CHAPTER - 2

THE GENERAL CONCEPT OF CUSTOMARY LAW
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In order to understand the present work with more clarity, it is intended to briefly analyze the conceptual framework on the jurisprudence of customary law. It is greatly felt that giving a brief general account to that aspect would surely throw some light in the following chapters where critical examination of the Tangkhul (Naga) customary law is made. In this regard, an endeavour is being made to study and evaluate various opinions of experts, writings of jurists, Judges, legal luminaries and different court decisions concerning customs and customary laws. Hence, the universal understanding of customary laws; its meaning, origin, classification, essentials (importance), transformation theories, Customary International Law, jurisprudential test of Tangkhul customary laws and proving of a custom in courts are summarily dealt with in this chapter.

Conceptual Meaning Of Custom

Customary law as defined and opined by different scholars, jurists and authors are being discussed in brief.

According to Sir John Salmond\(^1\), “Custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.” He further says that such national conscience may well be accepted by the court as an authoritative guide, and of this conscience national custom is the external and visible sign. Custom is the rule of conduct which the governed observe spontaneously and not in pursuance of the law settled by a

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political superior says John Austin. According to him, Customary laws as being the rules of positive morality arise from the consent of the governed and not from the position or establishment of political superiors. But considered as moral rules turned into positive laws, customary laws are established by the state... established by the state directly when the customs are promulgated in its statutes, circuitously when the customs are adopted by its tribunals. Carleton Kemp Allen also defines custom as a legal and social phenomenon that grows up by forces inherent in society, forces partly of reasons and necessity and partly of suggestion and imitation. According to Prof. T.E Holland, Custom 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 others follow in the same tract which they are likely to do after it has once been trodden - a path is made. J.C. Karter says that the simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances. According to G.W. Keeton, Customary law may be defined as those rules of human action, establishment by usages and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as sources of law, because they are generally followed by the political society as a whole, or by some part of it. In the Tanistry case, custom was described in these words: it is jus non scriptum and made by the people in respect of the place where the custom

7. Ibid.
8. Tanistry case, 30 F.R, 516.
obtains. For where the people find any act agreeable to their nature and disposition, they used and practised it from time to time, it is by frequent iteration and multiplication of the act that the custom is made and being used from time to time which memory runneth not to the contrary obtains the force of law. Meaning of custom does not confine to singular definition. Imitation also plays an important role in the growth of a custom. Such imitation may very often be guided purely by religion or superstitious adherence to a course of conduct. In early political societies the king or the head of the society did not make laws but administered justice according to the popular notions of right and wrong, whichever were enshrined in the course of conduct pursued by people in general. What was accepted by the generality of the people and embodied in their customs was deemed to be right and which was disapproved by them or not embodied in their customs was deemed to be wrong.

The sociological view, so far the custom is concerned is different. Ehrlich, one of the exponents of sociological school of jurisprudence gives a step ahead to evaluate customs with greater emphasis than statute. He defines custom as the living law of the people based on social behaviour rather than the norms of the state. Norms observed by the people whether in matter of religious habits, family life or commercial relations are law, even if they are never recognised or formulated by the norm of the state. He further says, at present as well as at any other time the centre of gravity of legal development lies not in legislation, nor in juristic science nor in judicial decision but in society itself. According to Ehrlich, the main defect of historical school was that it did not draw a distinct line between

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9 Friedman, W., Law in the Changing Society, Universal Book House, Delhi, p 20.
10 Ehrlich, E., Fundamental Principles of Sociology, p. 488.
legal rules applied by the courts and legal arrangement existing in society. Former one is artificial, a product of human reason and logic, on the other hand later one is spontaneous and natural. The rule of law stands out from the rest in that these are felt and regarded as the obligation of one person and the rightful claims of another. They are sanctioned not by a definite social machinery of binding force. The ceremonial manners in which most transactions are carried out which entails public control and criticism adds more to their binding force.

The anthropological understanding of custom also refers to the totality of socially acquired behaviour patterns which are supported by tradition and generally exhibited by members of society. The recent expressions such as culture and tradition are the indications of this sense. But one area of anthropology in which the expression custom still has currency is the comparative analysis of legal and political system. Custom is supported only by psychological constraints which operate when the individual violates the custom and by the social disapproval which deviation from custom may precipitate. In contrast, laws have the additional coercive support of specific individual or groups who have an institutionally vested charge to enforce conformity.11 In modern anthropological jurisprudence it is universally assumed that all customs are laws to the savage and that he has no law but his customs. Primitive men obey a certain class of custom for purely social reasons. Religion, social sanctions, supernatural penalties, group responsibilities and solidarity, taboo and magic are the main elements of jurisprudence of the savage society.

Hindu jurisprudence also acknowledges and accepted custom as a just

foundation of many laws in every system of jurisprudence. During the satra period, the influence of custom upon law was recognized by various sutrakars. Guatama, the most ancient of the sutrakars, stated - the custom of countries, caste and families which are not opposed to the sacred records have also authority. Section 7 of the Hindu Code also defines custom as an established practice at variance with the general law. This definition was made on the basis of the decision of the Privy Council in Hurpurshad case. Privy Council also pointed out that custom must be ancient, certain and reasonable and being in the derogation of general rules of law, must be strictly constructed. According to Mayne, a belief in the propriety or the imperative nature of a particular course of conduct produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative or proper to do so. When from either cause or from both causes, a uniform and persistent usage has moulded the life and regulated the dealing of a particular class or community, it becomes a custom.

Origin of Custom

It is said, custom is virtually as old as human society. It is the oldest form of law making. There cannot be any doubt to say that customary laws existed amongst the people and the society long before nations or states came into being. In primitive times, there was little organised sanction behind these customs as it is in a modern state. It was, therefore, the necessity and the force of public opinion which ensured their compliance. There are different and divergent views as regard to the origin of customs.

According to Savigny, the great exponent of the German Historical School, custom is originated in *Vöksgeist* which means the genius of the people or the race concerned. What the people thought to be good, righteous, just and beneficial, they observed; their practice became custom\(^\text{16}\). According to the propounder of this school, customs is law *per se*. A custom carries its justification in itself provided it assumes the form of *volksgeist*, as aforesaid. He further stated that 'law was found, not made. Only when popular customs in the past articulated by lawyers, had fully evolved, could and should the legislatures take action.\(^\text{17}\). Historical jurists, thus, say that custom originated from the common consciousness of the people. However, Savigny's view that custom springs from an inner sense of right cannot be substantiated. As C.K Allen remarks; it is often asked whether conviction generates practice or practice-conviction. If emphasis is given too much on the first alternative, this suggests that the community logically faces its problems and devises self-consciously the best rules. This is a false picture- the growth of much custom is not the result of conscious thought but of tentative practice. When a problem arises strife between two members of the community- then an answer must be found: but tact, a sense of the merit, and an appreciation of the strength of each faction play a greater part than any desire to find a rule that is logically justifiable, but once a rule is adopted, practice generates conviction. To primitive man as to the child, what has been done is the thing that ought now to be done.\(^\text{18}\)

\(\text{(Sir)}\) Henry S. Maine, a historical exponent assumed that in the beginning the judgements of the Kings under divine inspiration were the sole basis of customs.

This view shows a mark of departure from that of Von Savigny's historical theory.

\(^{17}\) Friedman, W. op.cit, p.19.
\(^{18}\) Allen, C.K. op.cit, p.83.
According to Maine, the king awarded judgement inspired by the *themis* as a divine agent, when a king decided a dispute by a sentence, the judgment was assumed to be the result of the divine inspiration from *themis* and a breach of such judgment was punished. Such judgment when came to use took the shape of customs gradually. Such judgements are naturally followed by the mass as if the king imposed it. Because people will not impose liability upon themselves by their own will until they are compelled by some authorities. The earliest notions with the conception of law or rule of life are contained in the Homeric words as “*Themis*” and “*Themistes*”. *Themis* appears in the later Greek *pantheon* as the goddess of justice. On the other hand in the *Iliad* it is described as assesor of Zeus. Accordingly, customs developed on those divine judgments. Ihering supports the same view. He says that people will not impose liability upon themselves (which the customs sometimes do) by their own will until they are compelled by courts. Later on these judgments became customs. J.C. Gray too says that custom often arises from judicial decisions. However, customs as a conception posterior to that of *themistes* or judgments as assumed by Maine and others had lately been falsified by anthropological researchers. As Holland rightly puts, a habitual course of action once formed gathers strength and sanctity every year. It is a course of action which every one is accustomed to see it followed: it is generally believed to be salutary and any deviation from it is felt to be abnormal and immoral. It has never been enjoined by the organised authority of the state, but it has been unquestioningly obeyed by the individuals of which the state is composed. There can, in fact, be no doubt that customary rules existed among peoples long before nations or states had come into being.
generally observed course of conduct which is the chief characteristic of customs originated, according to Holland, generally in the conscious choice of the more convenient of the two acts, though sometimes doubtless in the accidental adoption of one of the two different alternatives; the choice in either case having been deliberately or accidentally repeated till it ripened into habit.

In the words of P. Vinogradoff, the slightest actual investigation of primitive communities proves that custom is anterior to kings and courts. According to Paton, custom is co-eval with the very birth of the community. His views on the society is mostly homogenous. When the society tends to become complex, the custom also becomes less effective and loses its force. The test of custom is a continued observance and any custom ex hypothesi cannot be suddenly created to meet a new problem. When any problem arose, some solution was found out. Custom is useful for situation that have already occurred. It cannot be put into operation so far the unforeseen and future problems are concerned. He further says, 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. This meant that custom originated in the actual practices of the people as also in what was imposed upon them by the rulers; and the judges working on the (raw) materials of customs fashioned them in the form of laws through the judicial recognition of customs. Relating to the origin and development of custom, S. Roy also opined that it is impossible to ascertain the precise

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beginning or to discover the rudimentary growth of an ancient long established customs. It is of such high antiquity that neither human memory nor historical research can retrace it. Indeed on its antiquity and immemorial practicing depends the goodness of custom. But though we are unable to trace origin of a custom which is enshrouded in the mist of ages, yet we can ascertain the process by which a certain rule of conduct is generally established into a custom.

Classification of Custom

Custom in its wider sense may be divided into two classes; custom having sanction and custom without sanction. Custom without sanction are those customs which are non-obligatory. They are observed due to constant pressure of the public opinion. Austin termed them as 'social custom' or rule of positive morality. Custom having sanction are on the other hand those customs which are enforced by the state and the society. Custom having sanction may be divided into two classes; legal custom and conventional custom. The researcher is more concerned to this type of customs in the present work rather than to mere social customs.

Legal Custom

According to Salmond, a legal custom is one whose legal authority is absolute, that is, one which in itself and proprio Vigore possesses the force of law. It is that custom which is operative per se as binding rule of law, independently of any agreement on the part of those subject to it. Legal custom may further be divided as general customs and local customs. General custom is the custom prevailing throughout the entire realm and not limited to any locality. In other

words, it prevails throughout the territory of the state and is observed by all the members of a society. There was a time when common law was considered to be the same as the general customs of the realm followed from ancient time. According to Salmond, general custom prevails throughout England and constitutes one of the sources of the common law of the land. He further says that general custom must be of immemorial antiquity and reasonable. It must have existed in England since 1189 A.D. Keeton also shares the above view of Salmond and says that a general custom must possess five characteristics if it is to be truly a source of law. Those characteristics are: it must be reasonable, it must have been followed and accepted as binding, it must not conflict with statute law and lastly it should not be in conflict with the common law. In order that a general custom law may be regarded as having force of law, it is necessary that the custom is an ancient and immemorial custom of the realm; a recent practice can only be accepted if embodied by agreement. This view was, however, subsequently altered in Goodwin’s case where it was held that even a recent practice can be accepted by the court, so as to meet the wants and requirements of trade in the varying circumstances of commerce. This decision was approved in Edelstein’s case in 1902 and in an earlier case in 1894.

A local custom is that custom which prevails only in some defined locality and constitutes a source of law for that place. It is a custom *Proprio Vigore*, existing irrespective of any agreement. According to Salmond, the term custom in its

31. *Crounch v. Credit Frontier of England*, 1873, L.R.8, QB. 374
33. *Edelstein v. Schuler*, 1902, 2KB 114
35. Fitzgerald, P.J op.cit, pp. 198-203.
narrowest sense means local custom exclusively. In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements laid down by law. The requirements are such as; it must be reasonable, it must be in conformity with statute law, it must be observed as of right and it must be of immemorial antiquity. Local custom must also have a continuity, certainty and capable of peaceable enjoyment so as to persist its validity.

The western concept of local customs which apply only to a defined locality such as a district or a town do not similarly fall in Indian situation or for that matter in the whole South East Asia. Local customs here imply to something more than a geographical locality. In India, local customs may be divided into two classes. Geographical (local) custom and personal (local) customs. These customs are law only for a particular locality, sect or family.36

Section 273 of the Hindu Code also defined tribal custom as a custom confined to a particular tribe, caste or community.37 Tribal custom, in certain cases, applies to geographical local custom where the population of a particular district or town or region is covered by the said tribal community at the most. However, in other cases it applies both to the geographical locality and the personal locality. The condition of the Tangkhuls lies in the latter case. In England where there are no tribe or caste, custom derives its sanctions not from the variable will of a section but from the conscious fixed will of the whole community. Local custom exists also in England but its sanction is the same and it is imposed on the whole community and on all to whom it can apply, who may come within the locality where it is in

36. Tripathi Bijai Narain Mani. op.cit, p. 162.
37. Gour Hari Singh. op.cit, p. 90.
force. Every custom, says Prof. Allen, is in some fundamental respect an exception from the ordinary law of the land. Secondly, every custom is limited in its application. It does not apply to the generality of citizens but only to a particular class of persons or to a particular place. Common law, on the other hand, applies to the subjects generally and is the ordinary law of the realm.

Coventional Custom

A conventional custom or usage is a practice established by having been followed for a considerable period of time, and arising out of contract between the parties; it does not arise out of its own force. A conventional custom is so called because it is rooted in agreement or well established habits. In the words of Salmond, a conventional custom is one whose authority is conditional on its acceptance and incorporation in agreement between the parties to be bound by it. In the language of English law the term custom is more commonly confined to legal custom which is also referred as custom simpliciter while conventional custom is distinguished as usage. A usage or conventional custom is, thus, an established practice which is binding not because of any legal authority independently possessed by it but because it has been expressly or impliedly incorporated in a contract between the parties concerned. It is, therefore, an agreement or habit that a conventional custom is based with. A conventional custom is, thus, an established rule concerning trade, contract, sale of goods etc. The rules of sale of goods, negotiable instrument, agency and merchantile laws were in the beginning customary in character which were later recognised and adopted by the courts before they were codified.

The development of conventional custom essentially involves three stages.
In the first stage, it exists as a fact and its existence has to be proved by cogent
evidence to enable the court to act upon it. The usage may still be in course of
growth and will require evidence for its support in each case. It is enough if it
appears to be so well known and acquised in, that it may be reasonably presumed
to have been an ingredient tacitly imported by the parties into their contract. The
second stage is reached when it is recognised by courts so that it's proof is dispensed
with. In this way, it receives the authority of precedents. The third stage of historical
development of conventional custom is its codification. After it has passed the first
two stages it is embodied in a statute. The law of bill of exchange and the law of
marine insurance furnish examples of their development through these three stages.
Conventional custom cannot operate as a source of law in derogation of the general
law of the land where the law is absolute admitting of no modification by express
agreement to the contrary. But where the law is not absolute and permits of being
modified by agreement, conventional law has the same force as agreement to that
effect.41

Conventional customs are of two types; General and local conventional
customs. Local conventional custom are limited either to a particular place, or to a
particular trade or transaction. Conventional general custom on the other hand is
extensively practised throughout the realm. For instance, usages on negotiable
instruments apply throughout India. Some of the conditions which are to be fulfilled
before a court treats the conventional custom as incorporated in a contract are; it
must be shown that custom is clearly established and fully known. Conventions

41. Tandon Mahesh Prasad op.cit, p. 247.
cannot alter the general law of the land. Therefore, they are valid only within the area of their observance. It must be reasonable and need not necessarily be confined to a particular area. It may relate to any trade or commercial dealing which may be national or even international.

According to Roscoe Pound\textsuperscript{42}, four types of so called customary law may be noted. They are, a customary course of popular actions, a customary course of administrative actions, a customary course of advice to litigants or to tribunals by those learned in the law, and a customary course of judicial action. The second type may be called administrative custom. It may grow into administrative law as has tended to happen in some American Administrative agencies. The third type might be called professional custom. It may develop into a traditional mode of dogmatic teaching and doctrinal writing, as at Rome. The fourth type might be called judicial custom. It is a form of law in the common law system and has been becoming one in civil law countries. The three last named may grow up entirely apart from and independent of the first. In fact, it often grows up with respect to matters as to which there is and can be no customary course of popular action. The court in one case held that judicial or administrative usage may grow up quite apart from popular usage. But they may, on the other hand, recognize and apply such usage where no applicable legal precept is at hand. Thus, there may be a progress from custom of popular action of law. The course of action followed by the public may be a source of law. It may be noted, however, that while popular usage seized upon by the courts as a rule of decision may get the form of law, it is no less true that repeated and well known decision may give rise to popular usages based on and in recognition thereof.\textsuperscript{43}

\textsuperscript{43} Tyson v Smith (1838), 9A & E. 406, 423; Mercer v Denne (1905) 2 ch 534; Astrabulla v Kiamatulla, AIR 1937, Cal. 245.
Essentials of a Valid Custom

For a custom to receive legal recognition, it is necessary that it should possess all the important essentials or requirements of a valid custom. In this contemporary society, it is observed that a spontaneous growth of custom has come to a slow end. In the modern context, the society or for that matter the court accorded recognition only to those customs which have the essentials of a valid custom. Custom does not derive its inherit validity from the authority of the court, and the sanction of the court is declaratory rather than constitutive. But in order to merit recognition the custom has to satisfy certain test, all of which tend in one direction, that is, proof of the actual existence and operation of the custom\(^4\).

It is equally very important to examine some of the essentials of a valid custom so as to operate as a source of law and law _per se._

(a) Custom must be ancient

The first requirement of custom is that it must be ancient. The word ancient denotes that custom must be of some antiquity. A custom to be valid must be immemorial. According to 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\(^5\). Salmond\(^6\) also opined that custom in order to have the force of law must have existed for so long a time that, in the language of the law, "the memory of man runneth not to the contrary." Recent and modern custom is of no account. In England, the idea of immemorial custom was derived by the law of England from the canon

\(^{44}\) Allen, C.K. op.cit, pp.129-130.
\(^{45}\) Blackstone, W., Commentaries on the Laws of England 1 p. 76.
\(^{46}\) Fitzgerald P.T. op cit, p.201.
law, and by the canon law from the civil law. The expression “time immemorial” in England basically meant “time so remote that no living man can remember it or give evidence concerning it”. Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist. Both in English and foreign law, however, the time of memory was extended by the allowance of tradition within defined limits. A witness might testify not only to that which he had himself seen, but to that which he had been told by other who spoke of their own knowledge. In the course of the development of English law, a singular change took place in the meaning of this expression. The limit of human memory ceased to be a question of fact and was determined by a curious rule of law which still remains in force. Time of legal memory became distinguished from time of human memory. English law has set an arbitrary but necessary limit to ‘legal memory’ fixing it at 1189 AD, the year of the accession of Richard-I. A custom cannot, therefore, be impugned by showing an origin prior to 1189 AD. Invalidity of custom for want of antiquity can be established by proving its non-existence at anytime between the present day and the twelve century (1189) in England.

When custom is considered as an evolutionary phenomenon, the first question is why it came to be accepted by courts as a law constitutive medium in the first place. According to Dias,⁴⁷ there are two answers; before the common law had filled out, the itinerant justices had to find the law somehow. In the absence of a code, local customs usually were the only available guides and the justices were glad to avail themselves of these. By doing this they also helped to win local confidence in

⁴⁷ Dias, RWM., Jurisprudence, Fifth edition, Aditya Books Private Ltd. New Delhi, First Indian Reprint, 1994, p. 188.
the royal system of justice. For local people had built up expectations based on local practices and to have ignored these would have caused injustice. The only question with which the judges of old were concerned was whether a practice exerted sufficient local pressure to be acceptable to them. At that date, necessary conditions which had to be fulfilled were obvious. The custom had to possess a sufficient measures of antiquity. Sufficient means that it must have existed since before 1189AD but this was by no means the original interpretation. For instance, Prof. Plucknett quotes Azo (d, 1230) who said “A custom can be called long if it was introduced within ten or twenty years, very long if it dates from thirty years, and ancient if it dates from forty year.”

The way this requirement works now is that the onus of proving antiquity is upon the person who sets up the custom, but his task is helped by a presumption of existence since before 1189 on proof of the existence of the custom for a substantial period. The burden of rebutting it, then, lies on the other party.

However, this law of customary recognition in England is different from the Indian law and others in South East Asia including that of the Tangkhuls. In India too, a custom to be valid should be ancient. Yet, the technical rule of English law as to legal memory, has no application to India. Meaning, the Indian precept of time immemorial of custom need not be put in line with that of the English. The courts have time and again expressed an opinion that if a custom is established to be 100 years old or more, it is of sufficient antiquity to be called ancient. Derrett thinks that if it is 40 years old it is enough. Section 3(a) of the Hindu Marriage Act, 1955 lays down that custom to be valid must have been observed for a long time. Justice

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49. Simpson v. Wells (1872) LR 7 QB 214.
Jayakar, delivering the judgement of the Judicial Committee of the Privy Council in *Mussammat Subhani v. Nawab*,\(^{50}\) observed thus: It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient but it is not the essence of the rule that its antiquity must 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 will depend upon the circumstances of each case. What antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has by common consent, been submitted to as the established governing rule of the particular district. In a later case\(^{51}\), Sir George Raukin said: 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' rights in the place of the general law. In *Madhavrao* case\(^{52}\) Justice Kania held that the meaning of the term 'ancient' in English law is not applicable to custom in this country. The necessary proof in each case will depend on the nature of the custom alleged, and the want of instances or paucity thereof does not prevent the court from upholding the custom if there is a general consensus opinion of person who are likely to know of its existence, particularly when the evidence is all in one direction. Justice Gajendragadkar said, [If] in a particular case the party pleading a custom has produced general evidence of a respectable and reliable character showing that the particular custom prevails in the community to which the witnesses belong and that the observance of the custom is well known for a fairly long period of time, that evidence can be accepted in support of the custom.

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50. ILR (1941) Lah. 154 (P.C.).
52. 1946, 48 Bom. L.R. 196.
pleaded. There is no uniform rule in India regarding the time factor for which a custom must have been in operation before it is legally recognised. All that the law requires is that the custom must have been in existence from time immemorial, that is, for a time as far back as one can remember, which again in England it has been held to be as short as 20 years\(^53\) a period which the Privy Council regarded as sufficient even for this country (India) upon which the Jury would, and indeed, should presume its immemorial existence, provided there is no evidence to the contrary. The period of 20 years in England was fixed by the statute known as Lord Tenterden’s Act.

The reason for not enforcing a modern custom is that otherwise so many of the novel customs would become law. Of what use then would the value of such custom be? The law adopts sufficient methods of protection against the development of vexatious acceptance of modern customs. What otherwise the value of Judge made laws have been? To keep the force and power of precedent the law sees that modern or unreasonable custom should not be accepted.\(^54\) In the words of Allen, a mere habit, practice or fashion which has for a number of years nobody supposes to be *ipso facto* an obligatory custom, antiquity is the only reliable proof of resistance to the changing conditions of different ages.\(^55\)

(b) **A Custom must be reasonable**

Reasonableness is one essential of a valid custom. Any party challenging a custom must convincingly satisfy the court that the custom is unreasonable. Nevertheless, it cannot be said that custom is always founded on reasons. No amount

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54. *Simpson v Wells* 1872 L.R..7 QB. 214
55. Allen, CK. op. cit, p. 128.
of reason can make a custom. What is reasonable or unreasonable is a matter of social values. It may differ from time to time, place to place and society to society. Therefore, whether or not a custom is reasonable is also determined by the contemporary values of every society, although there are certain rules or practices which are considered unreasonable in all times and in all societies. The law courts would not enforce unreasonable customs, for law will not allow what is unreasonable or inequitable inspite of the fact that the people or a class of people in a locality have given their long acquiescence to a particular practice, the court may disallow that local custom if it finds that to allow it would do more harm than what might result by its disallowance. The appropriate time to decide the reasonableness of a custom is the time of its origin. Any custom that is opposed to the rule of natural justice, equity and good conscience should be regarded as unreasonable. A custom allowing sale of a religious office was held unreasonable and, therefore, unenforceable. Justice Parker observed in *Johnson v. Clark*\(^57\) that for a custom to be good it must be reasonable or at any rate, not unreasonable. The words ‘reasonable or unreasonable’ imply an appeal to some criteria higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with those rules or maxims. A custom should not then be repugnant to reason. This reason, however, as Sir Edward Coke Points out, is not to be understood of every unlearned man’s reason but of artificial and legal reason warranted by authority of law, *lex est summá ratio*.\(^58\) The reasonableness of a custom should be judged with reference to the general principles which are at the root of the legal system. Thus, a custom is contrary to reason if it is oposed to the principles of justice, equity and good conscience, as aforesaid. A custom can be refused

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57. (1908) I ch 303.
58. Co. Litt. 62 A
recognition only when it is opposed to public policy and is manifestly repugnant to right and reason. As Salmond points out, before a custom is denied legal efficacy, it must be found that the mischief resulting from its enforcement outweighs the detriment that would result from a nullification of the natural expectation that an established usage would have continuance in the future. In other words, the unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. Certain standards have been established on which the courts proceed with reasonableness of a custom. Definitely, reasonableness will not be judged with every change in social conditions. The time of its origin is the time to decide its reasonableness.

Prof. Allen says that 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 party who has proved the existence of a custom is not under further necessity of proving its reasonableness; it is for the party disputing the custom to satisfy the court of its unreasonableness. Custom must be useful and convenient to the society. It must be fair, just and without prejudice to any one under like circumstances.

It is well settled that the time to decide the reasonableness of a custom is the time of its origin. Now, it is said that if a custom has no rational basis, but has resulted from accident or indulgence and not from any right conferred in ancient times upon the party setting up the custom, there is then strong evidence that the custom is unreasonable and unenforceable. It is not clear, according to Allen, what

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60. Allen C.K. op.cit, p.140.
is meant by indulgence in this connection nor what is the relevance of conferring a right which arises by custom. As for accident, this cannot be considered a fatal objection to custom, for, as we have seen, it is impossible to find a specific and rational cause for every custom. Those, therefore, do not seem to be valid grounds for rejecting a custom as unreasonable. The fact is that in the great majority of cases in which an ancient custom has been held to be unreasonable in its origin, it will be found that the real reason for rejecting it is that it was originally, or is now (or both), contrary to a well established rule of law. In the famous Tanistry case,62 English Judges, accustomed to the rule of Primogeniture, had to consider the validity of the Irish Brehon law of succession, they were faced with the apparently barbarous rule that the property descended not to the eldest born but to the senior et dignissimus of the blood and surname of the last owner. There was no doubt of the existence of the custom, the origin and purport of which as Maine has shown in his “Early History of Institution, Lect. VII”, the English Judges did not fully understand. One of the chief reasons which they assigned for rejecting the custom as ‘encounter to the common wealth’ was that in practice it destined the property not to the senior et dignissimus but to the most potent - a moral argument against the triumph of might over right. But no modern reader can fail to detect in the case a deep seated prejudice against a custom which outraged feudal law by admitting a gap in the seisin, and by excluding daughters from the inheritance on the failure of male heir, indeed, as Maine observe, the Judges thoroughly knew that they were making a revolution, and they probably thought that they were substituting a civilized institution for a set of mischievous usages proper only for barbarians.

Among the older precedents, the case just cited is the most authoritative and is indeed, the source of the chief learning in English law on the subject of custom. In *Johnson v. Clark*, a married woman, in order to secure a debt due upon a promissory note, purported to convey by way of mortgage to the creditor of the promissory note certain property in which she had a life interest under her father's will. The conveyance was made with her husband's concurrence but without any separate examination of the wife. The wife sought to have the mortgage set aside on the ground that without separate examination it was void in law. Against her, it was contended that her estate was held in burgage tenure and that a local custom existed under which real property so held by a married woman could be disposed of by her with the consent of her husband without her separate examination and acknowledgement. Justice Parker held that such a custom was repugnant to a principle of the common law vital at the time when the mortgage was made (though since abolished). Dealing with the question of reasonableness, he said that looking at the matter apart from express authority, it is quite clear that for a custom to be good it must be reasonable or at any rate, not unreasonable. Littleton says of customs; whatsoever is not against reason may well be admitted and allowed, and on this as aforesaid Sir Edward Coke comments that this is not to be understood of every unlearned man's reason but of artificial and legal reason warranted by authority of law. If this be so, it appears to follow that a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent or at any rate not inconsistent with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system.
In a matter of reasonableness, the courts may reserve to themselves a right to discountenance or abrogate a pernicious custom. It is very rarely indeed that a court rejects a custom on the ground that it was unreasonable in its origin. In holding the origin to have been unreasonable, the court always doubts or denies the actual origin and continuance of the custom in fact. Further, the unreasonableness of a custom in modern circumstances will not affect its validity if the court is satisfied of a reasonable origin. A custom once reasonable and tolerable, if after it becomes grievous, and not answerable to the reason where upon it was grounded, yet it is to be taken away by Act of Parliament or any other appropriate statute. But where the court finds a custom in existence which, either by aberration or by a change in law since its origin, not merely differs from but directly conflicts with an essential legal principle (public policy), it has power in modern communities to put an end to the custom. In short, custom once indisputably proved is law, but the courts are empowered on sufficient reason to change the law which it embodies.

(c) Custom must be in conformity with statute law

A valid custom must not be in conflict with the statute law of the country. A statute can sometime abrogate a custom and not vice-versa. A custom must not be contrary to an Act of Parliament. In the words of Sir Edward Coke⁶³, no custom or prescription can take away the force of an Act of Parliament. William Blackstone stated that by no length of desuetude can a statute become obsolete and inoperative in law, and by no length of contrary usage can its provisions be modified in the smallest particular. The common law will yield to immemorial local custom, but the enacted law stands for ever. This means that custom must yield where it conflicts

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⁶³ Mahajan V.D (Dr), op.cit, pp. 271-272.
with statute. In England, this rule is observed as a positive principle of law.\textsuperscript{64}

On the other hand, under the Roman law and the various continental systems of law derived from the Roman law, customary law of a later date can override even a statutory enactment of a prior date, the maxim being; \textit{lex posterior derogat priori-a} later law derogates from an earlier one, and even overrides it. Justinian in his \textit{corpus juris} has mentioned several statutes which have fallen into disuse by a posterior contrary custom.\textsuperscript{65} If an enacted law comes first, it can be repealed or modified by a later custom and vice versa. Savigny has pointed out that customs and statutes are put on the same level with respect to their legal efficacy 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.\textsuperscript{66} Windscheid (Scottish) opines, 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. And this is true, not merely of rules of customary law \textit{inter se}, but also of the relations of customary to statute law.\textsuperscript{67}

(d) Custom must be in continuity

A custom to be valid should have been in existence from time immemorial. The continuous existence of a custom must have been recognised by the community without any interruption or break for such a period as may be considered by the court as being reasonably long to be recognised as a custom. If a custom has not been followed continously and uninterruptedly for a long time, the presumption is

\textsuperscript{64} Blackstone. W op.cit. p.76.
\textsuperscript{65} Lex Posterior Derogat Priori., Justinian Digest D. 1.3.32.
\textsuperscript{66} Singh, Avtar. op.cit, p. 189.
\textsuperscript{67} Windscheid, Pandaktenrecht, Vol I, sect. 18.
that it never existed at all. Unless there is a continuity, there is no custom.\textsuperscript{68}

Suppose, it is established that custom existed since one hundred years back. It is shown that there has never been single instance of following or practising that custom. The inevitable inference under such circumstances is that people had abandoned it or that it had become obsolete. The onus of proving its discontinuance is on that who alleges its discontinuance or abandonment.

(e) Certainty

A custom must be certain and the courts must be satisfied by clear and unambiguous proof that the custom exists as a matter of fact or legal presumption of fact. Willes, the Chief Justice observed in \textit{Broadbent v. Vilkes}\textsuperscript{69} 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 it is? And to this effect Jessel M.R. Observes; When we are told that custom must be certain that relates to the evidence of a custom. There is no such thing as law which is uncertain - the notion of law means a certain rule of some kind.\textsuperscript{70} As aforesaid, custom should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the court can be assured of their existence and that they posses the conditions of antiquity and certainty on which alone their legal title to recognition depend. Custom gradually changes with the passages of time. A new custom cannot be created by the mere assertion of the various tribes at a subsequent settlement.

\textsuperscript{68} Allen C.K. op.cit, p. 128.
\textsuperscript{69} (1742) Willes, 360.
\textsuperscript{70} \textit{Hamnerton v. Honey} (1876), 24 W.R. 603.
A custom in order to be valid and enforceable must be proved to be uniform and certain in its nature and as to the people or locality whom it is affected. Mere allegation as to the existence of custom does not suffice to ascertain its existence. It is necessary to prove with reasonable amount of certainty that the custom as alleged exists, and further that it is applicable to the parties on the matter at issue.

(f) Observance as of right

The third requisite of the operation of a valid custom is that it must have been observed as of right. Mere practice of a voluntary nature would not make a custom valid. It must have an obligatory force. It must have been followed openly without the necessity for recourse to force and without the permission of those adversely affected by the custom being regarded as necessary. These requisites are expressed in the form of the rule that the user must be 'necvinec clam nec precario' - not by force, nor by stealth, nor at will (Salmond). In other words, custom must not have been the result of coercion; it must have been the result of open and free act. It must have ultimately become a rule of conduct. Blackstone says, a custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good but a custom that everyman is to contribute thereto at his own pleasure is idle and absurd and indeed no custom at all.71 According to Salmond,72 there must be opio necessitatis, that is, the conviction on the part of those who use a custom that it is obligatory and not merely optional.

(g) Consistency

Custom must be consistent with each other; a custom cannot be set up in

71. Mahajan V. D. (Dr). op.cit, p. 271.
72. Tandon, Mahesh Prasad op.cit, p. 248.
opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another’s garden, the other cannot claim a right by custom to stop up or obstruct those windows. For these contradictory customs cannot both be good nor both stand together. He ought rather to deny the existence of the former custom.

(h) Peaceable enjoyment

The custom must have been enjoyed peaceably. If a custom is in dispute for a long time in a law court, or otherwise, it negatives the presumption that it originated by consent as most of the customs naturally might have originated.

(i) Custom must not be immoral

A custom, to be valid, must not be immoral. There is, however, no fixed test to judge the morality of a custom. Whether or not a custom is immoral is to be judged by the sense of the whole community. In *Mathura Naiki v. Eru Naikin*, the court held the custom to be immoral since the profession of dancing girls was immoral and adoption by them of girls was designed to perpetuate this profession. A 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 is also immoral.

Under Section 23 of the Indian contract Act, 1872, it is provided that if the consideration or object of an agreement is regarded by the court as immoral or

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73. Kane P.V. (Dr.), Hindu Customs and Modern Law, (1st ediction), 1950, p 52
74. (1880) ILR 4 Bom 545
75. Keshav Hargovan v. Baigundi (1915) ILR 39, Bom 538
opposed to public policy, then the consideration or object of the agreement would be unlawful and the agreement would be void.

(j) Custom must not be contrary to justice, equity or good conscience or opposed to public policy: Opinions differ as to how far public policy should guide in legal decisions based on customs. The doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.\(^76\)

A custom which would enable a woman to marry again during the life time of her first 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.\(^77\)

Transformation theories of Custom into Customary Law

It would be of great help to ponder the varied definitions of law given by different eminent jurist/scholars before the transformation theory of custom into (customary) law is being dealt with. This will certainly give a clear understanding about law which has relative importance in the following analysis of the theories of the two schools as regard to the legal efficacy of custom. For this purpose some representative definitions of concrete sense under five broad classes are quoted below\(^78\):

i. Idealistic Definition

(a) Salmond defines law as the body of principles recognized and applied

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\(^76\) Richardson v. Mallish, 2 Bingham, 229, p. 252, Quoted by Lord Bramwell in (1892) AC 25 at p. 45.

\(^77\) Budanso v. Faturr, AIR 1914. Mad. 192.

by the state in the administration of justice. In other words, the law consists of rules recognised and acted on by the court of justice.

(b) According to Gray, the law of the state or of any organised body of men is composed of the rules which the court, that is, the judicial organ of the body lays down for the determination of legal rights and duties.

ii. Positivistic Definition

According to Austin, a law, in the strict sense, is a general command of the sovereign individual or sovereign body issued to those in subjectivity and enforced by the physical power of the state.

iii. Sociological Definition

Duguit defines law as essentially and exclusively as social fact. It is in no sense a body of rules laying down rights. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. Therefore, the most important fact of social life is the interdependence of man (which Duguit calls as social solidarity). The aim of the social institution is to safeguard and further it. Only those rules can be called law which further this end. The basis of the validity of law is the popular acceptance and not the will of sovereign. The sovereign is not above the law but is bound by it. The law should be based on social realities. Ihering defines law as the form of the guarantee of the conditions of life of society, assured by state's power of constrain.
Ehrlich, another great sociological Jurist includes in his definition all the norms which govern social life within a given society. Roscoe Pound defines law as 'a social institution to satisfy social wants'. This approach is very valuable. It is directed towards new fields of study and lays down a constructive scheme for the study of law in the context of social problem. According to Pound, law is the body of principles recognised or enforced by public and regular tribunals in the administration of justice. According to Dias, it is the aggregate of rules set by men as politically superior or sovereign to men as political subject. In other words, law is a command which obliges a person(s) to a course of conduct or imposes a duty and is backed by a sanction. Thus, the command duty and sanction are the three elements of law and a law having such characteristics is called positive law. This is also known as law properly so called as it comes directly from the sovereign. The other law improperly so called and which does not come directly from the sovereign are, according to him, positive morality. John Erskine says, law is the command of a sovereign containing a common rule of life for his subjects and obliging them to obedience. Holland defines law as a general rule of external human action, taking cognizance only of external acts enforced by a determinate authority, which authority is human, and among human authority is that which is paramount in a political society.

Historical Definition

Savigny, the father of historical school says that law is not the product of direct legislation but is due to the silent growth of custom or the outcome of unformulated public or a professional opinion. He says that law is not a body of rules set by a determinate authority but rules consisting partly of social habit and
partly of experience. Law consists largely of 'ought' (normative) propositions prescribing how people ought to behave. The 'oughts' of laws are variously dictated by social, moral, economic, political and other purposes.

Realist Definition

Realist movement, which is considered to be a part of the sociological approach defines law in terms of judicial process. Justice Holmes, the realist considered the law to be an art of the judicial process. He said that; the prophesies of what the courts will do, in fact, and nothing more pretentions, are what I mean by law. According to Realists, the formal law is simply a guess as to what the courts would decide and the law is that what the court actually decides. They consider law as a social institution.

It is quite clear from the above definitions that different jurists of different schools have defined the term law differently. And it is not correct to say that any particular definition is absolutely correct and is applicable to all societies. The purpose and functions of law has been different in different times, that is why one finds variation in definitions. The term law is a dynamic one which changes with changed conditions. Hence, it is not possible to give an exact definition of the term law.

Whether or not a custom is already law and can be regarded as such independently of judicial recognition is a controversial issue. If it is not already a law, when does it become law? There are mainly two theories as regard to this question.
Analytical Theory

The basic argument of this theory is that custom are not law until so declared by the sovereign. Austin, one of the main priests of Analytical School, defined law as a command of sovereign. According to him laws properly so called also known as positive law is that which comes directly from the sovereign or from an agency which has been permitted by the sovereign to lay down a rule of law: Austin's vision was, therefore, conditional by the conceptual framework. Consequently, he excludes all unwritten laws including customs from the category of law.79

According to Austin, custom has only a pursuasive efficacy and is not law until pronounced upon by a court as applied in a particular case. To Austin, custom is not a positive law as it is not a command of sovereign, it is only a source of law and not law itself. Custom, accordingly cannot be law of itself but only by virtue of sovereign command, which might be expressed, as in the form of a statute, or tacit which can be seen when a judicial decision recognising a custom is carried out.80 He says, custom at its origin is a rule of conduct which the governed observed spontaneously and not in pursuance of a law set by a political superior. Custom is transmitted into positive law when it is adopted as such by the courts of justice and by state recognition. But before it is adopted by the courts and clothed with legal sanction, it is merely a rule of positive morality or a rule generally observed by the citizens of subjects, but deriving the force only from the general disapprobation falling on those who transgress it. This view of Austin is based on two propositions. Firstly, it is not every custom that is binding but only those which are valid-the validity being determined by judicial recognition. A recognised custom becomes

the customary law (legal custom). The other unrecognised customs are social custom or rule of positive morality. A sovereign or a legislature very often abolishes customs and is, therefore, superior to them. A custom is law only because a sovereign allows it to be so. Therefore, the answer to the question when does custom become law, according to Austin, would be when it is declared so by the sovereign.

Gray says; customs are not law until approved by Judges. Gray puts the courts in the centre of the legal system. According to him, in deciding cases, the Judges are guided mostly by statutes or precedents. There are only very few branches of law where customs have some influence. The adjective law is independent of customs. The customs often arise from judicial decisions. Thus, according to Gray, customs are not law until they commend themselves to the reason of the Judge and he recognises and embodies them in judgement.81

According to Holland, customs are not laws when they arise but that they are largely adopted into law by state recognition. He holds that the authority of customs arises not because it has been recognised by the courts but because it will be so recognised in accordance with predetermined rules of law, if the occasion arises custom is thus a legal material source of law.82 Holland amply remarks that the rule that a court shall give binding force to certain kinds of custom is a well established rule of law. He says, the state through its delegates, the Judges, undoubtedly grants recognition as law to such customs as to come up to a certain standard of general reception and usefulness. To these, the courts give operation not merely prospectively from the date of such recognition but also retrospectively; so far

82. Myneni, S.R. (Dr), op cit, p. 134.
implying that the custom was law before it received the stamp of judicial authentication.\textsuperscript{83} It varies with Austin's notion in this regard though they belonged to the same school. He continued to say that, binding authority has thus been conceded to custom provided it fulfils certain requirements, the nature of which has also long since been settled and provided it is not superseded by law of a higher authority.\textsuperscript{84} He further says that when 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 does not \textit{proprio motu} then for the first time make that custom a law; it merely decides as a fact, that there exist a legal custom about which others might upto that moment have been some question, as there might be about the interpretation of an Act of Parliament. It then applies the custom to the circumstances just as it might have applied an Act of Parliament to them.\textsuperscript{85}

In short, Holland views that customary law is not because it has been recognised by the courts or received the stamp of judicial authentication but because the Judges have invoked as the ratio of their decisions not only equity but also custom established among and by the people at large, as presumably embodying the rules which the people have found suitable to the circumstances of their lives.\textsuperscript{86} Holland who has practically adopted Austin's definition of law differs from him as regards to his opinion that a custom becomes a law only when it receives judicial recognition. According to Holland, custom was law before it received judicial recognition and both customs and statutes are principles or rules which govern and regulate the life and conduct of human societies. The former have their foundation

\textsuperscript{83} Holland, T.E. op.cit, p.60
\textsuperscript{84} Ibid, p.61
\textsuperscript{85} Ibid p. 62
\textsuperscript{86} Holland, T.E. op.cit, p 61.
in the collective will or common consent of the people just as much as the latter have on the will or pleasure of a sovereign or a state. The objects and functions of both are alike, though the procedure is different. Custom and usages which have all the force of law, may sometimes even have greater force than statutory laws.87

Prof. Allen criticised Austin's view when he says; the fallacy of the Austinian doctrine is in supposing that custom is not law until it has been pronounced upon by a court. The exact reverse is the truth. Custom is the first and most essential law.88 He further observes ancient customs are still an integral part of modern law and the courts frequently have to deal with them. Do they deal with them as law or as something which, existing de facto, may be turned into law by ex cathedra sanction? He conceive the former proposition to state the true principle.89 Most of the customs are recognised not because the courts or legislature gives them sanctity of law but because they are treated as such law by the community as a whole and people feel themselves bound by them. He further says custom grows by conduct and it is, therefore, a mistake to measure its validity solely by the elements of express sanction accorded by courts of law or by other determinate authority. Vinogradoff also criticised by saying that; it is not conflicts that initiate rules of legal observance but the practices of everyday directed by the give and take considerations of reasonable intercourse and social co-operation. Neither succession nor property, nor possession nor contract started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager, property began with occupation; possession is reducible to de facto detentions; origins of contract go back to the customs of barter.90

88. Allen C.K., op.cit, p.84
89. Ibid, p.87.
90. Mahajan V.D (Dr). op.cit, p.262
Historical Theory

The historical school holds just a contrary view to the earlier view of the analytical school. This theory emphasises that law has its existence because of the common consciousness of the people and customary observance is not the cause of law but the evidence of its existence. In their view, custom is the primary source from which all law derives its legal efficacy and authority, it is to be regarded as the formal source of law. They rejected the view of the other school which necessitates the declaration or recognition of a custom by the state in order to transform it into a binding customary law. James Carter writes what has governed the conduct of men from the beginning of time will continue to govern it to the end of time. “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.”

According to Savigny, the founder of this school, custom per se is law. It does not require the state recognition to become law. He says that law has its existence in the general will; customary observance is not the cause of law but the evidence of its existence. A custom carries its justification in itself. The very existence of custom indicates that it must have arisen due to the strong need and by the approval of the people. According to Savigny; law like language stands in organic connection with nature or character of the people and evolves with the people. According to him, custom is the sole source of law. He says, the foundation of the law has its existence, its reality in the common consciousness of the people.

We become acquainted with it as it manifests itself in external acts, as it appears in

91. Carter James., Law, its origin, growth and function (1907) p. 120.
92. Aggarwal, Nomita. op cit, p. 95.
94. Tripathi Bijai Narain, Mani. op.cit, pp.165-166.
95. Mahajan V.D. op.cit, p.259.
practice, manners and customs. Custom is the sign or badge of positive law and not its foundation or a ground of origin. According to him, 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. The view of Savigny is that custom is the type of all law and law is valid and just only in so far as it makes known and objectifies in concrete forms the true legal instinct of the community which it purports to govern. Puchta, the worthy desciple of Savigny even carried the principle further by saying, custom is not only self-sufficient and independent of legislative authority but is a condition precedent of all sound legislation. Thus, according to the view of historical school, custom is law independent of any declaration or recognition by the state. The historical theory has been criticised by many writers. According to Paton, the growth of most of the customs is not the result of any conscious thought but of tentative practice. Custom is coeval with the very birth of the community. According to Gray not only does custom play a small part at the present day as a source of non-contractual law, but it is doubtful if it ever did, doubtful whether at all stages of legal history, rules laid down by Judges have not generated custom, rather than customs generated legal rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions and that the latter have served to give expression to the former but of this there appears to be little proof. It seems at least as probable that custom arose from legal decision. According to Jethrow Brown; that custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, Judges frequently give rise to it. According to Allen, all

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96. Singh, Avtar. op.cit, p. 192.
97. Ibid.
98 Mahajan V.D (Dr). op.cit, p 259
100. Mahajan V,D (Dr), op cit, p 260.
101. Ibid.
customs cannot be attributed to the common consciousness of the people. In many cases, customs have arisen on account of the convenience or interest of a ruling class which imposes its will on the majority society.\textsuperscript{102} According to Henry Maine, custom is a conception posterior to that of \textit{Themistes} or Judgements. \textit{Themistes} were the awards which were dictated to the king by the Greek goddess of justice. It is later on that customary law came into existence.\textsuperscript{103} Vinogradoff and Sir Frederick Pollock do not agree with the principle that social custom grew up by gradual process in the household and daily relations of the clans and the Judge 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. The latter, after referring to a good deal of customary law in Greek society refers to a contradiction in the statement of Maine with regard to the origin of royal \textit{Themistes} in early law and custom wherein he says that they are doubtlessly drawn from pre-existing custom or usage.\textsuperscript{104}

Shortcomings of the two Approaches

The view of analytical school that customs are not laws until recognised by the sovereign certainly contains some truth but not the whole truth. Because, the bulk of custom is non-litigious and hence it does not come before the court but the society regulates its conduct according to its needs. In most cases customs are recognised not with the assumption that this recognition gives them the sanctity of law but with the assumption that they are law, and they have been treated so. The other reason is that though the court plays a creative role in rationalizing and shaping them, it draws its raw materials from customs. As such, this view is not fully correct.

\textsuperscript{102} Allen C.K. op.cit, p. 148
\textsuperscript{103} Maine Henry Summer, op.cit, pp.5-6
\textsuperscript{104} Vinogradoff., collected papers, ii, 420.
Similarly, the view of the historical school is also not balanced. Customs have not always arisen out of convenience or the need of the people. Sometimes they have been imposed upon the people by the ruling class. Secondly, although there are some rules of law which are, undoubtedly, based on the common conviction of the people, the majority of the rules are so complicated and technical that the common conviction might never have thought of it. Thirdly, the historical jurists did not pay proper heed to the fact that the state has the power of abrogating a custom. Lastly, they underestimated the creative roles of the Judges and of the legislators which are so imminent in modern times.

It may be noted that the correct position lies in a synthesis of the two views given above and adopting a socio-legal point of view. The customs lie in the foundation of all legal system. It came into existence with the existence of the society. The conduct embodied in customs is the corporated action. Sometimes we can trace some reasons, need or convenience behind sound customs but to say that every custom has always some reason behind it is to go far from the truth. To say that they are always of local origin or it arises out of the conviction of the people is also incorrect. As it has been observed earlier, foreign customs, such as the custom of the ruling class and sometimes international customs such as commercial customs are adopted and observed. With the development of society, many other forces such as the jurists, codifiers, law givers and others come to exercise their influence on customs. Now, it is also found that most customs of developed nations are being rationalized and are incorporated and embodied in legal rules. In Roman law, the creative role of the Magistrates, in English law-that of equity Judges (great
law writers from Bracton to Blackstone) and in Hindu law that of the Smritikars. the commentators and Privy Council decisions have materially affected the form as well as the substance of customs.

Customary International Law

The topic, Customary International Law requires a separate research work. Nevertheless, it is important to reflect something in this area so as to precisely comprehend the composite meaning of customary law in a nut shell. Customary International Law, based on general and consistent practice of states accepted by them as legally binding. It is also said, customary law is the product of general consensus and not of the meeting of wills of individual states. Customary International Law has general application, because it binds all states with the exceptions of persistent objectors. General customary law admits derogation in the form of special customary rules that bind only a limited number of states. Special customary rules are formed, they apply to the relations of the groups of states bound by them inter se.

"Fenwick" defines Customary International Law as established usages which have come to be regarded as having an obligatory character.105 Schwarzenberger also defines Customary International Law as the rules followed by states in their actions when they admit a legal obligation to act in such a manner.106 Openheim opines it as a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right.107 Manley O. Hudson in a study of Article 24

106. Ibid.
107. Ibid.
of the statute of International Law Commission writes that the emergence of principle or rule of Customary International Law would seem to require the presence of the following elements.\textsuperscript{108}

a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
b) Continuation or repetition of the practice over a considerable period of time;
c) Conception that the practice is required by or consistent with, prevailing international law;
d) General acquiescence in the practice by other state.

Article 38, 1(b) of the statute of International Court of Justice (ICJ) requires for the formation of customary law not only as a "general practice but also that it must be accepted as law." The structuralisation and a certain deliberation of effort in the formative stage of customary law are additional major features of the United Nations Organisation (UNO) framework. The analysis permits the conclusion that while parliamentary diplomacy may well have had its effects within the single requirements of customary law, the source of customary law as a whole has accommodated these developments without altering its structure in principle.\textsuperscript{109}

The interference that customary law is constantly modern in that it corresponds with the interest of states lead us to the further conclusion that no customary rule arises against the will of a state. If it is correct that consensus lies at the heart of customary law it would indeed be a contradiction in\textit{ adjecto} to speak of superimposed customary law. All states participate as equals in the formative process.

of customary law, and the conditions for the formations of a customary rule are such that even a state’s passive conduct has to be qualified to be of any significance. If a state opposes a customary rule from the early stages onwards, the state will not be bound *quo persistent objector*. And if many states object, the rule will never arise.\(^\text{110}\) According to Michael Akehurst, Customary International Law is created by state practice. State practice means any act or statement by a state from which views about customary law can be inferred; it includes physical acts, claims, declaration in abstracto (such as General Assembly Resolution), national laws, national judgement and omissions. Customary International Law also be created by the practice of international organization and (in theory at least) by practice of individuals.\(^\text{111}\) A state is not bound by a customary rule if it has consistently opposed that rule from its inception. However, a new state is bound by rules which were well established before it became independent. The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition and from the *general Principles of justice* applied by jurist and practiced by military courts. This law is not static but by continual adaptation follows the need of a changing world.\(^\text{112}\) It can, therefore, be said that such customary laws of states are found very effective and relevant in the absence of treaties made between the states.

The five-power proposal, introduced by the representative of Sweden, preserved the operation of the rule of Customary International Law codified in the Vienna Convention. In introducing the proposal, the representative of Sweden stated; it was generally agreed that most of the contents of the present Convention were merely expressive of rules which existed under customary international law. Those

\(^{110}\) Villiger, Mark E, op. cit, p 62. 
rules obviously could be invoked as custom without any reference to the present Convention. But to the limited extent that the Convention laid down rules that were not rules of Customary International Law, those rules could not be so invoked. The position could be regarded as general rule contained in Article 24 of the Convention. It might nevertheless be safer to make the point explicit in one of the final clauses.\textsuperscript{113}

According to J.B. Moor, there are two modes in which international law may be developed. The first is the general and gradual transformation of international opinion and practice, the second is the specific adoption of a rule of action by an act in its legislative nature. The operation of the former mode is often different to follow in its details but its effects are potent and undeniable.\textsuperscript{114}

A customary rule of international law grows out of international parties. Practice of states may be that of taking actions in certain circumstances or taking no actions at all. Of course, it is much easier to ascertain the existence of a customary rule in a case of positive acts, but there is no reason whatsoever to deny the possibility of creating a customary rule by way of negative practice. The continued habit of not taking action in certain situations may certainly lead to the formation of a rule of conduct which may be a legal rule. And it goes without saying that all that has been said before concerning the elements of repetition and time applies as well to the negative practice.\textsuperscript{115}

The study of bilateral customary relationship leads into a realm different from that governed by the notion of general rules of international custom and by


\textsuperscript{114} Berber, F.J op.cit, p.45.

\textsuperscript{115} Tunkin, G.L., Co-existence and International Law (1958) pp. 11-12
the traditional requirement for the establishment of such rules, namely, the
generality and consistency of state practice, its duration and the attendant *opinio
durati* *siv necessitatis*. These elements do not disappear in a bilaterally oriented
study; only their meaning becomes much more specific and particular.\textsuperscript{116} An attempt
has recently been made to produce a complete reformation of the theory of
customary law which would not be subject to the theoretical objections and practical
difficulties encountered by the traditionally accepted views; Professor D'Amato,
in his book, *The Concept of Custom in International Law*, (1971), has proposed the
abandonment of the concepts or *opinion juris* and usage as the constituent elements
of a rule of customary law, and the substitution of "articulation" and an "act or
commitment of a state to take their places.

The United Nations Charter and the work of the organisation have greatly
contributed to the generation of the Customary International Law of human rights.
Through its different organs, the United Nations has played an important role not
only in the formulation of human rights standards through the adoption of multiple
conventions, declaration, and resolution but also in their implementation. The 1948
Universal Declaration of Human Rights contains a list of rights; but as a General
Assembly resolution, the instrument was not binding as such. Nonetheless, it has been
considered as an authoritative guide to the interpretation of the provisions in the
charter, and there is no doubt that some of its provisions can be deemed to constitute
customary law and general principles of law.\textsuperscript{117}

\textsuperscript{116} Slouka Zdenek J., *International Custom and the Continental Shelf*, Martinus Nijhoff, the Hague, Netherland,
1968, p. 171.

\textsuperscript{117} Oraa Jaime., *Human Rights in the state of emergency in International Law*, Clarendon Press, Oxford, Reprint
1996, pp. 214-215
The U.S. third restatement of the foreign relations law considers a state be in violation of Customary International Law if, as a matter of state policy, it practices, encourages or condones genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or any other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or a consisted pattern of gross violation of internally recognized human rights.\(^\text{118}\)

Although these rights are considered as non-derogable in states of emergency, at least two of them present some problem. Firstly, prolonged detention is not considered to be arbitrary and is, therefore, legitimate in emergencies when it fulfils the main conditions of the derogation clause. Secondly, in a situation of emergency, state may also need to derogate from some of the internationally recognized human rights. The aspect of human rights is a branch of international law and, therefore, subject to its general rules, which, in the case of the information of customary law require the existence of the two traditional elements, a general practice and opinio juris.

The generally held view of Customary International Law, which has been endorsed by the International Court of Justice,\(^\text{119}\) is that the creation of a rule of cil postulates two constitutive elements, a general practice of states and the acceptance by states of the general practice as law.\(^\text{120}\) According to Thirlway, to appreciate the role of custom in the present and future international community, one must form a clear idea of what custom is and how it is formed. In particular, the existence of the


\(^{119}\) Continental self cases, 2 CJ Reports 1969, p 3, p 44

\(^{120}\) Schwarzenberger, A Manual of International Law, 1967, p.32.
two classic elements in its formation, the material elements of usage and the psychological elements of the *opinio juris*, must be insisted on as a precondition for recognition of any rule or principle which presents itself under the banner of international custom.\(^{121}\) In short, Customary International Law which, therefore, basically imbibes either state or general practice or *opinio juris* (a sense of legal obligation) or both was then found to be an effective instrument in the affairs of the international relations between states or kingdoms in the days of yore. The International Court of Justice (ICJ) in one Asylum case pointed out that, in order for a practice to become a rule of Customary International Law, the practice must be constant and uniform. Therefore, a need to standardize this determination has been greatly felt to make Customary International Law more viable.

The rapid globalization process of economy, trade and commerce, science and technology, law and politics have virtually brought the human society much closer to each other like never before. This act of globalization has also enhanced the need for more international proactiveness that leads to the making of numerous treaties between states. The logical question under such situation is, have the increasing number of international treaties made the relevance of Customary International Law redundant in our today’s society? The answer is definitely negative. Because Customary International Law has been playing vital role in national and international affairs and relations which, in fact, could not be totally substituted by even treaties and /or agreements whatsoever. Customary law traditionally has a central part to play in any decentralized society. Despite the growing globalization process and the establishment of the United Nations Organization (UNO) and other

related world institutions, it is very much true that our international community is presently decentralized, and will most likely remain so in the near future and, therefore, Customary International Law will not only continue to be an important source of international law but an international law *per se*. Thus, the relevance of Customary International Law is still significant.

A custom will become a binding rule in international law where there is sufficiently widespread or general practice adopted by states and where the practice is adopted out of a sense of legal obligation to do so. India recognises Customary International Law. *Vishaka case*¹²² can be cited as a judicial legislation wherein the judgment relies on the Principles of Convention on Elimination of Discrimination Against Woman (CEDAW) and customary law. Technically speaking, mechanism for interstate co-operation is needed. Often this can take the form of treaties but treaties typically are long in coming, and there may be a need for interim rules to guide behaviour until affected states find it to their mutual advantage to enter into actual pacts. The conventional and traditional account of Customary International Law hold that these interim rules become law once a large enough number of states act in accordance with these rules so as to create binding custom. Such rules are said to be rooted in nearly universal practice by drawing an inference from the silence of dissenting states. Unless the dissenting state is a 'consistent objector,' it is deemed to consent to the rule by its silence.

In an increasingly interdependent world there is already an international law system that mixes elements of state sovereignty and multistate pacts like the United

Nations Charter and World Trade Organisation, where states agreed in advance to delegate some of their sovereign authority to the institutions established by those agreements. Such a world is not the same anymore. In such a scenario, the role of treaty making is seemingly enhanced. Customary International Law at least plays a useful role in providing background or default rules in such treaty making. Two aspects of default rules seem central; (1) They define the expectation of the parties against the background of which the treaty is drafted, (2) they provide rule of decision for areas of conduct that the treaty, properly interpreted, does not reach (rule of decision” role). Another aspect is the educative effect of Customary International Law. Two related arguments might be offered in this regard. The first claim is that widespread recognition of binding Customary International Law promotes adherence to ‘rule of law’ norms, thus lessening the prospect of unilateral state action and the inevitable cycle of reactions by other states. The second is that such a world requires more interstate rulemaking than is possible under a treaty regime and the making of such intermediate rules can be the province of Customary International Law. Customary International Law also promotes a form of ‘law speak’ for international lawyers, non governmental organization (NGOs), and other elite groups. Mr. Weeramantary, former Judge of International Court of Justice expressed the view that though it is popularly believed that treaty law has precedence over customary law he believed otherwise. This, he added, is because of the reason that the very strength of treaty law stems from customary law and rule of treaty law emerge from customary law in the first place.123 India is not a party to the International Refugee Convention, nevertheless, she is strongly obliged to safeguard and protect the rights and interest of the refugees which principle is imbibed in the Customary International Law.

To sum up, Customary International Law understood either as state practice or *opinio juris* or in both ways is considered to have been in existence in human society since time immemorial or otherwise too. Customary International Law also means and includes a continuous habit of doing certain acts by states or societies with a sense of recognition, obligation and rights. Customary International Law further means and stresses on ‘general practice’ and necessarily universal practice. Court judgements, Publicists, NGOs and other internationalist elites are obviously considered to be causing the so called new (contemporary) Customary International Law. In the past, the varied nature of polity, culture and aspiration of the human societies in various part of the world made it difficult to determine uniformity, certainty and reasonableness of Customary International Law. But this has not been the case since the dawn of modernity and more particularly after the first and second world wars. A pursuit to comprehensively address common interest and common importance of global human society and the environment is being made with more proactive way than ever before, in this changing scenario of the world community. Today, for a custom to be valid, there has to be a recognition of the general principles of law in that custom. There has to be an ‘evidence of the acceptance of a general practice as law’ in order to give cognizance to that customary law as such.\textsuperscript{124}

The national territorial courts must treat all binding rules of Customary International Law except only when such international law is inconsistent and/or incompatible to the constitutional provisions of a state or an Act of Parliament whatsoever. This legitimacy theory of automatic absorption will certainly continue to be applied even though there are problems and difficulties that arise due to a

\textsuperscript{124} As incorporated in Article 38(I)(b) of International Court of Justice Statute.
gradually changing concept of Customary International Law in this changing global era. In a new world order of globalization, customary international law plays a vital role in treaty making. Meaning, almost all the world treaties or treaties made between two or more member-states are basically incorporated with certain basic structures of good cil or some national customary laws having international importance. It is also equally true that despite the rapid growth of treaty making business around the world, it is not immediately foreseen to have a centralized world body where uniform law can be applied effectively. In such a situation, international customary law shall remain relevant and viable for years to come. Another important aspect of Customary International Law is that since a (customary) law is dynamic in nature codification and development of customary law has become accordingly exigent to meet the need of today's international community. However, a judicious handling of the matter is important so that any codification of Customary International Law may not be one sided. International Law Commissions effort to codify cil must ensure fairness while essentially incorporating certain basic structures of customary laws to such a new code.

It is also found that there is an epistemic difficulty to identify Customary International Law. It is however observed that this difficulty can be removed to certain extent with the new dimensional approach to Customary International Law. Customary laws are needed to be ascertained and digested before they can be codified. Most importantly, there is an absence of general mechanism to ensure the effective enforcement of international customary law. It is suggested that such mechanism is vital in today's world. The relevance of Customary International Law will continue to subsist amidst this ever increasingly interdependent world.
Jurisprudential test of Tangkhul Customary Laws

Customary law, as understood by the Tangkhuls, always have a strong connectivity with their ancient religion, that is, ameoñan. Tangkhuls believe that customary law are derived from the devine laws of God. According to Ng. Ngareophung, a native writer, particular conduct of norms and practices enforced in the personal and societal lives since time immemorial is called customary law, Khangacha yan in native. The Tangkhul customary law is very rigid though not static. Law dealing with violation of customary laws and its punishment are called shiyan chikan. T. Luikham opines that Tangkhuls strongly believe customary law as the devine law of Ameoa since the days of yore. They feared and paid great honour to Ameoa and accordingly obeyed devine laws in different aspects of life thereby keeping their relationship with Ameo in tact. Such customary laws are known as mayonza in native term. The Tangkhuls have been governed by their customary laws since time immemorial. Customary law for them is not simply a source of law but law in itself with binding force. Tangkhuls perception and understanding of customary law is that, when a number of person have been doing a thing regularly over a substantial period of time it is usual to say that they have become habituated to it or accustomed to it. A compatible course of human conduct reflecting the hopes, aspirations and ideals of the people and its outlook on life once formed and later followed by the people through generations gathers strength every year and in due course of time assumes some kind of sanctity making it meticulous. This gave rise to a conviction that the said course of human conduct is best suited for them and the said practice should continue to be observed. The people sincerely believe that the said course of conduct is salutary and they call for strict compliance thereof

125. Ngareophung Ng., Wung Rampan Khangacha Yan (Tangkhul customary law) published by authoi, 1998, Imphal, p.8
126. Luikham, T., Wung (Tangkhul) Okthot Mayonza, Published by Author, 1961, Imphal, pp 21-23.
by all persons of the group and any departure from them is considered to be immoral or a taboo. Such a violation is taken as an insult or offence against the group whose outlook on life, its hope and aspirations are reflected on the said course of conduct. The violation is considered by the Tangkhuls not only as a crime but also a challenge to the society calling for its interference. The legal efficacy of customary law must be found when it comes to application. Despite some of customary laws of the Tangkhuls having become obsolete as of now, many other such laws are still effective and relevant in the contemporary society. According to Keeton, customary law may be defined as those rule of human action, established by usage and regarded as legally binding on those to whom the rules are applicable, which are adopted by the courts and applied as sources of law because they are generally followed by the political society as a whole or by some part of it. It is very important to determine the validity of Tangkhul customary laws on the basis of the following jurisprudential test upon some of the aforesaid essentials of the customary laws.

1. Antiquity test

The Tangkhul customary laws whether it be criminal, civil, constitutional and administrative laws are customary laws of ancient origin. It is said that custom is as old as human society. The Tangkhuls came to this present habitate more than two thousand years before. The Tangkhul traditional religion is called ameoyan. Ameoa, the super natural being, was their God. There were believed to be certain doctrinal commandments of Ameoa called Sakharan (dos) and Sakashar (don’ts or taboo). From the dharma of ammeoyan, ancient Tangkhul elders particularly the high priest called Sharwo created various doctrinal norms and practices which the

people followed and practiced. It gradually became customary laws of the *Tangkhuls*. The time immemorial customary laws had made rapid growth in the course of history. The bad customary laws are abolished by desuetude. A radical change was brought in *Tangkhul* society with the advent of Christianity in 1896 AD. The Tangkhul society was governed by their own customary laws even during the British regime. They are dominantly governed and bound by customary laws especially in civil and personal matters even after the independence of India. Hence, it is established beyond doubt that the customary laws on constitutional matters, administrative matters, civil and criminal matters are not of recent origin. These laws have been followed since time immemorial. Therefore, these customary laws are valid on this ground.

The customary law on village *ruichumnao* (citizenship), the village *hanga* system, village *kalangshim, shangzan-ramzan*, the hereditary village awunga system are some of the customary laws on village constitutional matters (*riyan*). The customary law on *pam* marriage, clan exogamy, payment of *manho, vashum kasa, ngalakakham, shatngathan* etc are customary law on marriage. Customary law of *shimluikat kaka* on primoginiture basis and non transferable of land to outsiders are also customary laws of inheritance and land. All these customary laws among others are of immemoriable ones. These are considered to be still relevant.

2 Test of Reasonableness

If any party challenges a custom, it must satisfy the court that such custom is unreasonable. To ascertain the reasonableness of a custom, it should be traced back to the time of its origin. According to Prof. Allen, the unreasonableness of the
custom must be proved rather than that of reasonableness.\footnote{128}{Allen C.K. op.cit, p.140.} However, it cannot be said that custom is always founded on reason. No amount of reason can make a custom. What is reasonable or unreasonable is a matter of social values. It may differ from time to time and from society to society. Therefore, whether a custom is reasonable or not is determined by the contemporary values of every society, though there are certain rules or practices which are considered unreasonable in all times and in all societies.\footnote{129}{Diwan Paras, Dr., Modern Hindu Law, 13th edition, 2000, p.42.} Custom must be useful and without prejudice to any one under like circumstances.

It is well settled that the time to decide the reasonableness of a custom is the time of its origin. Now, it is said that if a custom has no rational basis, but has resulted from accident or indulgence and not from any right conferred in ancient times upon the party setting up the custom, there is then strong evidence that the custom is unreasonable and unenforceable. The reasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. In a particular matter of reasonableness, the courts reserve to themselves a right to discontinuance or abrogate a pernicious custom. In holding the origin to have been unreasonable, the court always doubts or denies the actual origin and continuance of the custom in fact. Further, the unreasonableness of a custom in modern circumstances will not affect its validity if the courts are satisfied of a reasonable origin. The prevailing customary laws of the Tangkhuls like that of \textit{pam} marriage, clan exogamy, \textit{vashum kasa} payment of \textit{manho}, \textit{ruikakhui} etc. are still considered reasonable and tenable by the society. However, some of the customary laws which were considered reasonable in its origin have now turned to be
unreasonable with the more developed and changed notion of life. The irrelevant and unreasonable customary laws had been abolished by desuetude in the pace of time. Some of the bad and unreasonable customary laws, if any, are to be identified under this investigation and necessary measures be taken for abolishing it.

3. Test of conformity with general principles of law

The customary law of the Tangkhuls had been the dominant laws that governed the society since time immemorial. After the independence of India, the constitution of India has been extended in Manipur that includes the Tangkhul region. The Indian constitution recognises customary laws. The Tangkhul customary laws are in conformity with the provisions of the constitution. The Code of Criminal Procedure and the Indian Penal Code are extended in the hill (tribal) areas of Manipur only in spirit and not in letter. All other civil matters; family and personal matters are still governed by the customary laws.

4. Continuity test

A custom to be valid must have been in continuous existence. Mere non-existence of custom for some temporary period of time does not necessarily mean that custom has been abandoned. Non existence of custom for a long time leads to the inference of its abandonment provided conclusive evidence of its abandonment is established. Once it is established that a custom exists, then the rule is that it would be presumed to have continued to exist. The Tangkhul customary law on pam marriage, clan exogamy, vashum kasa, ngalakakham, payment of manho, ruikakhui, shimluikat kaka on primogeniture basis etc are on continuous practice.
5. Certainty test

A custom in order to be valid and enforceable must be proved to be certain. Mere allegation as to the existence of custom is not suffice to ascertain its existence. As observed by Justice Chatterji, customary law is in a fluid state and changes with the times and, therefore, the custom being set up need not be absolutely invariable, though no doubt the latter is the conception of what custom is. The change of custom would have to be gradual, and a new custom cannot be created by the mere assertion of the various tribes at a subsequent settlement. The changes should not affect to the underlying essence of the custom. Despite some of the Tangkhul customary laws being blended with Christian (Canon) laws after the advent of Christianity, the Tangkhuls still are dominantly following and practising the customary laws of antiquity.

6. Morality test

A custom that is immoral stands invalid. There is no fixed test for the morality of a custom. As aforesaid, the morality or immorality of a custom is to be judged by the sense of the whole community and/or tribe who actually practise that custom. In the context of the Tangkhuls, the practice of clan endogamy is within the degree of prohibition of marriage on immoral, unethical and unscientific grounds. Such marriage is a void marriage. The practice of clan exogamy on the other hand is accepted by the Tangkhuls as morally, ethically and scientifically approved. It is a valid marriage. A Tangkhul man or woman during satngathan cannot enter into another marriage. If any marriage of such type is entered into by either of the parties, such marriage are considered by the Tangkhuls as immoral. Marriage by elopement

will be considered immoral if the parties are from the prohibited relations. No ceremony of *vashum kasa* (socio-legal recognition) will be performed under such circumstances. Payment of *manho* by the bridegroom to the parents of the bride is considered to be reasonable and bears high moral value. The Tangkhuls do not consider payment of *manho* as a bride price or dowry as such, but as an act of gratitude and valuable acknowledgement given to the parents of the bride by the bridegroom for their valuable upbringing and contribution towards the welfare of the bride. The customary law of the Tangkhuls that makes the obtaining of parental approval to the marriage is also a high moral responsibility of the parties in a marriage. In such a manner, Tangkhul customary laws do not suffer from required moral value.

Proving of a Custom in Court

Under the Indian law, custom is a question of fact and the burden of proof is on the party who relies on the custom.\(^{131}\) There are some customs which the court takes judicial notice of when a custom is repeatedly brought to the notice of the court, the court may treat the custom proved without any necessity of fresh proof, otherwise all customs are to be proved without any other fact.\(^{132}\) When a custom is recognised by the courts for a long time, it is not necessary to prove it, the court can take judicial notice of the same.\(^{133}\) Custom is not a matter of theory but of fact. It is not always logical and cannot be deducted by inferences. In dealing with cases in which the question involved relates to the existence of a particular custom it is not permissible for the court to extend custom by logical process. In the absence of any authoritative statement of a custom it can only be established by instances

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and not by a *priori* method. The courts should take cognizance of actual facts instead of being swayed by theories, even though they may be strictly logical or by consideration affecting the symmetry of the customary system. While enforcing custom or while considering the question whether a custom has been proved, the court should not draw any analogy nor guess what the custom is or should be, it should go by evidence and see what the custom really is and whether it had been proved. Custom must be proved by evidence and courts are not permitted to deduce the existence of one custom from another. It is not the function of the Judge to surmise what custom ought to be; its duty is to see whether, as alleged, custom has been established by evidence.\(^{134}\)

According to Rattigan’s Digest, a custom may be proved in the court by any one of the following modes.\(^{135}\)

(a) Proof of custom by opinion

The existence of custom can be proved by the opinion of person likely to know of its existence, or having special means of knowledge thereon as provided under section 48 and 49 of Indian Evidence Act, 1872. The proof of custom should consist on those deliberate and well considered opinion of the people living under, and governed by the custom in question. The opinion must relate to “What custom is” and not to “What custom ought to be”. Justice Rossignol, however, remarked that ‘as to this argument it is sufficient for us to say that the only adequate proof of a custom is clear evidence that such a custom is followed and not merely opinions however numerous that such a custom ought to be followed’.\(^{136}\) Though judicial

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135. Rattigan W.H., op.cit, p94.

decisions are not indispensable, the acts required for the establishment of customary law ought to be plural, uniform and constant.\textsuperscript{137} It is admissible evidence for a living witness to state his opinion in the existence of a family custom and to state as to the grounds of that opinion or information derived from deceased persons and the weight of the evidence would depend on the position and the character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. In the \textit{Chunni Lal v. Jai Gopal},\textsuperscript{138} it was observed by Justice Bhinde that it is true that opinions of persons belonging to the same tribe on the question of custom are relevant in case of this kind, but mere opinions unsupported by instances have to be taken with caution. Hence, oral evidence must be supported by instances to prove the existence of a valid custom.

\textbf{(b) Proof by statement of persons who are dead}

Section 32 clause 4 of the Indian Evidence Act, 1872 provides that the existence of customs can be proved by statements of persons who are dead, or whose attendance cannot be procured without reasonable delay or expense, if such statements were made before any controversy to such customs arose.\textsuperscript{139} It further provides that the said statements must have been made only by persons who would have been likely to be aware of the existence of such custom if at all it existed. These statements must relate to the existence of any public right or custom or matter of public or general interest. Such statements are known as a declaration as to public and general right. Public rights are those rights found common to all members of the state, example, right of highway and ferry or of fishery in tidal

\begin{enumerate}
\item \textsuperscript{137} 1926, 98 Ind. cas. 43 (Calcutta) as pointed in W.H. Rattigan, op.cit p.99.
\item \textsuperscript{138} AIR 1936 Lah. 551.
\item \textsuperscript{139} Section 32(4) of the Indian Evidence Act, 1872.
\end{enumerate}
rivers. General rights are those affecting any considerable section of the community. The declarations are to be made before the actual dispute had arisen in regard to which they are tendered as evidence. The reason why the statements of deceased persons are admitted upon the public right or custom made ante-litem mortem (where there was no existing dispute respecting them) is that those declarations are considered as disinterested and dispassionate and made without any intention to serve a particular cause or mislead the posterity.140

(c) Proof of custom by transaction

Transactions will be relevant for the proof of custom in which the custom in question has been created, claimed, asserted etc. and not the transaction in which a casual reference to such a custom is made. Section 13(a) of the Indian Evidence Act, 1872 lays down that if in a transaction in which a custom was involved, such custom was taken notice of, claimed, modified, relied, asserted, demanded or its very existence was contrary to the very transaction and the terms thereof, then the existence or non-existence of such a custom may be proved by that transaction.

(d) Proof of custom by instances

The proof of custom by instances is probably the largest aspect of proof of custom. Instances should be in which a custom is claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from section 13(b) of the Indian Evidence Act, 1872. Instances of custom can be of various types. They may be oral instances, instances recorded in documents or judgments in which instances were asserted and accepted or rejected. The term instances denotes on

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something which has once occurred. Therefore, instances in which the right or custom was claimed, recognized, exercised etc. must be instances prior to the suit in question.

In customary law it is a repeated adage that custom grows out of the instances and acquired the force and sanctity on their multiplication. These instances may be in some record or document or they may be in the memory of people. The non-contest of a right or custom may raise a presumption that custom was so well recognized that one thought of contesting it. The uncontested cases are a very good proof of an alleged custom, for greater the strength of the custom, the less probability is there for anybody attempting to controvert it. In the words of Justice Robertson, the very best possible evidence of a custom is the one which shows that it has been followed consistently in a number of instances without dispute. An instance which itself is ambiguous cannot be proved by further instances in which it might have been noticed or discarded. The evidence of instances is very important to prove a custom but absence of evidence of instances is not fatal to the proof of custom. The instances, though an important evidence of custom, are not absolutely essential to its establishment. The Privy Council in Ahmed Khan v. Channi Bibi observed that a court cannot disregard the large body of general evidence before it in proof of customs merely on the ground that specific instances had not been proved, certain customs may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. However, when a custom is sought to be proved by general

141. Saddan v Khemi 15 PR 1906 quoted in Dr. Paras Diwan, op. cit. p.35.
143. AIR 1925 PC 267.
evidence, the general evidence should be such that there is practical unanimity on a point of custom in village after village and among a large number of witnesses.\textsuperscript{144}

(e) Proof by village oral traditions

It is an accepted position that the village oral traditions have been considered to be a good evidence of custom. The deliberate and well considered opinion of the people living under and governed by custom is a recognized mode of proof of custom. The question whether or not a particular custom does prevail in any particular tribe is a matter on which tribesman themselves are in the best position to pronounce an opinion. Whenever questions as regard to tribal customs are to be determined, the parties try to secure the evidence of the members of that tribe and even people living in the neighbourhood, as regards the existence and non-existence of the custom. The people of a particular community are the best and the most trustworthy repositories of the traditions which go to constitute a particular custom prevailing in that community and their evidence, therefore, is of a great value.\textsuperscript{145} A rule of custom may be established and held to be of binding force even where no instances is forthcoming if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour or if it is fairly deducible from the analogy of other well known principles of customary law. It was held by their Lordships of the Privy Council in \textit{Ahmed Jahan v. Channi Bibi},\textsuperscript{146} that custom could properly be proved by general evidence given by the members of the family or tribe without proof of specific instances. In the present case, there was overwhelming oral testimony that in this locality amongst jats unmarried sisters

\textsuperscript{144} Sihar Kaur v. Raja Singh (1911) 12 PLR 378, cited in Dr. Paras Diwan, op.cit p.37.
\textsuperscript{145} Rustomji Kaikhosru., A Treatis on customary law in the Punjab (4th edition) 1942, Published by University Book Agency p. 79.
\textsuperscript{146} AIR 1925 P.C. 267.
succeed for life or till their marriage to the land of their deceased brother which was not ancestral quo reversinoners. It was the most important consideration that not less than fourteen lambardars had deposed to this custom. Thus, oral tradition of the village is a very important evidence to establish the existence of a custom.

(f) Proof of custom by written memorials

Records of rights or customs prepared by public officers (Settlement Officers) are important piece of evidence. Written memorials such as the wajib-ul-arz or the Riwaj-i-am are also good evidences for proving the existence of a valid custom (section 35 of Indian Evidence Act, 1872).

(g) Proof by judicial decisions

A decision in a case of custom is not a judgement in rem. It is only relevant under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom being recognized.\textsuperscript{147} The reason for the relevancy of a judgment in a case of a custom under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom may be arrived at between certain parties while there may be another decision in a suit arising between other person.\textsuperscript{148} As per section 13, where the question is as to the existence of any right or custom, the relevant facts are to be ascertained from any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence. It can be also ascertained from particular instances in which the right or custom was claimed, recognised, or exercised or in which its exercise was disputed asserted or departed from.

\textsuperscript{147} Rustomji Kalkhrosru, op.cit, p.69.
\textsuperscript{148} AIR 1934 Lah. 861, observed in Rustomji, op.cit /69.
In *Sher Mohammad v. Jawahr Khqtun*, it has been held that a judgment on a question of custom is relevant not merely as an instance under section 13 of the Indian Evidence Act, 1872 but also under section 42 of the same Act, as evidence of the custom. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decision is sufficient to prove the custom. It was observed:

It was argued that the judicial decision counts only as an instance but a judgment on a point of custom is also relevant under section 42, Evidence Act. Besides, the value of the decision depends upon the nature of the enquiry and evidence produced. It may happen at times that the riwaj-i-am is held to be conclusive merely because no evidence has been produced to rebut it; as for instance was the case in AIR 1925 Lah. 842. On the other hand there was a very elaborate enquiry made in the case reported in 13 Lah. 276. The two decisions, therefore, cannot obviously be placed on the same footing. Although an initial presumption of correctness attaches to an entry in the riwaj-i-am, the presumption is a rebuttal one, and there is no good reason why that presumption should not be held to be rebutted by a finding arrived at after an exhaustive enquiry, as it was in 13 Lah. 276. It is indeed difficult to say how the presumption attaching to the entry in the riwaj-i-am can be rebutted in any other way.

The general opinion thus seems to be in favour of the view that a decision on custom only becomes a relevant instances under section 13 of the Indian Evidence Act, that such a right has been asserted and recognized. It is always necessary to assert and prove what the custom is. However, to the general rule that all the customs

149. AIR 1938 Lah. 309, quoted in the Rustomji, op.cit, p.70.
have to be proved, section 57 of the Indian Evidence Act provides an exception. In *Ujagar Singh v. Mst. Jeo*,\(^{150}\) the Supreme Court observed that when a custom has been recognized by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under section 57(1) of the Evidence Act. The Lahore High Court and the Punjab High Court have consistently expressed this view. They observed that where a custom has been repeatedly brought to the notice of the court and has been recognized regularly in a series of judgments extending over a long period of time, such custom attains the force of law and is no longer necessary to prove it in each individual case.

(h) Proof by authoritative manuals of customary laws

Authoritative manuals of customary law are sometimes considered as valuable evidence for proof of customs. Certain private manuals and books prepared on customary law by great exponents of custom are of great evidentiary value. For instance, Rattigan's Digest on customary law of Punjab throws a good deal of light on Punjab customs and may be used for the purpose of proving custom. Such manuals and digest as evidence of proof of custom have to be used with caution,\(^{151}\) the Supreme Court said that although Rattigan's Digest is of the highest authority on questions of custom of the Punjab, the judicial notice of the custom stated therein can be taken only if it has been well recognized by the decisions of the courts of law. In a series of cases the Supreme Court has held that whatever there is a conflict between an entry as to custom in riwaj-i-am and in Rattigan's Digest, the presumption is the entries in riwaj-i-am are correct.\(^{152}\) From all these judicial decisions, it can be conclusively said that official records and/or manuals are also important evidence to establish not only the existence of custom but its legal efficacy as well.

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150. AIR 1959 SC 1041.