

**RMM LAW COLLEGE SAHARSA**

**JURISPRUDENCE**

**Part I**

**Paper -1**

**Topic- Custom as a Source of law**

**Lecture Notes by- Indra Bhushan Singh**

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Customs are the earliest sources of law and form the basis of the English Common Law system as we see it today. They can be described as cultural practises which have become definite and backed by obligation or sanction just by virtue of widespread practise and continue presence.

Definitions

John Salmond

*“Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.”*

For Salmond, a valid custom has absolute legal authority which as the force of law in itself. He divides Customs into two:

1. General Custom – A general custom has the force of law throughout the territory of a state. For example, the Common Law in England.

2. Local Custom – The local custom are those which operate have the force of law in a particular locality. The authority of a local custom is higher than that of general custom.

C.K. Allen

C.K. Allen 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.”*

J.L. Austin

*“Custom is a rule of conduct which the governed observe spontaneous and not in pursuance of law settled by a political superior.”*

Austin’s ideas were often seen in contravention to customary law because for him, the political superior was the only source of law and customs were not ‘real law’. They needed the assent and command of the Sovereign to be considered law.

Robert 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.”*

Origin of Customs

In primitive societies, there was no external authority over people, yet people organized themselves in cohesive groups with a mechanism for fairness and liberty.

People developed rules and regulations through spontaneous reaction to their circumstances as well as a coordinated conscious decision to arrive at them.

Eventually, people started recognizing traditions, practises, rituals which were prevalent in a certain territory or group, and saw how they formed a systematized approach to social regulation.

In Britain, Jurists and legislators started studying these patterns, recording their prevalence, usage and applicability. These came to be known as customs, which were then formalized and put into legislation in the Common Law of England.

There are two philosophers with alternate views as to how customs originate.

Sir Henry Maine

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.

He described the development in distinct steps. These are:

1. Law by rulers under divine inspiration

At the first stage, law was given by rulers who sought divine sanction for their commands. They were believed to be messengers of God, laying out the law for the people.

## 2. Developing of Customs

Gradually, as people get into the habit of following the dictates of their rulers, they develop into customary law, and becomes a part of people's daily living.

## 3. Knowledge of law in the hands of priests

The knowledge of customs and practises is then studied by a minority, primarily religious people. This is possible due to the weakening of the power of the rulers over people. Priests study customs, recognize patterns, understand their relevance and formalize customs.

## 4. Codification

The last and final stage is that of codifying these laws. Priests study customs meticulously and put it on paper. This code is then promoted and spread to newer areas and territories.

## T. Holland

According to Holland, "custom is a generally observed course of conduct".

Holland says that custom originated in the conscious choice by the people of the more convenient of the two acts.

For Holland, customs grow through imitation. In early political societies the king or the head of the society did not make laws but administered justice according to the popular notions of right and wrong, whichever were enshrined in the course of conduct pursued by people- in general. What was accepted by the generality of the people and embodied in their customs was deemed to be right and which was disapproved by them or not embodied in their customs was deemed to be wrong.