Chapter- Sources of Hindu Law.....Continue

IV. Custom as a Source of Hindu Law

Custom

Customs is the tradition that has been practiced in society since ancient times. It is the type of practice which is under the continuous observation of the people has been followed by the people. Customs are a principle source and their position is next to the Shrutis and Smritis but usage of custom prevails over the Smritis. It is superior to written law. The Historical School of Jurisprudence conclusively established that, Custom was the main tools of legal development during early societies.

From the earliest period custom (‘Achara’) is regarded as the highest ‘dharma’. As defined by the Judicial Committee custom signifies a rule which, in a particular family or in a particular class or district has from long usage obtained the force of law.

Most of the Hindu law is based on customs and practices followed by the people all across the country. Even smritis have given importance to customs. They have held customs as transcendent law and have advised the Kings to give decisions based on customs after due religious consideration.
Nature and Origin of Custom

Custom is a habitual course of conduct observed uniformly and voluntarily by the people concerned. When people fine any act to be good and beneficial, which is agreeable to their disposition, they practice it and in course of time by frequent observance and on account of its approval and acceptance by the community for generations, a custom evolves.

In all societies of the world, custom has enjoyed a very high place in varying degree in the regulation of human conduct. Customs arise whenever a few human beings come permanently without adopting consciously or unconsciously, some definite rules governing reciprocal rights and obligations. Custom is to society what law is to the state.

Custom is one of the oldest forms of law making. In primitive societies human conduct was regulated by practices which grew up spontaneously and were later adopted by the people. What was accepted by the generality of the people and embodied in their customs was deemed to be right. So, custom has played an extremely significant role as a source of law, till other sources of law like legislation and precedent acquire prominence. Customs have been the most potent force in molding the ancient law.

According to Savigny and the German historical school, customs is in itself an authoritative source of law. According to them the present cannot be understood without reference to the past, and to understand the true source of law we must go back to the days when society was in its infancy. In early time it was only customary rules which were the only kind of laws known to the people and which had the people sanction.

It was held in the case of Collector of Madura versus Moottoo Ramalinga 1868 P.C.that clear proof of Custom is more important than written document.

**Essentials of a custom:**

Following are the essential points which constitute a custom-
Requirements for a valid custom

1. **Ancient**: Ideally, a custom is valid if it has been followed from hundreds of years. The word ancient means that its belongs to antiquity. According to Section 3(a) of the Hindu Marriage Act, 1955 it should be observed for a ‘long time’. In point of time what could be said to be the observance for a long time, is difficult to say in India, Custom need not be in memorial in the English law sense. The courts have time and again expressed an opinion that if a custom established to be 100 years old or more, it is of sufficient antiquity to be called ancient. Some authors like Derett thinks that 40 years should be sufficient time. A custom cannot create through agreement and cannot be recognized. Madras High Court said in the case of Deivana Achi versus Chidamra1954 Madras that 25 years is not a sufficient long period or elevated practice to the rank of custom. The privy Council observed that it is not the essence of this rule that its antiquity in every case be carried back to a period beyond the memory of man - still less that it is ancient in the English technical sense it in memory of managed in less. It will depend upon the circumstances of each case what antiquity must be established for the custom can be accepted.

2. **Continuous**: Only that custom is valid which has been continuously observed without any interruption from time immemorial. If a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never be exist. It is important that the custom is being followed continuously and has not been abandoned. Thus, a custom maybe 400 year’s old but once abandoned, it cannot be revived. Continuity of a custom is as essential as its antiquity. It is of the essence of family usages that this should be certain in variable and continuous and well-established. Discountenance must be held to destroy them. Such a discountenance may be intentional or accidental.

3. **Reasonable**: There must be some reasonableness and fairness in the custom. A custom must not be unreasonable. An unreasonable custom is void. Although it cannot be said that custom is always founded on reason. Reasonableness and unreasonableness is a matter of social value. It may be subject to time and place. Its authority is not absolute, but conditional on certain measure of conformity with the prevailing view of usefulness, justice and public policy. It is reasonable if found to be in consonance with reason and its origin and continuance are capable
of being explained. Thus, the 'sati pratha' could not take the place of a legal Custom due to its being repugnant to the logical sense of justice and goodness in man. A custom of burying or cremating the dead bodies of the people of the locality on an abandoned land is not unreasonable. It is however, not necessary that in order to be reasonable, a custom must fulfill the test of absolute rectitude and wisdom. The true rule is, observes Salmond that a custom in order to be deprived of legal efficacy must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity.

4. **Not against morality**: The ground of morality may vary from time to time and place to place like the reasonability. Custom should not be morally wrong or repugnant. For example, a custom to marry one’s granddaughter has been held invalid. In the case of Chitty v. Chitty, (1894) 17Mad 429, a custom that permits divorce by mutual consent and by payment of expenses of marriage by one party to another was held to be not immoral. In the case of Gopikrishna v. Mst Jagoo, (1936) 63 IA 295, a custom that dissolves the marriage and permits a wife to remarry upon abandonment and desertion of the husband was held to be not immoral.

5. **Must not be opposed to law**: No custom or prescription can take away the force of an Act of Parliament. Here opposed to law means opposed to statutory law. A custom opposed to sacred law prevails, but no custom opposed to statutory law can be given effect. Statutory law is Supreme and no length of desuetude can affect its efficacy. The custom in order to be a source of law must not, therefore, conflict with statute law. If a custom is against any statutory law, it is invalid. Codification of Hindu law has abrogated most of the customs except the ones that are expressly saved.

6. **Certainty**: The custom has to clearly defined, it cannot be vague and confusing. A custom must be certain and the court must Satisfied by Clear and unambiguous proof that the custom exists as a matter of fact or legal presumption of fact. A custom, however ancient, must not be indefinite and uncertain, and as Willes C.J. observed in Broadbent vs. Wilkes (1742) Willes, 360. " a custom must be certain because, if it be not certain it cannot be proved to have been time out of mind, for
how can anything be said to have been time out of mind when it is not certain what is? Custom must be prove with reasonable amount of certainty.

7. **Consistency:** Custom must be consistence with each other that these may operate as a source of law. There should be consistency between customs. Two customs that have opposing viewpoints cannot be considered valid.

In the instant case of Deivanai Achi v. chidambaram (1954) Mad. 667, it was held that in order to become legally sanctioned by law and binding on the people a custom must be continuous in practice, it should not be vague and ambiguous and should not oppose the well-established public policy. A customary rule must be in the complete observation of society.

In the another case, Laxmi v. bhagwantbuva AIR 2013 SC 1204, the supreme court stated that a custom becomes legally enforceable when the majority of people make the continuous use of such practice.

8. **Peaceful Enjoyment:** The enjoyment of a custom must be a peaceable one. If that is not so, consent is presumed to be wanting in it. Therefore custom must be enjoyed peacefully or without any obstruction.