3.1 CONCEPTUAL MEANING OF CUSTOM AND CUSTOMARY LAW

A Custom is any established mode of social behaviour within the community. Various dimensions of human behaviour which are prescribed by the community or society hint at the conceptual frame of custom. It is considered as one of the mechanisms of social control and an appropriate direction for humans to live in the community and to allow the society to perpetuate. Custom in Chamber’s 20th Century Dictionary means, ‘What one is wont to do: what is usually done by others: any of the distinctive practices and conventions of a people or locality, esp., those, of a primitive tribe’.

Custom has been defined and opined by various scholars, jurists and authors. “The word custom” as defined by Sapir, “is used to apply to the totality of behaviour patterns which are carried by tradition and lodged in the group, as contrasted with mere random personal activities of the individual.” R Radin states that “customs are regarded as habitual ways of conduct among social groups.” While Carter maintains that, custom is the “uniformity of conduct of all persons under like circumstances.” According to Holland, “custom is a generally observed course of conduct.”

In Subramanian Chettiar v. Kumarappa Chettiar custom has been defined as, “A particular rule which has existed from the time immorial and has obtained the force of

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2 Mohanti, ibid, at p 13.
4 Mahajan, ibid, at p 254.
5 AIR 1955 Mad 144.
law in a particular locality.” In *Hur Prasad v. Sheo Dayal*, custom has been defined as ‘Rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of law.’ Citing *Hur Prasad v. Sheo Dayal*, Sir Hari Singh Gour states that, ‘Custom is an established practice at variance with the general law.’

According to Sir John Salmond, “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 states that “The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign.”

“Custom”, says Austin, “is a rule of conduct which the governed observed spontaneously and not in pursuance of law set by a political superior.” Sir C.K. Allen also defines custom “as legal and social phenomenon growing up by forces inherent in society—forces partly of reason and necessity, and partly of suggestion and imitation.”

Citing the *Tanistry* Case (1908), Dav. 29, Viner states that, “A custom, in the intendment of law, is such a usage as hath obtained the force of law, and is in truth a binding law to such a particular places, persons and things which it concerns….But it is *ius non scriptum*, and made by the people only of such places where the custom is.”

In *Tanistry* Case, custom is further described in these words “it is *ius non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act agreeable to their nature and disposition, they use and practice it from

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10 Cited in, Tondon, *Supra* note 6 at p 167.
time to time, it is by frequent iteration and multification of the act that the custom is made and being used from time to time which memory runneth not to the contrary obtained the force of law.”

According to Keeton, ‘Customary law may be defined as those rules of human action established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as source of law, because they are generally followed by the political society as a whole, or by some part of it.’

The Hindu Code defines custom and usage as “Any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law…in any local area, tribe, community, group or family, if it is certain and not unreasonable or opposed to public policy.”

3.2 CLASSIFICATION OF CUSTOMS

Taking into consideration what has been discussed above, customs are habits of action or patterns of conduct which are generally observed by classes or groups of people. Such habits of action or pattern of conduct (customs) can be classified into— 1) Customs without binding obligation and 2) Customs with definite binding obligation.

3.2.1 Customs without Binding Obligation

Customs which are concerned with less important aspects of social life are covered in this category. Most societies have certain customs with respect to the kind of dress one is expected to wear on various occasions. For example, wearing a black dress at a funeral ceremony in England but, white in India. Well-established customs are observed at burials and other solemn ceremonies, etc. A large section of people observe customs of

14 Cited in, Tondon, Supra note 6 at p 168.
15 Section 3(a) of The Hindu Marriage Act, 1955; see also section 3(a) of The Hindu Adoptions and Maintenance Act, 1956.
certain kind for the funeral of their deceased relatives, irrespective of the fact that it may not be affordable for them. Whatever it may be, none of these customs is completely obligatory / binding. Their sanction, in many cases though powerful, is imperfect. No man is under an absolute compulsion to give a feast at the time of marriage or after the funeral of the deceased relative, etc. All these customs are followed due to the fear that non-observance of such customs may lead them to be socially outcaste. Such customs are non-binding in the sense that they are not obligatory to follow. People follow them due to the social pressure of public opinion. When a custom of this type is violated, society usually reacts by showing social displeasure or disapproval; but it has no sanction in the strict sense of the term. Such customs can be called as ‘Social Customs’.

3.2.2 Customs with Definite Binding Obligation

In this category those customs are covered “which in a more definite and stringent sense are regarded as the specific duties and obligations of men. Such customs may regulate the obligation of marriage and the upbringing of children, the transmission of property at death, or the modes of consummating and fulfilling agreements. Such customs do not pertain to the sphere of social formalities, outward decorum, or aesthetics; rather, they are concerned with the serious business of society, the work that must be accomplished in order to secure and guarantee satisfactory conditions for collective life.”16 Customs covered in this category are backed by sanction which is more certain in its operation than any other social customs. Such customs, if satisfy certain standards or tests, acquire legal character, and their violation is met by typical sanctions employed by the legal order. Such customs are enforceable and obligatory. Such customs can be further divided into Legal Customs and Conventional Customs.

For the purpose of the present study the researcher is more concerned with Legal Customs than to mere Social Customs.

3.2.2.1 Legal customs

‘Legal Custom’ occupies a place by itself in that its sanction is more certain in its operation than that of any other. “The effect of sanction”, writes Sir C. K. Allen,\(^{17}\) “is negative rather than positive: if the custom is not followed, certain desired consequences will not be brought about.” For example, if a particular custom is not followed, the marriage will not be treated as valid; the desired consequences of becoming a husband and wife will not be brought about. Children out of such marriage will not be treated as legitimate. Law, back by the opinion at the earlier stage and at later stages by the tribunals of the community, will forbid those relationships to be effected.

Customary rules are ‘legal’ in the sense that they are binding and obligatory rules of conduct (not merely of faith and conviction), and the breach of them is a breach of positive duty. In legal custom no option, however small, is left to the individual, as in other social customs. Legal custom is operative \textit{per se} as a binding rule of law, independent of any agreement on the part of those subject to it. According to Salmond, ‘A legal custom is one whose legal authority is absolute—one which in itself and \textit{proprio vigore} possesses the force of law.’\(^{18}\) Legal custom may further be classified as General Custom and Local Custom.

3.2.2.1.a General customs

General custom is that which prevails throughout the country and constitutes one of the sources of the law of the land. It prevails throughout the territory of the state and is observed by all the members of the society. There was a time when common law was considered to be the same as the general custom of the realm followed from ancient time.\(^{19}\)

\(^{17}\) Allen, \textit{Supra} note 11 at p 68.
\(^{18}\) Fitzgerald, \textit{Supra} note 8 pp 192 -193.
\(^{19}\) Mahajan, \textit{Supra} note 3 at p 268.
3.2.2.1.b Local customs

A local custom is a custom confined to a particular locality and constitute a source of law for that locality only. According to Salmond, “The term custom in its narrower sense means local custom exclusively.”

The western concept of local custom which applies only to a defined locality such as a district or a town, does not similarly apply to the Indian situation. Local custom here implies to something more than a geographical locality. In India, local custom may be divided into two classes – Geographical Local Customs and Personal Local Customs. These customs are law only for a particular locality, sect, or family.

‘Tribal custom’, says Sir Hari Singh Gour, ‘is a custom confined to a particular tribe, caste or community.’ 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.

Customs and the customary laws of the Adivasis, the subject-matter of the present study, fall in the latter category.

3.2.2.2 Conventional customs

According to 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.’ He further stated that, ‘In the language of English law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as

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20 Fitzgerald, Supra note 8 at p 198.
21 A kulachar, or family custom is a custom, the existence of which is confined to a single family. Gour, Supra note 7 at p 158.
22 Gour, Supra note 7 at p 158.
23 Fitzgerald, Supra note 8 at p 193.
usage. Usages are not laws *ex proprio vigore*.{superscript}24 A conventional custom or usage is a practice established by having been followed for a considerable period of time, and arising out of a contract between the parties; it does not arise out of its own force. Thus, a usage or conventional custom is an established practice which is legally 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.

Conventional custom may, again, be divided into two types—General Conventional Customs and Local Conventional Customs. General Conventional Customs are extensively practiced throughout the realm; whereas Local Conventional Customs are limited to a particular place or to a particular trade or transaction.

### 3.3 TRANSFORMATION THEORY OF CUSTOM INTO LAW

The general criterion which distinguishes social customs from legal custom has already been discussed above. The lines of demarcation between the two are fluid. While some customs are non-legal, in the sense that they do not have absolute binding obligation whereas, some customs have absolute binding obligation. Customs having absolute binding obligation are legal customs and are elevated to the status of law{superscript}25 if they satisfy certain judicial tests. At this point, it becomes necessary to consider the conditions under which the transformation of ‘custom’ into ‘law’ takes place. Broadly speaking, there are two theories regarding the question as to when custom is transformed into law. Those are the Historical and the Analytical theory of law.

#### 3.3.1 Historical School

Edmund Burke, who laid down the foundation of the historical school, pointed to history, habit and religion as the true guides to social action. Friedrich Carl Von Savigny and George Friedrich Puchta are the main exponents of the historical school of law. This

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{superscript}25 Article 13(3)(a) of the Constitution of India elevated the custom to the status of law.
school maintains that, law was primarily the expression of the legal convictions and practices of the community. According to this school, custom carries its own justification in itself, because it would not exist at all unless some deep-seated needs of the people or some native quality of temperament give rise to it. The growth of law does not depend upon the arbitrary will of any individual. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. Savigny calls it *Volkgeist*.

According to Savigny, ‘Law was not something that should be made arbitrarily and deliberately by a lawmaker’. It was a product of “internal, silently-operating forces.” It was deeply rooted in the past of a nation, and its true sources were popular faith, custom and the common consciousness of the people. Like language, the constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its national spirit (*Volkgeist*). To him, “law like language stands in organic connection with nature or character of the people and evolves with the people.” Therefore, according to Savigny, the true basis of positive law is its existence, its reality, in the common consciousness of the people. Custom therefore is the badge and not the ground of origin of positive law.

Puchta agreed with Savigny and carried the theory even further. To him, custom was not only self-sufficient and independent of legislative authority, but was a condition precedent of all sound legislation. He founded the basis of customary law in the collective purpose of the nation, and express legislation could be useful only in so far as it embodied this purpose as already manifested in custom.

The Historical theory of law has been criticized by many scholars and jurists. Without disrespect to the scholarly genius of Savigny and his followers, Allen criticizes their

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26 See, Bodenheimer, *Supra* note 16 at p 71.
27 See, Mahajan, *Supra* note 3 at p 259.
view as, ‘Many customs which have taken deep root in society do not appear to be based on any general conviction of their rightness or necessity, or upon any real or voluntary consensus utentium.’ Slavery, for example, was almost the universal practice of the ancient world. Slavery is frankly admitted to be ‘contra naturam’, whereas liberty is a ‘naturalis facultas eius quod caique facere libet.’ The truth is that slavery was a custom based upon the needs not of a popular majority but of a ruling minority. Many customs, again, says Allen, are so essentially local in origin that they cannot be said to arise from any widespread conviction…. The reason and utility on which (such) customs rest often arise from purely local conditions, and not from any widespread Geist. In cosmopolitanism of commercial customs and many other customs the Volkgeist loses much of its meaning.

According to Sir Henry Maine, "Custom is conception posterior to that of Themistes or judgments.” Themistes were judicial awards which were dictated to the King by the Greek goddess of justice. He explained, “Themistes, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judges.” Jethrow Brown also maintains that, “Custom is often posterior to judicial decision…. Under the pretence of declaring custom, judges frequently give rise to it.”

### 3.3.2 Analytical School

Austin, one of the main priests of the Analytical school, denies customs the force of law until they have been expressly recognized by the sovereign. This is consistent with his general doctrine of sovereignty, for, without the cachet of supreme authority, custom cannot be conceived as a command. To him a customary practice is to be regarded as a rule of positive morality unless and until the legislature or a judge has given it the force of law. According to this view, habitual observance of a custom, even though

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29 Allen, Supra note 11 pp 89 – 93.
30 Similar is the case with the custom of untouchability in India.
32 Maine, ibid, at p 4.
33 Mahajan, Supra note 3 at p 260.
34 Gray puts the courts in the centre of the legal system. According to him, ‘law is what the judges declare.’ The statute, precedents, opinions of the learned experts, customs and morality are the sources of law.
accompanied by a firm conviction of its legally binding character, does not suffice to convert the custom into law; it is the recognition and sanction of the sovereign which impress upon the custom the dignity of law. The sovereign may abrogate custom. A custom is law only because the sovereign allows it to be so. Custom is a source of law and not law itself. According to Austin, “A customary law may take the quality of legal rule in two ways: It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode (statute law) or it may be taken as a ground of judicial decision, which afterwards obtains as a precedent and in this case it is converted into a law after judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign.”

Analytical theory has also been criticized by many scholars and jurists. According to Allen, “custom grows up by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law or by any other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted by a supreme arbiter, nor from any claim of meum against tuum, but from practices prompted by the convenience of society and of the individual, so far as they are prompted by any conscious purpose at all.” He further stated that, the starting-point of all custom is convention rather than conflict, just as the starting-point of all society is co-operation rather than dissension. Vinogradoff also states that, “It is not conflicts that initiate rules of legal observance, but the practices of every day 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 detention, the origin of contract goes back to the customs of barter. Disputes as to rights

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35 Mahajan, Supra note 3 at p 261.
36 Allen, Supra note 11 pp 70 - 71.
in primitive society are pre-eminently disputes as to the application of non-litigious customs”\textsuperscript{37}

To conclude, both the theories contain some element of truth but that is only partial and not the whole truth. Austin denies customs the force of law. He calls it a ‘positive morality’. But, according to Allen, Austin ‘failed to explain satisfactorily why the body of rules which he classified as ‘positive morality’… lacked the true characteristic of law.’\textsuperscript{38} This is true, especially when customs grow up by conduct and are derived from the common consciousness of the people. Therefore, it is a mistake to measure its validity solely by the elements of express sanction accorded by courts of law or by any other determinate authority. But it is also true that many customs do no appear to be based on general conviction of their rightness or necessity, or upon any real or voluntary consensus utentium. It also appears that the historical school has undermined the creative role of the judges in molding and shaping the customs. In India, especially, in order that a custom may have the force of law, it is necessary that it should satisfy all the essentials or requirements of a valid custom.

\textbf{3.4 ESSENTIALS OF A VALID CUSTOM}

Essentials of a valid custom can, broadly, be classified into – Formative Essentials and Operative Essentials. Antiquity, Uniformity/Continuity, Certainty and Conscious acceptance as of right, etc. are the essential formative elements of a valid custom. Custom possessing these elements is \textit{prima facia} valid though it may be unenforceable if it is unreasonable, opposed to morality, public policy, express enactments of legislature and for want of proof; all these are invalidating elements. Therefore, in order to be valid, a custom must be reasonable, should not be opposed to morality, public policy, express enactments of legislature and must be strictly proved. All these are operative elements. Hence, in order to be valid custom must possess all the formative as well as operative elements.

\textsuperscript{37} Allen, Supra note 11 at p. 71.
\textsuperscript{38} Allen, Supra note 11 at p. 70.
3.4.1 Custom must be Ancient

The word ancient denotes that the custom must be of some antiquity. The term ‘ancient’ is equivalent to the expression ‘from time immemorial’.\(^ {39}\) 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.”\(^ {40}\) Salmond also states that, custom, to have the force of law, must be immemorial. It must have existed for so long a time that, in the language of law, “the memory of man runneth not to the contrary”.\(^ {41}\) In English law, the expression ‘time immemorial’ means ‘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.’\(^ {42}\) English law places an arbitrary limit to legal memory and fixes 1189 A.D. (accession of Richard – I) as enough to constitute the antiquity of a custom. But this was by no means the original interpretation. For instance, Professor Plucknett quotes Azo (d 1230) who said: ‘A custom can be called \emph{long} if it was introduced within ten or twenty years, \emph{very long} if it dates from thirty years, and \emph{ancient} if it dates from forty years’.\(^ {43}\)

The rule that ‘a custom in order to be legal and binding must have been used for so long that the memory of man runneth not to the contrary’ is neither opposite nor useful when applied to Indian conditions. In India, there is no such fixed date or technical rule to determine antiquity of a custom.\(^ {44}\) It will depend upon the circumstances of each case.\(^ {45}\) The courts are; therefore, free to decide the question upon the facts of each case. The courts have time and again expressed an opinion that if a custom is established to be 100

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\(^ {39}\) Umrinath Chaudhari v. Goureenath, (1870) 13 MIA 542, at p 549.  
\(^ {40}\) Mahajan, Supra note 3 at p 269.  
\(^ {41}\) Fitzgerald, Supra note 8 at p 201.  
\(^ {42}\) Fitzgerald, Supra note 8 at p. 201.  
\(^ {43}\) Dias, Supra note 24 at p 188.  
\(^ {44}\) However, the Calcutta High Court in Nolin Behari v. Hari Pada, AIR 1934 Cal 452 took a view that either 1773 or 1793 is material point of time to decide question of antiquity. In 1773 by the Act of Parliament the Supreme Court was established and after 1793 there is registry of regulation. That is why, according to Calcutta H.C. these two dates are to be taken into consideration while deciding the question of antiquity. The Calcutta H.C.’s view has been questioned by many jurists and judges.  
years old it is sufficient antiquity to be called ancient.\(^{46}\) Derrett thinks that if it is 40 years old it is enough.\(^{47}\) Section 3(a) of the Hindu Marriage Act, 1955 lays down that custom to be valid must have been observed for a ‘long time’. What the law requires before an alleged custom can receive the recognition of the court and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or district or country; and the course of practice upon which the custom rests must not be left in doubt, but proved with certainty.\(^{48}\) If a custom is found to have existed at a particular date within living memory, it must be taken to have the ordinary attribute of a custom that it is ancient, and may assume to have existed prior to that date.\(^{49}\)

Sir Hari Singh Gour stated that, the custom must, in theory, at least, be of an origin as ancient as the law itself to which it constitutes an exception.\(^{50}\) This is true, especially; because, every custom is in some fundamental respect an *exception* from the ordinary law of the land.\(^{51}\) Sir Hari Singh Gour also maintains that, ‘Custom is an established practice at variance with the general law.’\(^{52}\)

### 3.4.2 Custom must be Uniform and Continuous

One of the essential elements of a valid custom, as has already been discussed above, is that, it must be ancient. From the fact that the custom is ancient, it follows that it must be uniform (and not variable), definite and continuous, for these are the elements to establish its immemorial use. If there is discontinuance, such discontinuance destroys its stability.

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\(^{46}\) Umritan Chaudhari, *Supra* note 39.
\(^{47}\) Cited in, Singh, Salam Pramodkant, Faculty of Law, Gauhati University, “A Critical Analysis of Customary Rites and Ceremonies of Meiteis in the Light of the Hindu Marriage Act, 1955”, (2006), a thesis submitted to the University of Gauhati, at p 62. It has also been held in *N. Venkata Subha Rao v. Trirumala D. Bhujangayya*, AIR 1960 AP 412 that, although the plaintiff’s witness had given instances covering nearly a period of 40 years it was not unreasonable to assume that the evidence of instances showed that the custom had been or must have been in existence even before the period so covered.
\(^{50}\) Gour, *Supra* note 7 at p 161.
\(^{51}\) Allen, *Supra* note 11 at p 130.
\(^{52}\) Gour, *Supra* note 7 at p 156.
If a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all. Blackstone says that, interruption within legal memory defeats the custom ‘continua dico ita quod non fit legitime interrupta’. It is immaterial whether such discontinuance was accidental or intentional. In its effect it amounts to an abandonment of the custom.

When it is said that the custom must be uniform what is implied is that, within its circle of authority, it must have been given effect to as often as there was occasion to have recourse to it. “A custom is not uniform”, says Sir Hari Singh Gour, “if it is intermittent and not continuous. But law distinguishes the interruption of a right from the interruption of its enjoyment. If there is interruption of right, no matter for how short a period the right is extinguished, and if the right is revived it may become the starting point of a new custom, but it ceases to be the continuance of the old custom, and if the new right arose within the time of legal memory so that its commencement is known, it ceases to be an ancient custom.”

From the fact that the custom must be uniform it follows that it must be consistent. Custom must be consistent with each other. Two contradictory customs cannot exist in the same place with reference to the same people. Therefore, according to Blackstone, “One custom cannot be set up in 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 are contradictory customs cannot both be good, nor both stand together.”

53 Allen, Supra note 11 at p 136.
54 Gour, Supra note 7 at p 163.
55 Mahajan, Supra note 3 at p 272.
3.4.3 Custom must be Certain

In order to be valid, custom must be certain and definite. Willes C.J. in Broadbent v. Wilkes observed that, 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?’\(^{56}\) To the same 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.’\(^{57}\) Custom must be certain in respect of (i) its nature; (ii) its locality; and (iii) the persons whom it is alleged to affect.

Custom is observed ‘as of right’. Therefore, in the first place, the right asserted as a customary right, must be clearly defined and definitely certain. For if the right is uncertain, the custom itself cannot be proved. Secondly, the custom must be certain as regards the locality where it is alleged to exist. Its local extents must be defined with reference to the geographical division of land, such as district, town, village, etc. Thirdly, custom must be certain in respect of the person or classes of persons to whom it is made applicable.

3.4.4 Custom must be Consciously Accepted as of Right

Opeino necessatis, that is, Conviction on the part of the members of the community that a custom is legally binding and the source of enforceable rights and obligations is one of the most essential elements of a valid custom. It is this conviction which distinguishes a legal custom from social custom. Therefore, in order to be valid, custom must have been consciously accepted as having the force of law. It must have been observed as of right and must have been enjoyed peaceably. Allen states that, the public which is affected by the usage must regard it as obligatory, nor as merely facultative.\(^{58}\) According to Sir Hari Singh Gour, enjoyment of custom must be “as of right, and therefore, neither by violence

\(^{56}\) See, Allen, Supra note 11 at p 139.
\(^{57}\) Allen, Supra note 11 at p 139.
\(^{58}\) Allen, Supra note 11 at p 137.
nor by stealth, nor by leave asked from time to time”.\textsuperscript{59} Dias puts it as, \textit{nec vi nec clam nec precario}.\textsuperscript{60} For without this there is no evidence that it exerts obligatory pressure to conform.

According to Bodenheimer, custom must be accompanied by the \textit{opinio juris} or \textit{opinio necessitatis} before a court can carry it into effect as a rule of law. This requirement means that a custom cannot be recognized as a rule of law in the absence of a firm conviction on the part of the members of the community that the custom is legally binding and a source of enforceable rights and obligations. Custom which flow merely from feeling of sympathy or propriety or from habit are not capable of generating law.\textsuperscript{61}

\textbf{3.4.5 Custom must be Reasonable}

\textit{Malus usus abolendus est}, that is, a custom must be reasonable is another essential requirement of a custom. The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility. This does not mean that the courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their judgment. According to Salmond, “Custom, in order to be deprived of legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of expectations and arrangements based on its presumed continuance and legal validity.”\textsuperscript{62}

Reasonableness of a custom is an essential requirement of its validity. However, it cannot be said that custom is always founded on reasons. 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, from place to place. Therefore, whether a custom is reasonable or not is determined by the contemporary values of every society, though there are certain rules

\textsuperscript{59} Gour, \textit{Supra} note 7 at p 165.
\textsuperscript{60} Dias, \textit{Supra} note 24 at p 188.
\textsuperscript{61} Bodenheimer, \textit{Supra} note 16 at p 374.
\textsuperscript{62} Fitzgerald, \textit{Supra} note 8 at p 199.
or practices which are considered unreasonable at all times and in all societies. The law courts will not enforce unreasonable customs, for law will not allow what is unreasonable or inequitable in spite of the fact that the people or a class of people in a locality has given their long acquiescence to a particular practice, if it finds that to allow it would do more harm than what might result by its disallowance.

According to Allen, the unreasonableness of the custom must be proved and not its reasonableness. This is not a mere distinction without difference, for it seriously affects the onus of proof. If any party challenges a custom it must satisfy the court that the custom is unreasonable. The question of reasonableness is one of law and not of fact. The standard which the courts apply has been defined by a Divisional Court of the King’s Bench as ‘fair and proper, and such as reasonable, honest and fair-minded men would adopt’. Brett J. states the test more broadly: ‘Whether it is in accordance with fundamental principles of right and wrong.’ It has been held in Mahamaya v. Haridas that, ‘A custom is unreasonable if it is injurious to the multitude and prejudicial to the commonwealth.’ On the point of standard of reasonableness, Sir Edward Coke comments: ‘This is not to be understood of every unlearned man’s reason, but of artificial and legal reason warranted by authority of law.’

To ascertain the reasonableness of a custom, it must be traced back to the time of its origin. 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 whereupon 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 principal, it has power in modern communities to put an end to the custom.

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63 Allen, Supra note 11 at p 140.
64 Produce Brokers’ Co. v. Olympia Oil and Coke Co., [1916] 2 K. B. 296 at p 298.
66 I.L.R. 42 Cal. 455 at p. 475.
67 Allen, Supra note 11 pp 145 – 46.
In short, custom once indisputably proved is law, but the courts are empowered on sufficient reason to change the law which it embodies.

3.4.6 It should not be Opposed to Morality, Public Policy or an Express Enactment

A custom to be valid must not be opposed to principles of morality or public policy and must not be expressly forbidden by an enactment of the legislature.

A custom, to be valid, must not be immoral. The court cannot enforce immoral custom. There is, however, no fixed test or strait jacket formula to judge the morality of a custom. The question what customs are ‘immoral’ must be left to the conscience of the court. Morality is a necessary social convention as to which all agree up to a certain extent; but beyond it, it is a matter of opinion. A European would, for example, regard both polygamy and polyandry as highly immoral, but both these institutions are deep rooted in the Indian soil and though polyandry is now fast dying out, polygamy is a popular oriental custom. A Muslim, especially, may not think polygamy as immoral. But judging the validity of such customs, the courts generally adapts itself, as far as possible, to the standards of morality of the sect, tribe or caste to which the custom is sought to apply, remembering always that it has not only to pay due regard to the sentiments of the community but also to the general welfare of the society. A custom which is abhorrent to decency or morality however long practiced and recognized by a particular community can find no kind of enforcement by a court of law. A good many cases have arisen where the courts have refused to recognize and enforce certain customs on the ground that they are immoral. In Balusamy Reddiar v. Balkrishna Reddiar, marriage with the daughter’s daughter was held illegal as being abhorrent to morality though there was such a custom in the Reddiar community of Tirunelveli district. The custom by which the marriage ties could be dissolved by either husband or wife against the wish of the divorced party on payment of a sum of money was held immoral.

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68 AIR 1957 Mad 97.
A custom, otherwise good, may become void on the ground of public policy. Like morality, in public policy also no fixed test or strait jacket formula is available to judge whether the alleged custom is or is not opposed to public policy. Subba Rao J. in *Gherulal v. Mahadeodas*, described the doctrine of public policy as: “untrustworthy guide”, “variable quality” and “unruly horse”. The general words ‘opposed to public policy’ may cover a very wide range of topics. With reference to the prevailing social values, customs having “tendency to injure public interest or public welfare” are opposed to public policy. In relation to custom, the term “public policy” in its broadest sense means that something which the court will, on “considerations of public interest”, refused to enforce it. In *Fender v. St. John Mildmay* (1938) AC 1, Lord Atkin observed: ‘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 inference of a few judicial minds’. In *Budansa v. Fatima Bi*, a custom which would enable a woman to marry again during the lifetime of her husband without any defined rules by the marriage with the first husband is dissolved before the second marriage is contracted was held to be contrary to public policy and morality. Similarly a custom of paying bride-price to the parents of a girl is held to be void.

A custom must not be in conflict of with the statute law of the country. According to Coke, “No custom or prescription can take away the force of an Act of Parliament.” A statute can abrogate a custom and not vice versa. ‘Customs’, says Allen, ‘are local variations of the general law. But they must not be more than variations. It is one thing for a custom to be a local variation of the general law, another for it to negate the very spirit of law.’ It is a well-established principle that though a custom has the effect of overriding the law which is purely personal, it cannot prevail against a statute law, unless it is thereby saved expressly or by necessary implication. Thus section 4 of the Hindu

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70 AIR 1959 SC 781.
72 AIR 1914 Mad 192.
74 Mahajan, *Supra* note 3 at p 272.
Marriage Act, 1955 lay down that, save as otherwise expressly provided in this Act, any custom or usage immediately before the commencement of the enactment shall cease to have effect with respect to any matter for which provision is made in this statute. Thus custom must yield where it conflicts with statute. Therefore, it has been held in Prem Nath v. Jasoda\textsuperscript{76} that, a custom compelling the second husband to pay compensation to the first husband’s family in respect of the expenses of the first marriage amounts to a restraint on a widow’s right to remarriage and cannot be enforced. Similarly, it has been held in Padala Latchmna v. Mutchi Appalaswami\textsuperscript{77} that, a custom prevailing in Golla community in Sirkakulam district of Andhra Pradesh, according to which a widow remarrying forfeits her claim to the jewellery and other gifts given to her at the time of marriage either by the husband or her relations is directly opposed to Section 5 of the Hindu Widows’ Re-marriage Act, 1956 and cannot be recognized as valid.

3.4.7 Clear Proof of Existence of Custom

Another essential requirement of a valid custom is that, it must be established by clear and unambiguous evidence; where it is in derogation of the general law it is construed strictly. Since custom claims a privilege out of the ordinary course of law, it must be strictly proved, stricti iuris. Custom goes back to the distant ages; they are set up with various motives for the furtherance of various interests, and the initial problem is always to decide whether the custom prayed in aid has a good foundation \textit{in fact}.

3.5 PROOF OF CUSTOM

Under the Indian law, custom is a question of fact and the burden of proof is on the party who relies on the custom\textsuperscript{78}. There is no presumption that a particular person or class of persons is governed by custom. A custom which is repeatedly brought to the notice of the courts may be held to be introduced into law without the necessity of proof in each

\textsuperscript{76} AIR 1953 Ajmer 7.
\textsuperscript{77} AIR 1961 AP 55.
\textsuperscript{78} Mst. Kripal Singh v. Bachhan Singh, AIR 1958 SC 199.
particular case. Therefore, when a custom is recognized by the courts for a long time, it is not necessary to prove it each and every time as the court can take judicial note of the same. It has been held in *Saraswati Ammal v. Jagadammbal* that, a custom cannot be extended by analogy. It is not a matter of theory but of fact, and cannot be established by theoretical generalization, or by priori method. 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 to court to extend custom by logical process. In the absence of authoritative statement of custom it can only be established by instances 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 considerations affecting the symmetry of the customary system.

While enforcing custom or while considering the question whether a custom has been proved, the courts should not draw any analogy or guess what the custom is or should be; it should go by evidence and see what the custom really is and whether it has been proved. Custom must be proved by evidence and the 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.

Rattign’s Digest lay down that a custom may be proved by any one of the following modes—

(a) By opinions of persons likely to know of its existence, or having special means of knowledge thereon.

(b) By statements of persons who are dead, or whose attendance cannot be procured without reasonable delay or expense, provided they were made before any

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80 AIR 1953 SC 201.
controversy as to such customs arose, and were made by persons who would have been likely to be aware of the existence of such custom, if existed.

(c) By any transaction by which the custom in question was claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(d) By particular instances by which the custom was claimed, recognized or exercised, or in which its existence was disputed, asserted or departed from.

(e) By village oral traditions.

(f) Written memorials, such as the Wajib-ul-arz or the Rewaz-i-am.

(g) By judicial decisions.

(h) By authoritative manuals of customary law.\(^81\)

3.5.1 Proof of Custom by Opinions

Opinion as a rule are inadmissible in evidence, as a witness is required to depose to facts of which he knows, and not merely of what he thinks. But to this rule there are certain exceptions wherein opinions are admissible in evidence. The existence of a custom can be proved by the opinion of a person likely to know of its existence, or having special means of knowledge thereon as provided under sections 48 and 49 of the Indian Evidence Act, 1872. The proof of custom should consist of those deliberate and well considered opinions 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”. Section 48 lays down that when a court has to decide as to existence of any general custom or general right, the opinion of persons, who would have known the custom if it existed, is relevant. Section 49 deals with family customs or customs of any body of men.

It is obvious from the provisions of the sections that only persons who are “likely to know” about the existence of a custom in question are competent to give opinion evidence. And it is for the court to appreciate their evidentiary value. Opinion is valueless without the grounds upon which it is based. This is true alike of an expert as of a layman witness. Both must disclose the data which the court is free to examine. The opinion must

\(^{81}\) Cited in, Singh, Salam, Supra note 47 pp 70-71.
not be merely the repetition of a hearsay (*ipse dixit*) but a reasoned conclusion drawn from facts and conduct, tradition, observation, inquiry, research and study upon which a reasonable man forms his judgment. It is not absolutely necessary for the person giving his opinion, that he should have personal knowledge about the facts sought to be proved by him. However, such a witness should possess sufficient experience which would go to suggest that he is “likely to know” of the existence of the custom sought to have been proved by him.

It is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state as the grounds of that opinion the information received from dead persons. But it must be the experience of independent opinion based on hearsay and mere repetition of hearsay.\(^\text{82}\) Mere *ipse dixit* is not admissible. In *Chunni Lal v. Jai Gopal*, Bhinde,\(^\text{83}\) J., observed: “It is true that opinion of persons belonging to the same tribe on the question of custom are relevant…, 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. One instance would not prove a custom.\(^\text{84}\) However it has been held in *Hubraji v. Chandrabali*\(^\text{85}\) that, specific instances need not be proved by the witness.

### 3.5.2 Proof by Statements of Persons who are Dead

According to section 32(4) of the Indian Evidence Act, 1872, 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. 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 a 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


\(^{83}\) AIR 1936 Lah 551.


\(^{85}\) AIR 1931 Oudh 89.
as a declaration of public right. And the declarant must be disinterested at the time when he made the statement. If it is proved that the speaker had some interest to misrepresent, his declaration would be rejected. The reason why the statements of the deceased persons are admitted upon, the public right made *ante litem motem* (when there was no existing dispute respecting them) is that these declarations are considered as disinterested dispassionate and made without any intention to serve a particular cause or mislead the posterity.  

3.5.3 **Proof of Custom by Transaction**

Section 13(a) of the Indian Evidence Act, 1872 lays down that any transaction by which the rights or customs in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence is relevant to prove the existence of custom or right. Therefore, 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 or non-existence of such a custom may be proved by that transaction. In *Channoo Mahto v. Jang Bahadur Singh*, it has been observed that, “A transaction as its derivation denotes is something which has been concluded between persons by a cross or reciprocal actions as it were.” Therefore, a transaction is something already done and completed. Transaction as contemplated under section 13 is a genuine and *bona fide* transaction. Therefore, *benami* transaction which is not meant to be acted upon is fictitious transaction and in the eye of law is not a transaction at all.  

Section 13(a) speaks of transactions “by which” the right or custom is created, asserted, etc., and not those “in which” the right or custom is asserted, etc. The nature and scope of the transaction is thus the pertinent consideration.

Section 13 is very wide, and includes judgments, decrees and orders in civil, criminal and revenue cases in which a custom was claimed, decreed, or disallowed and in fact any business or dealing in which the question of custom was gone into. Not only judicial or

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86 Batuk Lal, *Supra* note 82 at p 482.
87 AIR 1957 Pat 293.
quasi-judicial records, but acts, conducts and proceedings of such bodies, as the caste *panchayat*, arbitrators and the like, would be admissible under this section. It can broadly be said that, any document bearing on the custom may be proved in evidence.

### 3.5.4 Proof of Custom by Instances

The proof of custom by instances is, probably, the largest aspect of proof of custom. “The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced.”

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. Section 13(b) of the Indian Evidence Act, 1872, deals with “instances”. It says, where the question is as to whether a certain right or custom exists, the particular instances in which the right or custom was claimed, recognized, exercised, or in which its existence was disputed, asserted or departed from may be proved. The term “instance” means an example; something which has once occurred. According to Batuk Lal, it must be borne in mind that the instances in which the right or custom was claimed, recognized, exercised, etc., must be instances prior to the suit in question, because this clause is in the past tense throughout.

In customary law it is an 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 right or custom may raise a presumption that the 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 custom, the less probability is there for anybody attempting to controvert it. According to Robertson J., “The very best evidence of a custom is that which shows that it has been followed consistently in a number of instances without

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89 *Lachman v. Akbar*, ILR 1 All 440, Cited in, Gour, *Supra* note 7 at p 176.
80 Batuk Lal, *Supra* note 82 at p 482.
dispute." The evidence of instances is very important to prove a custom but its absence is not fatal to the proof of custom. The instances, though an important evidence of custom, are not absolutely essential to its establishment. It has been observed by Privy Council 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 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.

So far as instances are concerned, no hard and fast rule can be laid down as to how many instances are sufficient to make out a valid custom. There should, however, be such a multiplication or aggregation of instances as is sufficient to establish a tangible recognition of custom as obligatory.

3.5.5 Proof by Village Oral Traditions

Village oral traditions have been considered to be a good evidence of custom. The deliberate and well-considered opinion of the people living and governed by custom is a recognized mode of proof of custom. The question ‘whether a particular custom does or does not prevail in any particular tribe’ is a matter on which tribesmen themselves are in the best position to pronounce an opinion. Whenever questions as regards 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 or 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.

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91 Saddan v. Khemi, 15 PR 1906. Cited in, Singh, Salam, Supra note 47 at p 77.
92 Ahmed Khan v. Channi Bibi, AIR 1925 PC 267, Cited in, Ningshen, Supra note 13 at p 88.
A rule of custom may be established and held to of binding force, even where no instance 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 has been held by their Lordship of the Privy Council in Ahmed Khan V. Channi Bibi\textsuperscript{93} that, custom can properly be proved by general evidence given by 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 succeed for life or till their marriage to the land of their deceased brother which was not ancestral quo reversioners. It was the most important consideration that not less than fourteen lambardars had deposed to this custom. Thus, village oral traditions is an important evidence to establish the existence of a custom.

**3.5.6 Proof of Custom by Written Memorials**

Custom can be proved by entries in any public document made—

i. By a public servant in the discharge of his official duty, or

ii. By any other person in the performance of a duty especially enjoined on him by the law of the country in which the public document is kept.

Section 35 of the Indian Evidence Act, 1872 speaks of relevancy of entries in public or official book made by a public servant. An entry to be admissible under this section—(1) must be contained in any public or official book, (2) must be made by a public servant, (3) in the discharge of his official duty or by a person in performance of duty specially enjoined by the law of the country, an (4) must be stating relevant factor in issue. Thus, records of rights or customs prepared by public officers (settlement officers) are important pieces of evidence, e.g., \textit{Wajib-ul-arz}\textsuperscript{94}, \textit{Riwaj-i-am}, mutation entries, etc.

\textsuperscript{93} AIR 1925 P.C. 267.

\textsuperscript{94} Initially, \textit{wajib-ul-arz} was the record of right containing statement of custom prevailing in the villages. They were prepared as village wise record of custom. Later on, the task of preparing \textit{wajib-ul-arz} was given up, and, instead, \textit{riwaj-i-am} were prepared; they were prepared district-wise. \textit{Rewaj-i-am} in the Punjab is a record of local tribal customs prepared by an officer deputed for that purpose.
3.5.7 Proof of Custom by Judicial Decisions

A decision in a case of custom is not a judgment in *rem*. It is only relevant under section 13 of the Indian Evidence Act, 1872 as judicial instance of the custom being recognized. A judgment in a question of custom is relevant not merely as an instance under section 13, but also under section 42 of the Indian Evidence Act, 1872 as evidence of the custom. Section 42 of the Act says that, judgments, orders or decrees (other than those mentioned in section 41) are relevant if they relate to the matters of public nature, but such judgments, orders or decrees are not conclusive proof of that which they state. It has been held in *Ram Kishore v. Kabindra*\(^{95}\) that, a judgment as to existence or non-existence of a custom is a good evidence to prove the existence or non-existence of that custom. Section 42 permits custom to be proved by a judgment, decree or order not *inter partes*, in which it was recognized. But mere production of judgment, however relevant, is not conclusive proof of custom. Judgments under section 42 are only a piece of evidence of custom. As regards its evidentiary value, much depends upon the nature of the enquiry, the evidence adduced and the decision given thereupon. A judgment given *ex parte* cannot command the same value as one given after contest, or one suffered on compromise resulting after a contest.\(^{96}\) All these judgments cannot be placed on the same footing.

The general opinion seems to be in favour of the view that, a decision on custom only becomes relevant instances under section 13 of the Indian Evidence Act, 1872, 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 have to be proved, section 57 of the Indian Evidence Act, 1872 provides an exception. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decision is sufficient to prove the custom. In *Ujagar Singh v. Mst. Jeo*,\(^ {97}\) 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.

\(^{95}\) AIR 1955 All 59.
\(^{96}\) *Durga Devi v. Ranyan*, (1911) P.R. 91, Cited in, Gour, *Supra* note 7 at p 174.
\(^{97}\) AIR 1959 SC 1014.
3.5.8 Proof by Authoritative Manuals of Customary Law

Authoritative manuals of customary law are sometimes considered as valuable evidence for proof of customary law. The courts freely admit into evidence published works of repute on the subject of custom. But, of course, such works must be those compiled to instruct and not merely to entertain readers. Works such as Sherring’s *Law of Caste*, Steele’s *Law of Caste*, Tupper’s *Punjab Customary Law*, Rattigan’s *Digest on Customary Law of Punjab*, Sant Ram Dogra’s *Code of Tribal Custom*, Craik’s *Customary Law of the Amritsar District*, etc. fall into the former category and command serious attention. Such manuals or digests as evidence of proof of custom have to be used with caution. In *Jagat Singh V. Ishwar Singh*, rejecting a statement of custom in Craik’s Customary Law being opposed to the statement of law in Rattigan’s Digest, Abdul Qudir J. observed: “on this particular point the manual (Craik’s *Customary Law of the Amritsar District*) states the proposition too broadly to be accepted as correct in as much as it is materially at variance with the view embodied in Article 48 of Rattigan’s Digest...” It has been held in *Jai Kumar v. Sher Singh* that, although Rattigan’s Digest is of the highest authority on the question of customs 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 conflict between an entry as to custom in *Riwaj-i-am* and Rattigan’s Digest, the presumption is the entries in *Riwaj-i-am* are correct.

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98 AIR 1930 Lah 700 (2).
99 (1960) 3 SCR 975.