

# Custom

## **Introduction:**

(DIAGRAM FROM PRECEDENT)

- Source gives us an understanding of the objective behind the formation of everything.
- Sources of law are the origins of rules of human conduct that came into existence in different ways. The word source of law is used in various senses.
- Everyone must have thought that, what was the situation when there were no codified laws, and there must be a question that there would be anarchy or how society or people live or survived?
- In ancient times when there were no laws then they must be governed through customs.
- Custom is the oldest and important source of law.
- Customs is a very authentic (trustable) and binding (necessary) source of law, because of the historic value they have.
- 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. Custom is some kind of special rule which is followed from ancient time. Law based on custom is known as customary law.

## **Meaning:**

The word 'custom' literally, grammatically, or ordinarily means; tradition, practice or usage.

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.

Custom means uniformity of conduct of people which is followed by any part of community or whole community. Many people in one place use the same technique this is custom.

## **DEFINITIONS OF CUSTOM:**

### **According to Salmond:**

"Custom is the embodiment (type) of those principles which have commended (suggest) themselves to the national conscience (moral sense of right and wrong) as principles of justice and public utility".

### **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".

## **Origin of Custom:**

Custom is the oldest form of law making. In ancient society the lives of the people were regulated by custom.

## Theories of Transforming Custom into law:

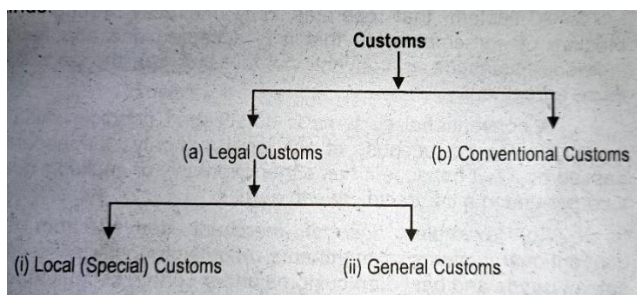
- **HISTORICAL THEORY:**

According to this theory, the growth of law doesn't depend upon the random(arbitrary) will of any individual. It grows due to the intelligence of people.

- **ANALYTICAL THEORY:**

Custom are not positive law until their existence is recognized by the decision of the court. A custom becomes law when it is enforced by the state.

### Kinds of Custom:



Custom has two kinds which are following

- a) Custom without sanction.
- b) Custom having sanction.

**Custom having sanction** can be further classified into two types:

- Legal Custom.
- Conventional Custom.

**Legal Custom** can be further classified into two types:

- General Custom.
- Local (special) Custom.

### **Custom Without Sanction:**

These are those customs which are not required. They are all observed due to presence of the public opinion. Austinian term for them is positive morality.

### **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

### **1. Legal Custom:**

The legal customs are those whose legal authority is absolute and unconditional.

Legal customs are of two types.

- Local custom.
- General custom.

#### **Local Custom:**

A local custom is that which prevails(exist) in some defined locality (area). A local custom to be valid should be sustain, reasonable, continuous, and permanent and should not be contrary (opposed) to any existing law.

#### **General Custom:**

A general custom is that which prevails(exist) 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 kingdom 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.

### **2. Conventional custom:**

A conventional custom is conditional and condition is that it will be binding on the parties only, it has been accepted and incorporated (united) by them in their agreement.

### **Essential of a Valid Custom:**

There are many essential elements of valid Custom which are following-

#### **Custom must be ancient:**

A custom cannot be created in a day. It should be a long lasting one. Unlike England, where custom has existed from an ancient time. In Pakistan Long usage or observance is sufficient. It may be considered as a valid custom if it's ancient or immemorial.

#### **Custom must be continuous:**

The custom must have been in use continuously, it should not be un-followed by any particular community for a time period. It must be a continuous process and it should not be vague or indefinite. Its existence must be proved by clear, unambiguous evidence.

**Reasonable:**

Custom must be within the limits of reason to be considered as legally binding. Therefore, if it opposes the principles of justice, equality and good conscience, the custom will be considered unfair or unreasonable. And it must be reasonable because no court will enforce an unreasonable custom. If it is not reasonable in its origin or practice, it cannot be considered a valid custom. **For**

**Example SATI** (sati custom was a widow-Burning custom common in Hindu community in Indian sub-continent) was an accepted custom once, but with the modern moral understanding, it becomes wrong, and it cannot be considered a custom today.

**Consistent with morality and public policy:**

Custom must not be inconsistent with morality, public order and with other customs in same region.

**Conformity with Statutory law:**

No custom however, old or reasonable can stand if it is conflict with a statue or legislation or any part of it. Custom can't infringe the fundamental rights of any person. If he does so, it will be declared null and void by the court.

**Custom must have been obligatory force:**

Custom must have been enjoyed as a right because without this it cannot build compulsory pressure to follow. Customs must be followed openly and enjoy peacefully without the need of force.

**Certainty**

It must be clear and unambiguous (definite) as to what the custom is and how it is practiced. It needs to be absolute and objective in theory and in action and it should not change with changing time.

**Must be peaceful in its practice**

Any custom advocating or calling for violence, implicitly or explicitly, cannot be considered a custom.

**Must not be opposed to Public Policy**

Whatever the public policy may be of the state the custom is operating in, has to be conformed to.

**Must be General or Universal**

According to Carter, "Custom is effectual (capable) only when it is universal or nearly so. In the absence of unity of opinion, custom becomes powerless, or rather does not exist."

**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 must be a valid. The various factors which make a custom valid and binding are ancient, reasonableness, continuity, peaceful enjoyment, certainty, conformity with public policy and statutes, and morality.