

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Custom as a Source of law

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Types of Customs

There are two broad categories into which customs can be divided. These are customs without binding obligation and customs with legally binding obligations.

Customs without binding obligation

These customs are not enforceable by law, but are still prevalent in society and have societal sanctions attached to them.

For example, every society has some customs about how to dress, how to address elders or how to conduct marriages etc. These are not legally binding but can still have powerful sanctions attached to them. For example, if a person comes to a funeral wearing colourful clothes, he will be ostracized and alienated by others around him.

These customs, although not binding, hold tremendous importance in society and must be followed uniformly for efficient functioning of society.

Every one of these customs are pursued because of the fear that non-recognition of such customs may lead them to be socially outcasted. Such customs are non-authoritative as in they are not mandatory to pursue. Individuals follow them due to the social pressure of society. At the point when a custom of this sort is abused, society typically responds by demonstrating social dismay or ostracization; however it has no sanction in the true sense of the term. Such customs can be called as 'Social Customs'.

Customs with binding obligations

In this classification those customs are discussed which in an objective and stringent sense are viewed as the particular obligations and commitments of men. Such customs may direct the commitment of marriage and the upbringing of children, the transmission of property etc.

Such customs don't relate to the circle of social conventions, outward propriety, or style; rather, they are worried about the genuine business of society, the work that must be practiced in request to verify and ensure necessary conditions for community living.

Customs under this category have sanctions which are more stringent than the previous category. If these customs gain widespread acceptance, they acquire legal character. On violation of these customs, adequate penalty is incurred by the violator as per the statute that governs the particular custom.

These can be further divided into Legal Customs and Conventional customs.

Legal Customs

The sanction of a legal custom is certain and absolute. It is negative in its operation, in the sense that, if the custom is not followed, certain desired consequences would not take place. For example, if you do not follow the custom of marriage properly, that marriage will be considered void and any children born out of that marriage will be considered illegitimate.

Legal custom is operative *per se* regardless of any agreement of participant parties contrary to the custom. They are unconditional and absolute in their function and take up the form of law.

They are obligatory rules of conduct on not based on faith or convention.

According to Salmond, Legal Customs have legal obligation in itself or *proprio vigore*. He divides legal customs further into General and Local Customs which have been discussed earlier.

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.'

A conventional custom or usage is a practice which comes into practise due to it being followed for a long period of time and arising out of a contract between the parties; it does not have any legal character in itself. Thus, a usage or conventional custom is an established norm which is legally enforceable, 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 a particular territory; whereas Local Conventional Customs are limited to a particular place or to a particular trade or transaction.

Requisites of a Valid Custom

Reasonability

A custom must be in conformity with basic morality, the prevailing understanding of justice, health and public policy. If it is not reasonable in its origin or practise, it cannot be considered a valid custom. For example, Sati was an accepted custom once, but with the modern moral understanding, it is reprehensible, and therefore it cannot be considered a custom today.

This, however, does not mean that every custom must be perfect in its morality or ethical concerns, or contain eternal wisdom, it just needs to be relevant to contemporary times, useful and capable of being legislated on.