CHAPTER III

NATURE AND EFFECTIVENESS OF CUSTOMARY JURISPRUDENCE

Nature of Customary Law:

It is not well recognised fact that custom has been playing an important role in the socio-legal development of human society through ages. Indeed custom is coeval with the very birth of community itself. The moment human being started leading an organised life, the stage was set for the evolution of custom. In its widest sense custom is a body of rules which regulates the conduct of human beings among themselves vis-a-vis the individual and the society. As the human life grows complex and human beings engage themselves in multifarious activities, there evolves certain uniform patterns of human behaviour. These characteristic patterns of human behaviour when universally accepted and recognised by the society are called usages. And, in the course of time, with the social, economic and political development of the society these usages when established, develop and mature into custom.

Different customs have a varying degree of sanctions behind them. But all of them command obedience since

their disregard will involve some kind of penalty, whether self imposed or by the collective will of the community. The former carries a personal and individualistic undertone and cannot be rated of social significance so far as its legality is concerned. But the penalty inflicted through consensus has a deterrent effect which elevates it to a status of law. Thus the self imposed penalty has only an individualistic and purgatory undertone, but the collective will of the society enjoys socio-legal sanction.

In the earlier stages of the evolution of society, the status of an individual remained subordinated to the collective will of the community in which he lived. The 'collective will' regulated individual and collective behaviour of that community. The instances of such practices can still be seen even today in remoter village communities of Himachal Pradesh of which Malana in remote Parvati valley of Kulu district is a living example. In the absence of an organised judicial and administrative system within the community, the conduct of an individual was wholly regulated by the code evolved through consensus and these customary rules were enforced by the social reprobation. The forms and degree of such reprobations varied from community to community and racio-cultural background. For instance, in endogamous
societies, the sex-offences have been taken very seriously and punished deterently but on the other hand, in polygamous communities, such offences have been taken lightly with lax punitive provisions. A comparison between endogamous Gaddis and polygamous Pangwals and Kinnaurs are the case of the point.

All customs do not have the force of law. However, custom is a primary source of law. Austin called custom as 'positive morality.' According to him at its origin, a custom is a rule of conduct which the people observe spontaneously, and not in pursuance of a law set by the political superior. A custom acquires the force of law only when it is recognised and enforced by the courts. But, before it is adopted by the courts and armed with legal sanction, it is merely a rule of positive morality. In short, according to Austin, customary law is positive law when it is fashioned by judicial legislation upon pre-existing custom. Austin's theory of law is contradicted by Holland who asserted that the custom was law before it received the stamp of juridical recognition. However, the value of

3. *Ibid*.
custom lies in traditions and usages yet antiquity would lend sanctity to it. The birth and growth of custom depends upon economic, cultural, geographical and political environments of the community. Historical jurisprudence has recognised the role of customary law. Savigny advocated that laws are not great but they evolve and grow in response to the social needs of the society.5

No society can exist without following certain norms of social order i.e. some uniform practices and habits of life. These norms do not necessarily emanate from a political superior, but may be based on utility or social and communal necessity, and are enforced by the express or implied sanction of the collective will of the people. Customs often grow and fashion themselves under various factors:6 political, geographical, historical and cultural. But, it is the economic factor which overrides all other considerations in their development and growth. That is the reason why we find different customs among different sections of the same community having compact socio-cultural background. The stratification of customs according to the economic status has been

an universal phenomena. But, in the more civil and urbanised societies, the egalitarian concept has to a great extent levelled this distinction. But in the remoter and rural communities where the modern social ideas have not penetrated significantly, this distinction is profound. This feature is clearly visible in the Scheduled Tribe Communities of Himachal Pradesh where the economic factor dictates the performance of marriages irrespective of their forms prevalent in that community. It is observed that a pompous marriage in a particular community is generally performed by the people who are economically better off. Whereas, those belonging to an economically weaker section of that society would normally be obliged to go in for humbler form of marriage which requires lesser expenditure. However, a new trend is also visible in the social order in the tribal areas: any person of means and education would resent being labelled as a member of a particular 'caste' or 'clan' and would declare to belong to a higher strata of society. Wealth, which in the past did not count in social matters, is now a factor powerful enough to break all social barriers and secure to its possessor a higher position. Education has also contributed to catalyse the process of this thinking. The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those
which are on the whole best suited to promote its physical and moral well being.\footnote{Sir Henry Sumner Maine, \textit{Ancient Law}, (1970), p.16.} Customs, thus belong to the people and are best suited to, and in harmony with, their economic and cultural environments.

Logic and reasons do not apply to customs. Customs may not be as wise as laws are. But, having been evolved through a long process of the collective consciousness, these represent a collective psychological response of the community for its own survival and stability. As such they are always popular and die hard even when the circumstances change. The custom of polyandry among Kinnauras and 'Lahulas' of Himachal Pradesh lends support to this conclusion. The conditions for the custom of polyandry are fast changing but polyandry still being practised among them. A custom loses its intensity and relegated into obscurity only when the society within which it had prevailed, finds it irrelavent and hence useless. But so long as it holds currency in the community, the custom or the law based on it is the bed-rock of the jurisprudence for that particular community provided further that such custom may be able to establish the antecedence of its antiquity and continuous usage. Manu also says that immemorial usage
is the 'Transcendental Law'. The Hindu Law also establishes the rule that clear proof of custom will overweigh the written text of law. In order to up-keep the socio-cultural identity of the scattered and isolated tribal population of the country, the Constitution of India have accorded specific protection to them. And, in order to further this objective, the scheduled tribes are specially excluded from the operation of the provisions of the Hindu Marriage Act, 1955. They are to be governed by their respective customs in such and other personal matters. The significance of Customary Law for the community of its origin is overwhelming in deciding the disputes arising out of matrimony, succession, adoption, maintenance and other family matters. The law of the land give due cognizence to them.

Tribal Customary Law Vis-a-Vis Family Laws:

The tribal customary laws seek their origin from different sources which may vary from region to region and country to country. And, it may not be possible

10. Arts: 46, 244, 275, 330, 332, 334, 330, 339.
11. Sec. 2 (2).
to identity such origin to form an universal theory. For example, the factors governing the evolution of tribal customary laws in the nomadic societies of Middle-East may be entirely different to those of the primitive African tribes. In fact these two extremes present two variant positions of evolution of tribal set-up. Any conclusion based on the study of such extreme situations may not be valid for the tribal societies of Himachal Pradesh which by the typicality of their origin calls for special treatment—and approach. In order to trace the evolutionary process of the customary laws of the scheduled tribes of Himachal Pradesh and their bearing on the respective family law, it is imperative that we look into the social milieu of the past of which these tribals are the descendants.

The Scheduled tribes of Himachal Pradesh are not of one origin nor were they settled in the region simultaneously. There are certain communities like Kinnauras, Bhot, Swangla, Jad etc. who occupied the inner hills of this region in western himalaya in remote antiquity. Whereas, the tribal communities namely, Gaddi, Gujjar, Pangwals etc. are the settlers of recent past and have come from the plains because of the socio-political upheavals in the mainland during the early
medieval period which forced them to take refuge in the interior of the Western Himalayan region. Because of their isolation in the interior Himalayan ranges they developed tribal characteristics and their own customary laws. The customary laws of these isolated tribes were essentially inspired by the omnibus codes based on the contemporary popular usages among the Hindu population of the mainland which have been formulated and recorded in various sacramental scriptures of the Hindus. The transitory phase of these tribes must have been critical for the omnibus customary laws of these tribes, influenced by the Hindu scriptures, must have come in the way of their respective family laws which were prone to register the local influences readily under local circumstances. It may not be difficult to imagine a situation where the customary laws of a tribe must have come in conflict with the individual conduct. Such situations in extra tribal matrimony must have been too frequent in early stages and may be seen even today among these tribal communities. Although, it may not be possible to specify such instances but numerous folk songs among the Gaddis fully support

such possibilities. Ex-communication is known to be a general punishment among Gaddis when an individual took liberty with the customary laws. Obviously, tribal customary laws must be regarded as predominating over the family laws among the Gaddis. Identical inferences in respect of Gujjars may also be drawn. Being strictly endogamous, pastoral and semi-nomad, like Gaddis, the Gujjars are strict adherents of their tribal customary laws and any conduct of an individual or a family may fetch serious reprobation under their tribal customary laws. The reasons for it may not be far to seek. Semi-nomadic, buffalow grazors, the Gujjars families live in prolonged isolation and in such a situation strict adherence of the customary laws can maintain their identity. As such no deviation, whatsoever, it permitted from the tribal customary laws and the concept of family laws is alien to them. On the other hand the Pangwals, although having their origin in the mainland, living in the isolation of Pangi valley beyond Sach Pass in Chamba district have evolved such flexible forms of tribal customary laws where family laws may appear to have better say. In fact the group instinct, so inherent in tribal communities, is not to be seen among the Pangwals and it is the family laws of different families which regulate their family conduct.
In fact the Pangwals do not have a distinct tribal customary law of their own but what may be termed as Pangwal's customary law is a loose assaultment of Gaddis and Lahulas customary laws. Under such vague conditions the family laws among the Pangwals have been noted to take liberty in matrimonial cases. It is for this reason that a large number of songs recording extra tribal love affairs may be seen among Pangwals.

The situation among the Lahulas is almost identical to the Pangwals. In fact the Lahulas isolated in the Chandra Bhaga valley of Lahul region across Rohtang Pass have imbibed dual tribal traits i.e. they in majority belong to socio-cultural group of mainland but have acquired non-hindu traits under the primitive tribal influences of this region known as Bon Pa. Obviously, it may be hard to identify specific tribal customary law of the Lahulas and in the absence of such community laws the family law holds, sway.

An individual or a family in Lahul may easily take liberty with tribal customary law because of multi-racial character of the population designated as Lahulas.

The Scheduled tribes localised in Kinnaur and Spiti pockets region belong to non-hindu origin and
are largely endogamous. It is this character which has been responsible for the evolution of complimentary and uniform set of tribal customary laws and family laws. In fact it is the elaboration and extension of the family laws among them which have been crystallised into customary laws. But in these polyandrous communities the deterrent effect of tribal customary laws in the event of matrimonial infringement is quite lenient and liberal. The tribal customary law in case of matrimonial violation feels satisfied by closing its eyes than by frowning on it. That is why we may find numerous cases of extra tribal marriages in Kinnaur and Spiti areas in which the requirement of tribal customary law is fulfilled only by paying nominal monitory fines or compromise money. It may be for this reason that Kochas, i.e. outsiders were feared in Kinnaur.

Essentially, the family laws form the bases of tribal customary law and in strict endogamous and settled tribal society a conflict between the two may be unconceivable. But situation may arise where the family laws and the tribal customary laws may be put in conflicting situations. In such circumstances whether the family laws or the tribal laws will be considered decisive is a question to which different answers may be given depending upon different aspect
of the tribal society like (i) whether the society is nomadic, semi-nomadic, migratory or settled, (ii) whether it is endogamous or exogamous (iii) Polyandrous or monogamous (iv) the racial background. It has generally been noted from the study of scheduled tribes of Himachal Pradesh that among the migratory tribes the family laws have been given cognisence over their customary laws in settling matrimonial disputes. The question of customary laws versus family law may come up in such instances where two families belonging to different tribes having been settled away from their traditional homes and enter into matrimonial contract. In such circumstances, notwithstanding tribal customary laws, it will be the mutual settlement between the two families which will validate a matrimonial alliance.

Application of Local Laws on Transmigration:

Among the so called nomads (although this is an erroneous definition) the Gaddis are, in fact migratory folk. They move in a linear form to and from between their native place in Cadern and warmer second homes in the lower valleys according to season. As such, these people can, at best, be termed as migratory. These people migrate to the lower hills, particularly during the winter season and remain away from their original habitat for about six months in a year and
returning back during summer. Among the migratory tribes of Himachal Pradesh, the Gujjars may, in a limited sense, be termed as nomadic. They have been moving with their bufellows from place to place in a cyclic formation throughout the year and quite a good number of them even may not have a permanent living place. But after independence, due to the rehabilitation programme of the Government, the Gujjars have also shed off their nomadic habits and taken to settled living. In the recent past a tendency has been noted in these nomadic communities to purchase land in the lower region of the Pradesh and to construct permanent homes to be used as permanent shelters during their migration in winter season. Thus Gaddis are purchasing land and constructing homes in the lower shiwalic hills. Lahulas in the Kulu valley, Kinnuars in the Shimla hills in Shimla district and the Gujjars have been allotted lands by the Government in Chamba district for their permanent habitat. It has been observed during the field survey that certain families keep some members of their family, particularly younger generation, in those newly built houses in the lower regions so as to facilitate the migration of others during winter seasons. This tendency of acquiring 'second home' in the lower region is
increasing. The necessary consequence of this development is that the relationship of these families with other members of their communities is loosening and they are coming closer to the neighbouring non-tribal people in respect of their mode of living. On the other hand, there are certain families who have been migrated to the tribal areas and settled there permanently in the recent past. This trend has, however, been checked by the recent legislation of the government whereby a non-tribal has been debared to purchase land in the tribal areas. Those families who have already migrated had developed their relationship with the native people and are living in the similar circumstances and thereby acquiring the habits of the native people in respect of their way of life.

Thus there has been transmigration of tribal population in Himachal Pradesh. How far the local laws are applicable in personal and social matters in such cases depend upon the fact that to what extent the migrated family has given up its own religions and social usages. In case of immigrants who have taken to the primitive practices, the rule of law applicable seems to be the ratio-decidendi in Ma Yait Vs Maunc.

13. Himachal Pradesh Transfer of Land (Regulation) Act, 1968, Sec. 3 Cl.
Chit Maung. So if it is found that a migrated family has given up its own religious and social usages and has adopted the customs of a particular tribal community, then it should be governed by the customary law of that particular community and not by Hindu law.

The doctrine of English jurisprudence that lex loci determines the devolution of immovable estate does not apply in India. In India a Hindu is governed by the law of his personal status. The law of a particular school becomes the personal law and a part of the status of every family which is governed by it. Where any such family migrates to another province governed by another law, it carries its own law with it. The fact that the migration took place many centuries back would not alter the law to be applied, except in the case of those who have adopted the customs of their new domicile or usages different from those of their original personal law.

14. 48, IA, p. 553.
To determine the law *prima facie* applicable domicile is important. When once migration is proved, the personal law must be determined accordingly. When an original variance of law is once established, the presumption arises that it continues and the onus of making out this contention lies upon those who assert that it has ceased by confirmity to the law of new domicile. 17 Such presumption may be refuted by proof that the individual or his ancestors adopted the law, usages, and religious ceremonies of the country of his residence. 18 As such the tribal families who have established their second home in the non-tribal areas are to be governed by their respective customary law in dealing with other members of their community. But in their dealings with non-tribals they are not to be governed by their customary law but by the law of the land.

**Hindu Personal Laws and the Scheduled Tribes**

Generally speaking the scheduled tribes of Himachal Pradesh are undoubtedly hindus, but an attempt to apply the Hindu law to their family relationships will cause chaos. The case of Rattan Devi 19 is an

ample warning against such a course. In this case maintenance has been denied to a tribal woman by the court from her husband on the ground that she is not the lawful wife of her husband. The court has applied the provisions of the Hindu Marriage Act, 1955 to determine the validity of her marriage. Most of the tribal communities of Himachal Pradesh had settled in this region long before the present code of Manu or the Mitakshara were written. A study of post-vedic literature reveals that there has been a gradual metamorphosis of customary law with the religious, ethical, and social evolution of the Hindus.

Generally Hindus regard the Vedas as eternal, the Code of Manu as a direct emanation from Brahma himself and all the Sutras and smrities as equally sacred and equally true, but the historical jurisprudence considers these as documents of antiquity which record the contemporary social conditions and also the rules which the Hindu sages would wish to be followed. It cannot be doubted that the Dharam Sastras, though they undoubtedly enshrine many genuine observances of the Hindu race, still in some measures are merely ideal pictures of that which in the view of the Brahmans
ought to be the law.  

The Scheduled tribes of Himachal Pradesh, however, have retained their primitive social and family organisation and the tribal areas of Himachal Pradesh thus continue to be a repository of verifiable phenomena of ancient usages and juridical thought. These areas generally remained beyond the influence of Brahmanism as a result the personal laws of the tribal communities remained unsacredotal and secular though influenced by animism. The observance of great jurist Mayne about the limited applicability of Sanskrit law holds good for the Scheduled tribes of Himachal Pradesh. He observed:

Races who are hindu by name or ever Hindu by religion are not necessarily governed by any of the written treatises on law, which are founded upon, and developed from the smritis. Their usages may be very similar but may be based on principles so different as to make the developments wholly inapplicable.

For a true appreciation of the family law of the scheduled tribes we should not look to the Mitakshara or the codified hindu personal laws. Only a careful


examination of actual usages of the people is needed to determine the intrinsic coherence of and juristic conceptions underlying their family laws. Furthermore, in dealing with the tribal customary laws one should avoid the pitfalls of delusive analogies and a priori assumptions. The observed facts must be carefully scrutinised and the historical order of the growth of legal ideas should be well kept in mind. No conception can be understood except through its history. At the same time no hasty decision be made by comparing the particular practice being followed elsewhere.