

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

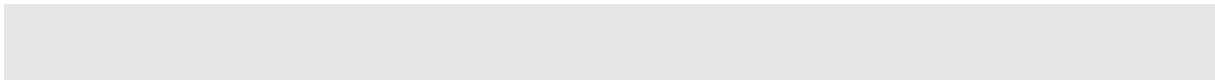
Part I

Paper -1

Topic- Custom as a Source of law

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Conformity with Statute Law

No custom can be in contravention to the existing law of the land. Any practise, however widespread and accepted, if found in violation of any statute of a said territory cannot be considered a custom.

Certainty

It must be clear and unambiguous as to what the custom is and how it is practised. A custom can only hold up in a court of law when it is not indefinite or uncertain. It needs to be absolute and objective in theory and in action.

Consistency

A custom must be consistent with the general principles of Law which form the basis of every law or statute which exists. These principles form the basis of ideas like Justice, fairness and liberty, and every custom must be in consonance with these.

Antiquity

It is necessary for the custom to have been followed for time immemorial. The practise must be so ingrained in society, that legislating it seems like the only natural step. Recent or modern practises cannot be custom until they become firmly established in society.

Continuity

A custom must not be interrupted or its practise must not be sparse. It needs to be continuing for time immemorial without any interruption.

Must be peaceful in its practise

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

Must not be opposed to Public Policy

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

Must be General or Universal

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

Theories of Customs

Historical Theory

As indicated by this school, custom contains its own legitimacy, since it would not exist at all except if some profound needs of the general population or some local nature of societal needs offer validity to it.

The development of law does not depend upon the subjective will of any person. It is because of the knowledge of the communities and civilizations that have existed throughout history.

Custom is achieved from the common conscience of the general population. It springs from an innate feeling of right. Law has its reality in the general will of the people. Savigny calls it “Volkgeist”.

Analytical Theory

Austin was the main proponent of the Analytical theory. For him, Customs did not have any legally binding force in themselves. Their legal character is always subject to the assent of the Sovereign. For him, customs were merely reflection of law, and were not ‘real law’. Customs need the modification and the approval of judges, jurists or rulers for them to have any binding force on people. This is in consonance with his idea that all law is the ‘Will of the Sovereign’.