JURISPRUDENCE NOTES

CUSTOM:-

Salmond- Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.

Carter- The simplest definition of custom is that it is the conformity of the conduct of all persons under like circumstances.

Austin- Custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior.

Judicial Committee of Privy Council- A rule which in a particular family or a particular district has, from long usage, obtained the form of law.

Tanistry's Case- It is *jus non scriptum* and made by the people in respect of the place where the custom obtains, for where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practice it from time to time and it is by frequent alteration and multiplication of this act that the custom is made and being used from time to which memory runneth not to the contrary obtains the force of law.

ORIGIN OF CUSTOM:-

A study of ancient laws shows that in primitive society, the lives of the people were regulated by custom which developed spontaneously according to the circumstances. It was felt that a particular way of doing thing was more convenient than others.

Holland- Custom originated in the conscious choice by the people of the more convenient of the two acts. Imitation must have played an important part in the growth of customs.

Trade- Imitation is not mere curiosity of psychology, but it is one of the primary laws of nature. Nature perpetuates itself by repetition and the three fundamental forms of repetition are rhythm or undulation, generation and irritation.

Vinogradoff- Social customs themselves obviously did not take their form from assembly or tribunal. They grew up by gradual process. The magistrate came only 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.

BINDING FORCE OF CUSTOM:-

The very fact that any rule which has the sanction of custom raises a presumption that it deserves the sanction of law also. Judgments are inclined to accept those rules which have in their favor the prestige and authority of long acceptance.

Salmond- Custom is to society what law is to the state. Each is the expression and realization of the measure of man's insight and ability of the principles of right and justice. Custom embodies them as acknowledged and approved, not by power of the state, but by the public opinion of the society at large.

The binding force of custom is that the existence of an established wage is the basis of rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated.

Sometimes, a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law. Reference may be made in this connection to three grace days on bills of exchange.

Customs rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

Paton- Custom is useful to the law giver and codifier in two ways. It provides the material out of which the law can be fashioned- it is too great an intellectual effort to create law *de novo*. There

is inevitably a tendency to adopt the maxim ‘Whatever has been authority in the past is a safe guide for the future.’

HISTORICAL THEORY:-

The growth of law does not depend upon the arbitrary will of any individual. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. Law has its existence in the general will of the people.

Savigny(Gives it the name of Volksgeist)**-** Law, like language, stands in organic connection with nature or character of people and evolves with the people. Custom is the sign or badge of positive law and not its foundation or a ground of origin.

Puchta- Custom is not only self-sufficient and independent of state, *imprimatur* but it is a condition to all sound legislation.

James Carter- What has governed the conduct of men from the beginning of time will continue to govern it to the end of time. The human nature is not likely to undergo a radical change and therefore that to which we give the name of law always has been, still is, and will forever continue to be, custom.

CRITICISM:-

Paton- The growth of most of the customs is not the result of conscious thought but if tentative practice.

Jethrow Brown- That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the preference of declaring custom, judges frequently give raise to it.

Nlen- All customs cannot be attributed to the common consciousness of the people. In many laws, customs have arisen on account of convenience of the ruling class.

Sir Henry Maine- Custom is a conception posterior to that of judgments.

The view of historical school is not balanced. Customs have not always arisen out of convenience or the needs of the people. Sometimes they have been imposed by the ruling class.

The historical jurists did not pay proper attention to the fact that the state has power of abrogating custom.

ANALYTICAL THEORY:-

The great advocates of analytical theory are Austin, Holland, Gray, Allen and Vinogradoff.

Austin- Custom is a source of law and not law itself. A customary law may take the quality of legal rules in two ways. It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode or it may be taken as a ground of judicial decision which afterwards obtains as a precedent and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned, emanates from the sovereign. Custom only has a persuasive value. Customary practices have to be recognized by the courts before they become law. Law styled customarily is not to be considered a distant kind of law. It is nothing but judiciary law founded upon anterior custom.

Holland- Customs are not laws when they arise but they are largely adopted into laws by state recognition. Binding authority has thus been conceded to custom, provided it fulfills certain requirements, the nature of which has also long since been settled, and provided it is not superseded by law of a higher authority. When therefore, a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom, as it might to any other pre-existent law. It merely decides as a fact that there exists a legal custom about which there might, up to that moment, have been some question, as there might, about the interpretation of an Act of Parliament.

Gray- The true view, as I submit, is that law is what judges declare; that statutes, precedents, the opinions of the learned experts, customs and morality are the source of law; that custom is one of them, but to make it not only one source, but the sole source of law itself, requires a theory which is as little to be trusted as that of Austin.

CRITICISM:-

Allen- Custom grows by conduct and it is therefore a mistake to measure its validity solely by the element of express sanction awarded by courts of law or by other determinate authority. The characteristic feature of majority of custom is that they are essentially non-litigious in origin. The starting point of all custom is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension.

The analytical theory contains some truth but that is only partial and not the whole truth. In most cases, customs are recognized not with the assumption that the recognition gives them the sanctity of law but with the assumption that they are the law and have to be treated as such.

Vinogradoff- Most of the branches of law did not start from legislation or from any other source. They started from customs. This applies to law of succession, property, possession and contract.

CLASSIFICATION OF CUSTOMS:-

The customs in their wider sense may be classified into two classes-

- Customs without sanction- They are those customs which are non-obligatory. They are observed due to pressure of the public opinion. The Austinian term for them is ‘positive morality’.
- Customs with sanction- They are those customs which are enforced by the state. It is with these customs that we are concerned here.

LEGAL CUSTOM:-

A legal custom is one whose legal authority is absolute. It possesses the force of law *pro prio vigor*. The parties affected may agree to a legal custom or not but they are bound by the same.

A legal custom is of two kinds. It is either a local custom or a general custom of the realm.

LOCAL CUSTOM:-

1. The term ‘custom’ in its narrowest sense means local custom exclusively.
2. Local custom is that which prevails in some defined locality only such as borough or county and constitutes a source of law for that place only.
3. In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements. It must be reasonable. It must conform to statue law. It must have been observed as obligatory. It must be of immemorial antiquity.
4. It must be reasonable. The authority of usage is not absolute but conditional on a certain measure of conformity with justice and public utility.
5. The true rule is that in order to be deprived of legal efficacy, a custom must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and agreements, based on its turning of the expectations and agreements, based on its presumed continuance and legal validity.
6. Another requirement is that a local custom must be in conformity with statute law. It must not be contrary to an Act of Parliament.

Coke- No custom or prescription can take away force of an Act of Parliament.

7. It must be observed as a matter of right. This does not mean that the custom must be acquiesced in as a matter of moral right. The custom must have been followed openly, without the necessity of recourse to force and without the permission of those adversely affected by the custom being regarded as necessary.
8. Legal custom is its immemorial antiquity. In order to have the force of law, the custom must be immemorial.

GENERAL CUSTOM:-

1. A general custom prevails throughout the country and constitutes a source of the law of the land. The common law of the realm is the common custom of the realm.

2. There is no unanimity of opinion on the point whether the general custom must be immemorial or not.
3. **Salmond-** A general custom must be immemorial. The general rule is that a general custom cannot have the force of law unless and until it is also immemorial.
4. **Parker-** When a general custom is adopted as a precedent, it is accepted as a form of conventional law. It is adopted because common law provides that an agreement should be enforced according to its terms.
5. A general custom, once recognized, cannot be set aside by a later general custom. A general trade custom cannot become law if it conflicts with law.

Keaton- A general custom must satisfy certain conditions. It is to be a source of law. It must be reasonable. It must be generally followed and accepted as binding. It must have existed from time immemorial. It must not conflict with statute law of the country. It should not conflict with the common law of the country.

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. There are certain implied terms which can be omitted.

The intention of the parties to the contract can be gathered from the customary law and other things which can reasonably be taken to be implied in the contract. The customs of the locality or trade or profession are taken to be included in the contract. The courts are bound to take notice of these customs.

There are some conditions:

- It must be showed that the convention is clearly established and it is well known. It implies that both the parties were aware of such a convention.

- Conventions cannot alter the general law of land. Therefore, they are valid only within the area of their observance.
- They must be reasonable. If certain conventions are expressly excluded by the parties, they will not be enforced.

ESSENTIALS OF A CUSTOM:-

1. Antiquity-

- **Blackstone-** A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom.
- The idea of immemorial custom was derived by the law of England, from the Canon law and by the Canon law from the Civil law. An arbitrary time limit, that is, the year 1189, the first year of the reign of Richard I, has been fixed, at which the custom must be proved into existence.
- **Sir George Rankin**(In *Baba Narayan V. Saboosa*)- In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' right in place of the general law.

2. Continuance-

- If a custom has been followed continuously and without any interruption for a long time, it gains recognition.
- If it has been interrupted, the presumption is that it never existed at all.

3. Reasonableness-

- A custom must be reasonable. It gives a good deal of discretion to the court in the, matter of recognition of customs.
- It has been settled that the time to decide the reasonableness of a custom is the time of its origin.

Allen- The rule regarding reasonableness is not that a custom will be admitted, if reasonable, but that it will be admitted unless it is unreasonable.

- The courts are not at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom or whenever they think a better rule can be formulated in the exercise of their own judgment, otherwise, a custom will lose much of its force and sanctity.

4. Peaceable enjoyment-

- The enjoyment of custom must be a peaceable one. If that is not so, consent is presumed to want it.

5. Certainty-

- A valid custom must be certain and definite.
- 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.

6. Obligatory force-

- A custom is valid if its observance is compulsory. An optional observance is ineffective.
- **Blackstone-** A custom that all the inhabitants shall be rated, towards maintenance of a bridge, will be good but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all.

7. General or universal-

- **Carter-** Custom is effectual only when it is universal or nearly so in the absence of unanimity of opinion, custom becomes powerless, or rather doesn't exist.

8. Public policy-

- **Privy Council**(In *Raja Varma V. Ravi Varma*)- Public policy, when against custom, will invalidate that the custom was bad in law.

9. Conformity with statutory law-

- **Coke-** No custom or prescription can take away the force of an Act of Parliament.
- A state can abrogate custom but not vice-versa.
- But according to the historical school, a custom is superior to statute and it can supersede a statute, though this view has nowhere been recognized in practice. The English rule is that a custom will not be recognized if it is in conflict with some fundamental principle of the common law.