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CUSTOM

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Custom is often understood as being typical of "primitive" systems of law with no strong differentiation between political and legal spheres and no clear distinctions among the processes through which law is made, interpreted, and applied. Custom is of great importance to international law, with its horizontal structure: the subjects of law are also its authors and, more often than not, are also responsible for interpreting and applying legal rules and imposing legal consequences. The voluntarist approach in international law, which explains law's validity by reference to the consent of states to be bound by rules, produces an account of international law's validity which can provide an explanation for the sources of validity of *all* international legal rules. This approach has been subject to sustained criticism from many quarters, however, for leaving little room for the operation of democratic principles, for its heavy reliance on legal fictions (this is particularly true of custom), and for placing international law at the mercy of state self-interest, among other reasons.

At the domestic level, it is much more difficult to understand the validity of custom in the same way as that of other legal rules—notably legislation and judge-made law—for the simple reason that the latter are organized in a formal manner, by means of a constitution, and are rooted in the political authority of the state. The authority that stands behind custom is much more difficult to identify.

In colonial and post-colonial settings, the distinction between custom and state-based law is clear enough, and clearly recognized: customary rules are often understood to belong to an entirely different legal system which coexists with a system imposed by the colonial power. Outside the colonial context, custom retains its distinctiveness from sources such as legislation and jurisprudence, but without the further distinction provided by the very different societies and cultures from which the two bodies of law proceed. Here, custom's distinctiveness lies in its being a different

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type of source: the procedures and activities which give rise to customary rules bear little resemblance to those that produce legislative provisions or judicial decisions. Custom could easily be conceptualized as belonging to a different normative system altogether, though one that intersects and interacts with state-based law and is generally considered to be part of the legal landscape. In international law, such a sharp distinction between custom and other sources is not made: custom is simply one type of law. Certain customary rules constitute cornerstones of the international legal system, notably its rules of recognition—that is, the secondary rules according to which legal rules are brought into existence. The other two sources of law, treaties and general principles, are understood to be legal sources by virtue of customary rules.

In order to be able to treat custom as law, one would assume that we need plausible answers to two interrelated questions: first, *how* is it that custom is law, and second, *what* is it that makes custom law. The first question goes to the authority that stands behind custom and permits it to be law, giving it validity as law. The second goes to the making of distinctions between law and other normative systems. Customary law, as law, is not merely practice or usage; nor is it morality, but how do we know the difference? What is the secret ingredient that makes custom law? As stated, one would assume a need for answers to these questions, but satisfying, generally applicable, and generally accepted answers to these questions are elusive.

I will begin with the second question, which is more straightforward as it focuses our attention on practical distinctions that can be drawn in particular contexts. It was long believed that time is the secret ingredient: if a custom exists from time immemorial, it can be said to be law. This might be because the validity of the rule has been asserted or presumed for so long, by so many different actors, and in so many different circumstances that we can safely assert that its validity is now beyond question. It might also be that the passage of time deflects our attention from the vexed questions of authorship and the authority that stand behind the customary rule. The paradox of law's validity—which arises from our inability to come up with a convincing answer to questions about the sources of law's validity—is not resolved but is obscured and can, in the course of day-to-day affairs, be more or less forgotten. But while the passage of time might be a sufficient condition for the creation of a customary rule, it is no longer considered a necessary one. It is now well accepted that custom can arise quite rapidly. Indeed, the flexibility and dynamism of custom are often touted as great advantages over often slow and ponderous legislative processes, particularly treaty-making at the international level. However, the distinction between custom and "mere" usage indicates that, even in the case of a long-standing practice, some further distinction must be made, since many such practices may have endured because of

convenience or efficiency, in which case they are not good candidates for customary status.

In order for a rule to be customary law and not usage on the one hand or morality on the other, it must possess some law-like characteristics. But this leads us to a tautology, unless we succeed in identifying those law-like characteristics. It could be that custom's validity is rooted in the consent, tacit or explicit, of actors that will be bound by it if and when it emerges as a customary rule. This is a prevalent, but heavily criticized, approach taken in international law, largely because of the immense difficulties of proving explicit consent and the legal fictions and mental gymnastics that are required to establish tacit consent. The argument that the consent of the rule's subjects is the secret ingredient of customary law is a convenient one, as it would help us to understand the nature of the authority standing behind the law. But this approach has little resonance in the domestic setting.

Another way to identify the properties of a legal rule that make it law would be to turn to abstract notions of what a legal system is, and what rules a legal system ought to have in order to be considered as such. If a candidate for customary status looks enough like the kind of rule a legal system ought to have—one could think, for example, of rules that require restitution or compensation upon the breach of a legal duty causing injury—then the candidate can be viewed as law. Another way to approach this would be to ask if the rule is of a norm-creating character: if it looks like a legal rule and can be seen to fulfill the functions of a legal rule, it passes muster. This might be understood as a question as to whether the rule candidate would create legal rights and obligations. The problem with this line of thinking is that there are many different types of legal rules, carrying out many different functions. For example, while some legal rules create rights and obligations, others create capacities to create rights and obligations (if you want to conclude a contract, or get married, here is how you go about it); still others establish categories and boundaries (the deposit of this substance into a river counts as pollution, while the deposit of this other substance does not).

Another way out of the conundrum is to conclude that custom's status as law is conferred by courts and legislatures. Certainly, there are rules to which judges can refer to evaluate claims that customary rules apply. Rules in statutes may incorporate customary rules by reference, leaving it to judges in the context of individual cases to make largely—or entirely—factual rulings as to whether a rule is or is not custom. Similarly, judicial decisions create rules as to where and under what conditions customary rules can be relied on by parties. But again, one must ask whether the rule becomes custom because a judge declares it to be so, or whether a rule that is already understood to be custom is recognized as such by a judge. If the former, one must ask a further set of questions about why a

judge should pluck one rule rather than another from the pile of practices and usages. If the latter, then of course we still need to know why the rule is custom. In other words, the question about the secret ingredient still needs to be asked in both cases. In any event, this approach cannot help us much at the international level, where adjudication of disputes is the exception rather than the rule, and where customary law is depended on so heavily.

It seems difficult to avoid the conclusion that the secret ingredient has something to do with the way in which actors regard norms. The precise circumstances under which customary norms emerge vary immensely, but the key seems to be recognition that a given rule is to be treated as binding. This is not the same thing as desiring the emergence of a legal rule, in which case one might vote for certain members of Parliament or lobby political authorities. It is, rather, a decision (perhaps unconscious) to regard oneself as being bound by a particular rule and to assert that others are also bound. A property owner may assert exclusive rights to his land, but a peasant may assert a right to lops and tops—that is to say, both a right to enter the land and take wood, and the capacity to assert that right as against the owner's property rights. It is important that both rights be seen to exist on the same plane, within the same system, or at least, if in different systems, within a further overarching system that encompasses both. This is not a matter of the assertion of a moral right to take lops and tops, or the assertion of an economic argument regarding efficient use of resources. Both those types of arguments could coexist with an argument that the owner has a right to exclude peasants from his land. Neither trumps the other because they do not directly confront one another. But if the right is understood as customary law, it exists within the same system as the property right and interacts directly with it.

The secret ingredient, then, would seem to be nothing more than the fact that a legal rule is treated as a legal rule and not as some other kind of rule. On one level, this is a deeply unsatisfying response. Like the argument based on the passage of time, it obscures or deflects attention away from—rather than solves—the paradox of law's validity. But it may also provide a reasonably accurate depiction of the ways in which custom emerges and is used in legal argumentation and everyday life.

Consider the commonly accepted definition of customary international law: customary rules emerge out of state practice and *opinio juris*, or a belief in the binding nature of the rule. Many commentators argue that state practice and *opinio juris* are composed of different kinds of phenomena: practice is what states do, *opinio juris* is what they believe. Evidence of *opinio juris* would take the form of outward manifestations by a state of its conclusions as to the existence of a customary international rule. If a state's coast guard patrols the oceans off its coast and warns off vessels that seek to fish within twelve nautical miles of the coast, we can call that

practice. If a diplomat then asserts in a multilateral negotiating session that it is their state's position that states have exclusive fishing rights within a twelve-mile territorial sea, we can call that an expression of *opinio juris*—a belief that states have a right at international law to draw a boundary twelve miles from their coast. But what if a state adopts legislation in which a twelve-mile territorial sea is designated, and exclusive fishing rights asserted? Is this practice or the expression of a belief in the existence of a legal rule? Arguably, both. In any event, it is hard to see what purpose can be served by seeking to place such a phenomenon in one category or the other. So can we assert that the adoption of legislation counts both as state practice and *opinio juris*? Perhaps, but what about legislation that declares that the age of majority is eighteen years? Can we take this to be the reflection of a belief that an international rule of customary law exists, or is deemed to exist, to this effect? Probably not; the designation of eighteen could be seen as a practice. One would not likely conclude that the state believed itself to be internationally bound to establish eighteen as the age of majority.

If state practice and *opinio juris* do not designate two different types of phenomena, is the distinction between them useful? I would argue that it is essential, because without *opinio juris* we have no reason to say that a practice should be treated as law rather than mere usage, and without practice we might be able to point to the desire to bring a particular rule into existence but not to the rule itself. By insisting on evidence of both, a number of things are revealed: the content of the rule; the extent to which actors behave in accordance with the rule; reactions by other actors to both rule following and rule violation; the extent to which actors treat the rule as belonging to a legal system as opposed to some other system. The distinction maps on, though it does not correspond perfectly, to Hart's distinction between the external and internal aspects of rules.

The secret ingredient of customary law appears to be that it is treated like law: actors invoke it, rely on it, and bring their behaviour into conformity with it; actors through their assertions and behaviour demonstrate that they believe the rule to be legally binding. It may be that the authority standing behind customary rules is quite different from that standing behind the rules found in legislation and judgments. But the two sets of rules are not treated as belonging to separate normative systems, and when they enter into tension with one another, it is expected that the tension will be resolved within the legal system.

References

Hart, HLA, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012).