so essential in the case of a custom
10. A custom arise out of its own force, whereas, usage does not arise out of its own force but is arising out of contract between the parties. In other words a legal custom has its own independent stand and is not a creature of agreement, on the other hand a conventional custom or usage does not exist or arise out of any legal authority independently possessed by it; it arrives out of agreement between the parties.

## **5. CUDOM AND PRESCRIPTION: A DISTIONTION**

Some of the important points of distinction between custom and prescription are as under;

1. Custom is long practice operating as a source of law; prescription is long practice operating as a source of rights.
2. Historically, a prescription is a personal custom that is to say, a custom limited to a particular person or his predecessor in title, whereas, a local custom is limited to an individual place.
3. When a course of conduct is practiced for a time it gives rise to a rule of law known as custom, but if it gives rise to a right, it is called prescription.
4. In case of custom, the old rule as to time immemorial still subsists, but in case of prescription the fiction of lost grant operates and it is governed by Statutory prescribed time. Thus a prescriptive right to air and light can be acquired by uninterrupted use for period of twenty years.
5. A custom originates from long usage, whereas, a prescription originates from waiver of a right.
6. A customs is *lex loci* and inherent in the soil whereto it is fixed for the service of everyone that is qualified to use it, whereas, prescription is fixed in the person and therefore,ought always to be laid in persons.

7. A claim is based upon custom when it depends on a general rule of property within the particular locality, applying equally to all persons of a given class resident within the limits of the locality. A prescriptive right, on the other hand, is personal to the claimant.
8. The limitation of reasonableness which, we shall see, applies to customary rights has no application to claim based on prescription.
9. According to Coke, “ in the common law, a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predessors.... and a custom, which is local, is alleged in no person, but layed within some men or other place”
10. Custom is based on long usage, but prescription is based on lost grant and operates as sources of right.
11. A custom must be reasonable and conform to justice, public policy and utility, but that is not necessary in the case of prescription.
12. Custom is a generally observed course of conduct and has the force of law on account of long usage. Prescription means the acquisition of right or title by user or possession in the manner laid down by law
13. Custom applies to a particular locality, if local and to public at large, if general. Whereas, prescription is personal and applies to persons. In other words, a custom extends to a particular place, locality, or community as a whole, but prescription is of personal nature and is confined to an individual or his relatives.
14. Custom must be ancient to make it binding, whereas prescription requires only a period of 20 years.
15. Custom has given rise to law, whereas, prescription has given rise to legal rights.
16. Custom must be ancient and there is no time limit within which it can be observed as of right; prescription, however, becomes effective and can be observed as of right when it has been enjoyed peaceably and without interruption for a period of twenty years.

## **6. VALID CUSTOM**

## **JUDICIAL TESTS FOR A**

Each and every custom cannot be legally enforced. They must be proved before the courts like any other thing before they can have the force of law. Custom to be legally recognized



by the courts and acquire the binding force of law evolved some judicial tests. These tests are as follows:

### **1. Immemorial Antiquity:**

The first test of a valid custom is that it must be immemorial. It must be old or ancient and must not be of recent origin.

Allen, Paton, Salmond and all other jurists are of the views that before custom can be have the validity in law; it must be shown that the custom is of immemorial antiquity or origin.

In the words of Allen, “a mere habit, practice, or fashion which has existed for a number of years nobody supposes to be *Ipsa facta*an obligatory custom; antiquity is the only reliable proof of resistance to the changing conditions of different ages.” But Dr. G. William has objected to it as the statement is unconvincing. According to Blackstone, “A custom in order that it may be legal and binding, must have been used as long that the memory of man runneth not to the contrary. In ancient Hindu law also, the antiquity was one of the essentials for the recognition of custom. Manu said, “Immemorial custom is transcendental law”. The idea of immemorial custom was derived by the law of England from the Canon law, and by the Cannon law from the Civil law. Time immemorial means in the Civil law and Cannon law and in the systems derived there from and originally meant in England also time so remote that no living man can remember it or give evidence concerning it.

In England a custom must be of reign of Richard I King of England”. That is in England the time of legal memory is 1189 for a custom to be regarded as valid. The year 1189, was the first year of the reign of Richard I. But the English rule of ‘immemorial origin’ is not strictly to be followed in India. The Allahabad High Court as early as 1895 laid down in *Kaur Sen v. Mamman*, that it would be inexpedient to apply the English ‘rule of 1189’ in India as it would destroy many customary rights of modern growth in villages and in other places. The Calcutta High Court, on the other hand, in *Ambalika Dasi v. Aparna Dasi* was of the view that either 1773 A.D. or 1793 A.D. is the date for treating a custom which has been in existence as immemorial. The Bombay High Court was of the view that if within last 20 years, instances have occurred in which an alleged custom has been recognized, the presumption is that it is of immemorial origin. Likewise the Andhra Pradesh High Court following Bombay High Court observed in *Venkata Subba Rao v. Bhujangarrya* that a custom being in existence for 40 years is an enforceable custom. The Supreme Court, however, finally in *Gokul Chand v. Parvin Kumari*, decided the mater once for all by laying down that the English rules of custom in order to be valid must have been used so long that the memory of man runneth not to the contrary should not be strictly applied to the Indian customs. In India it has been said that a custom must be of old nature, but there is no such fixed period for which it must have been in existence as it is in the English law.

The reason for not enforcing a modern custom is that otherwise so many of the novel customs would become law. The law adopts sufficient methods of protection against the development of vexatious acceptance of modern customs. What otherwise would the value of

judge-made law have been. To keep the force and power of precedent the law sees that modern or unreasonable custom should not be accepted.

## **2. REASONABLENESS**

The second important judicial test of a valid custom is that it must be reasonable. It must not be unreasonable. It must be useful and convenient to the society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. That is the burden of proof lies upon the person who challenges the custom. To ascertain the reasonableness of a custom it must be traced back to the time of its origin. The unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. According to prof. Allen, the unreasonableness of the custom must be proved and not its reasonableness. Therefore, a custom shall not be valid if it is apparently repugnant to right and reason and it is likely to do more mischief than good if enforced. The authority of a prevailing custom is never absolute, but it is authoritative provided it conforms to the norms of justice and public utility.

Sir Edward Coke pointed out that a custom is contrary to reason if it is opposed to the principles of justice, equity and good conscience. Salmond has rightly suggested that before a custom is denied legal recognition, it must be found out that the mischief resulting from its enforcement outweighs the harm that would result from the multiplication of the natural expectation of the people.

The judicial committee of the Privy Council, delivering its judgment through Sir James Colville in *Raja Varma v. Ravi Varma* observed that a custom which is not reasonable is invalid in law and not binding. In this case it was held that a custom permitting the sale of trusteeship of a religious endowment for pecuniary advantage of the trustee as unreasonable custom. In *Walstanton Ltd. v. Newcastle-under-Lyme Corporation*, it was held that Courts will not enforce unreasonable customs, for law will not allow what is unreasonable and inequitable. In case of *Lutchmeeput v. sadaulla*, a plaintiff, a zamindar sued to restrain defendants from fishing in certain bhils (ponds) which formed part of his zamindari and where the defendants contended that they had a prescriptive right to fish under a custom according to which all the inhabitants of the zamindari have the right of fishing in the bhils, it was held that the alleged custom was unreasonable the defendants may take away the entire of fishing in the bhils leaving nothing for the plaintiff who was admittedly the owner of them.

The reasonableness must not judge by our modern view of suitability. A custom should be regarded as sufficiently reasonable when it is not opposed to the fundamental principle of morality, or of the law of the state in which it exists, or principles of justice, equity and good conscience. It must not be otherwise imprudent, harsh or inconvenient.

The question of reasonableness is one of law for the court. The standard which the courts apply has been defined by the Divisional court of the King's Bench in *Produce Brokers co. v. Olympia oil and coke co.*, as "fair and proper, and such as reasonable, honest and fair minded

men would adopt". Brett, J, in *Robinson v. Mollett*, stated the test even more broadly: "whether or it is in accordance with fundamental principles of right and wrong."

It is not in respect of validity of a custom that it should be reasonable, but a period of validity of a custom that it should be reasonable, but a precedent which is plainly and seriously unreasonable may be overruled instead of followed. Similarly, certain forms of subordinate legislation, e.g. unreasonable by laws are as void and authoritative as an unreasonable custom or precedent. Prof. Allen says: "The true rule seems to be not that a custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable".

### **3. MORALITY**

Third test of a valid custom is that a custom, to be valid, must not be immoral. It is a well-recognized rule that a custom should not be opposed to decency and morality. A custom must not be opposed to public policy or justice, equity or good conscience. In *Mathura Naikin v. EsuNaikin*, the Bombay High Court has held that the custom of adoption of girls for immoral purposes, like dancing is illegal as it was designed to perpetuate this profession. In case of *Balusami v. BalaKishna*, the custom permitting marriage with daughter's daughter has also been held immoral. In *Gopi v. Jaggo*, the Privy Council allowed a custom which recognized and sanctioned re marriage of a woman who had been abandoned and deserted by her husband. The Bombay High Court, in *Narayan v. Lavingheld* a custom permitting a woman to desert her husband at her pleasure and marries again without his consent to be immoral. Similarly in *KeshavHargovan v. BaiGundi*, the same Court held as custom by which the marriage tie could be dissolved by either husband or wife against the wish of the divorced party on payment of a sum of money, to be immoral.

### **4. CONTINUANCE**

The fourth test for a valid custom is that it must have been continuously observed without any interruption. General rule is that if a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all. It must have been in existence and recognized by the community without any intervening break, for such duration as may, under the circumstances of the case, be recognized as reasonably long. In case of *Muhammad Hussainforki v. Syed Mian Saheb*, it was held that unless there

is continuity there is no custom. A custom may be abrogatory and if it abrogates another custom, such other custom ceases to exist. Blackstone has drawn a distinction between the interruption of the “right” and the interruption of the mere ‘possession’. It is the discontinuance of the ‘right’, for howsoever small a time that ends the custom. It means that if possession for some time is disturbed, but the claim to enjoy the custom is not abandoned, the custom continues. The discontinuance of the right even for a day shall put the custom to an end.

#### **5. PEACEABLE ENJOYMENT**

The next important test is that custom must have been enjoyed peaceably. If a custom has been in dispute for a long time in a court of law or otherwise, it will negate the presumption that it did originate by consent as most of the custom naturally did. Therefore, for the enforceability of a custom; it is necessary to show that the custom has been enjoyed without any disturbance or contest. A custom is based on consent or habit, and unless there was an undisturbed existence of the custom, we cannot say that it was based on the general consent of the people.

#### **6. CONSISTENCY**

The test for a valid custom is that it must be in conformity with the statute law. It should not be contrary to the statutory law. A custom should necessary yield where it conflicts with a statutory law. This rule is observed as a positive principle of law in England and countries like India which follow English law. The Roman law and various continental systems, however, do not adhere to this rule. Justinian in his *corpus juris* mentions several statutes which have fallen into disuse by a posterior contrary custom. That is to say, the latter rule prevails over the earlier, regardless of their origins and legislation has no inherent superiority in this respect over custom. If an enacted law comes first it can be repealed or modified by a later custom and vice versa. Commenting on this aspect Savigny pointed out that customs and statutes are put on the same level with respect to their legal efficiency and customary law may complete, modify or repeal a statute, it may

create a new rule and substitute it for a statutory rule which it has abolished. In Scotland and ancient Greece also a statute may fall into disuse by the posterior contrary custom.

But in India the position is clear that custom must not be opposed to statute law, as the same thing has been held by the Indian Supreme Court in *Darshansing v. Naimum Nisa Bibi*. Obviously custom cannot abrogate a newly enacted legislation. For instance, among the Hindus all the customary forms of marriage, adoption, succession, or property have been abrogated by the newly enacted legislation concerning such problems. Hence an old inconvenient and unjust custom cannot be set up against statutory law. For instance, the custom of child marriage and usage of dowry has no legal force in modern India. According to Coke, "No custom or prescription can take away the force of an Act of parliament." "A state can abrogate a custom and not vice versa. However, it is to be observed that there are writers who hold different views on this point. According to them, legislation has no inherent superiority over custom. If the enacted law comes first, it can be repealed or modified by a later custom. If the customary law is the earlier, it can similarly be dealt with by later enacted law. According to Savigny, "if we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished." According to Windshield, "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."

## **7. CERTAINTY**

Certainty is an indispensable condition of a valid custom. A custom, however, ancient must not be indefinite and uncertain. In *Wilson v. Willes*, it was held that a custom must be certain and not vague. A custom which is vague or indefinite cannot be recognized. It is more a rule of evidence than anything else. The court must be satisfied by a clear proof that custom exists as a matter of fact, or as a legal presumption of fact. In one case, the plaintiff claimed a customary right of easement for the shadow falling from the branches of trees hanging from the neighbour's field. Mr Justice Pandalai of the High court of Madras ruled that there cannot be a custom relating to shadow of tress because it is so uncertain, ambiguous and transitory that it cannot give rise to any customary right.

## **8. COMPULSORY OBSERVANCE**

A custom to be legally recognized as a valid custom must be observed as a right. It means that custom must have been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it. It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice; it cannot be treated as a customary law. These requisites are expressed in the form of the rule that the user must be *nec vi nec clam nec precario*- not by force, nor by stealth, nor at will. In *Hamperton v. Hono*, it was held that if the observance of a custom is suspended for a long time, it would be assumed that such a custom was never in existence.

## **9. 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.

## **10. PUBLIC POLICY**

Another test for the validity of a custom is that it should not be opposed to public policy. This test may be included in the test of reasonableness, as it is very wide term and it may include public policy as well. In case of *Budanso v. Faturr*, a custom which would enable a woman to marry again during the life time of her husband without any defined rules by which the marriage with the first husband is dissolved before the second marriage is contracted, was held to be contrary to public policy. In nut shell a custom is valid if it not contrary to justice, equity or good conscience or opposed to public policy.

## **11. NOT BY ANALOGY**

Custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by priori methods. It cannot be a matter of theory but must always be a matter of fact. Likewise one custom cannot be deduced from other. Custom also cannot be set up against fundamental rights.

## **7. THEORIES REGARDING TRANSFORMATION OF CUSTOM INTO LAW**

There are two theories regarding the transformation of custom into law, which are as follows:

- i. **Historical theory:**-The main exponents of this theory are Karl Von Savigny, his disciple Puchta, Blackstone, and Sir Henry James Summer Maine. According to Savigny, custom is per se law. He says law is based on custom. A custom carries its justification in itself. According to Puchta, the custom is independent of the law of sovereign. It is independent of any declaration or recognition by the state.

Sir Henry Maine regards custom as source of formal law. According to Manu, “custom is transcendent law”.J.C.Gray also contends that great many laws were brought in not only without the wishes of the people but against the wishes of the great mass of them. Allen also pointed out that all customs cannot be attributed to the common consciousness of the people

According to this theory, the growth of law does not depend upon the arbitrary will of any individual . Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people.

The Historical theory has been criticized by Paton as “The growth of most of the customs is not result of any conscious thought but of tentative practice”

- ii. **Analytical theory:** - The main exponent of this theory is Austin. According to him, custom is not law in itself, but it is a source of law. If a custom is not recognized by the legislation and approved by the judiciary, it will not become a law. Gray also says that true view is that the law is what the judges declare. The legislation, precedents, customs and morality are all sources of law.

According to Holland, customs are not laws when they arise but they are largely adopted into laws by State recognition. A custom is a law only to the extent to which,

and from the time, when the sovereign sanctions it. According to him, custom is a legal material and source of law. This view is also supported by Salmond. Gray also concedes that custom is one of the sources of law but it is certainly not the sole source of law.

The Analytical theory has been criticized by Allen in these words-“Customs grow by conduct and it is therefore, a mistake to measure its validity solely by the element or express sanction accorded by courts of law or by other determinate authority”

## **8. CLASSIFICATION OF CUSTOM**

Custom can be classified into two types:

1. Custom without sanction, and
2. Custom having sanction.

Custom having sanction can be further classified into two types:

- i. Legal Custom, and
- ii. Conventional Custom.

Legal Custom can be further classified into two types:

- a. General Custom, and
- b. Local Custom.

### **1. Custom Without Sanction:**

These are those customs which are non-obligatory. They are all observed due to presence of the public opinion. Austinian term for them is positive morality.

### **2. Custom Having Sanction:**

These are those customs which are enforced by the State. These customs are backed by sanction.

These customs have two types which are as follows:

- i. Legal custom; and
- ii. Conventional custom



**i. Legal custom:** - The legal customs are those whose legal authority is absolute and unconditional. These customs operate as a binding rule of law. They have been recognized by the courts and have become a part of the law of the land. They are enforced by the courts. Legal customs are of two types:-

a. Local custom

b. General custom

**a. LOCAL CUSTOM**

A local custom is that which prevails in some defined locality, that is, to a district, town or an area. But they do not imply geographical locality only. Sometimes, certain sects or families take their customs with them wherever they go. They too are called local customs. Therefore, in India, local customs may be divided into two classes; Geographical local custom' and personal local custom. These custom are law only for a particular locality, set or family.

Halsbury defined local custom as a particular rule which has existed actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although it is contrary to or not consistent with the common law of the realm.”

A local custom to be valid should be sustain, reasonable, continuous, and permanent and should not be contrary to any existing law.

**b. GENERAL CUSTOM**

A general custom is that which prevails throughout the country and constitutes one of the sources of the law of the land. There was a time when common law was considered to be the same as general custom of the realm followed from ancient time, but today it is not so. Now only the statute law passed by the British parliament and precedents are regarded as the sources of common law.

According to Keeton, ‘a general custom must also satisfy certain conditions if it is to be a source of law’. It must be reasonable, followed and accepted as binding, should not be in conflict with the statute law of the country and must be in existence from the time immemorial.

**ii. CONVENTIONAL CUSTOM**

A conventional custom is also called “usage”. It is an established practice whose authority is conditional on its acceptance and incorporation in the agreement between the parties bound by it. In simple words, a conventional custom is conditional and condition is that it will be binding on the parties only, if it has been accepted and incorporated by them in their agreement. A conventional custom is binding on the parties not because of any legal authority, but because of the fact that it has been expressly or impliedly incorporated in a contract between the parties concerned. When two parties enter into contract, generally whole terms of the agreement are not set out expressly and a large part of most contracts is implied. The intention of the parties to the contract can be gathered from the customary law prevalent in the trading community. A conventional custom may either be local or national.

In order to acquire the status of law, a conventional custom must also fulfil the essentials of a valid custom. That is, it must be immemorial, it should not be contrary to the statute law, it should be reasonable, and must be in conformity with morality and public policy.

There is an important point to mention here that in *Asarabulla v. Kiamtulla*, it was held that a conventional custom or usage which is contrary to any express condition laid down in a contract shall not be enforceable by law.

## **9. 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 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

immemorial antiquity, reasonableness, continuity, peaceful enjoyment, certainty, conformity with public policy and statutes, and morality.