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Customary Legal Norms

Contributors: Gordon R. Woodman
Editors: David S. Clark
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Custom is a source of law in many nation-states as well as in international law. Although it is of inferior authority to legislation and scholars often give it less attention than statutory law and judicial decision making, in many states it is the source of legal norms of great importance in the lives of many subjects. Customary legal norms have legal authority prior to their recognition. Organs of state law enforce them on the ground that they already have the quality of law. Such norms are sometimes required to have received long observance, and to be regarded as obligatory, before they can be recognized in the communities in which they are observed. State organs also usually assert a discretionary authority to override custom when they consider it would be wrong to recognize it.

Custom and Its Variety

There are many examples of such customary laws, including the following:

- 1. Customs that people observe in particular localities
- 2. Some elements of English common law, which judges have historically stated to be “the common custom of the realm”
- 3. Customary laws of indigenous minority peoples, the best publicized instances being in North and South America, Australia, and New Zealand
- 4. Customary laws of the various ethnic groups that constitute the populations of states in sub-Saharan Africa
- 5. Observed religious laws, significant in many parts of the world
- 6. Customary norms of international law as well as *lex mercatoria*, the customary norms of the worldwide commercial community

Some argue that many other instances of customarily observed norms, such as those of groups that have arisen to conduct particular economic enterprises in modern societies or of persons who engage in particular sports, should be classified as law, but this is not generally accepted.

The Recognition and Authority of Custom

Customary norms derive their authority and content from social practice. They are generally unwritten. Sometimes states recognize them as legal norms. There has been scholarly debate about whether customary legal norms are legal ipso facto or only by virtue of state recognition. The classical legal positivist view, exemplified by the British jurist John Austin (1790–1859), held that law properly so called consisted exclusively of general commands issued by the sovereign of an independent political body, either directly or indirectly through a delegate. Customary norms were not law, properly so called, unless and until the sovereign commanded them to be obeyed. This command might occur by the enactment of customary norms in a statute or by judges who, authorized by the sovereign, declared certain customs to be law and then enforced them in cases before the courts. This view is no longer universally accepted. Nevertheless, **[p. 380 ↓]** many lawyers consider that even though state recognition may not be required to confer the character of law on customary laws, it alone brings customary laws within their professional field of interest.

State recognition of customary norms may be effected by their incorporation into the body of state law that is enforced by state institutions (normative recognition) or by state endorsement of the exercise of jurisdiction by nonstate institutions that apply customary norms within their field (institutional recognition). Many types of customary laws receive state recognition in one or both of these forms. A few illustrations of the most prominent types follow.

Illustrations of Customs

In many jurisdictions, customary norms observed in particular localities are recognized as effecting valid variations in generally applicable norms of state law. Certain communities, for example, may observe different rules of inheritance law from those of the general population. It is normally required, as a condition of recognition, that the customs be proven “ancient” in origin, sometimes with periods such as forty or sixty years. Moreover, state institutions exercise the power to refuse recognition to such

customs on the ground that they are (in the eyes of state law) unreasonable or contrary to public order. Local custom as a source of state law tends to decline in importance as a state modernizes; the proportion of the law consisting of legislation increases; and the population becomes more homogeneous in some sense.

In its origins in twelfth-century England, the common law consisted of norms that officials asserted people already observed throughout England. Stated another way, the common law consisted of the common customs of the realm of England. However, royal justices carried out subsequent elaboration of the rules and principles of the common law through case law, employing the authority of precedent without further explicit reliance on the customary norms of England. Today, one sees the common law as deriving its legal authority from judicial precedent, rather than from custom.

In many countries, indigenous populations have become minorities within the population because of large-scale immigration by colonizing peoples of a different culture. In these countries, law modeled on that of the country of origin of the immigrants is often introduced as state law. Examples of indigenous minority populations who have experienced this situation are the Indians and Inuit of North America, the indigenous peoples of South America, the aboriginal peoples of Australia, and the Maori of New Zealand. In a trend that became prominent in the second half of the twentieth century, promoted by international conventions and institutions, the state came increasingly to give recognition to the customary laws of these indigenous peoples. This recognition was based on obligations in morality, international law, and the underlying principles of state law. The methods include normative recognition by the jurisprudence of state courts and both normative and institutional recognition through state legislation, sometimes enacted following negotiation between the state and indigenous communities.

Similar to the foregoing are the many instances of customary-law communities that have constituted the overwhelming majority of the population, but state law has historically consisted of a body of legal norms first developed in other societies, usually from Europe, and imported or transplanted as a result of colonization. Almost all states in sub-Saharan Africa fall into this category. In British colonies, there were from the outset legislative provisions for normative recognition of “native laws and customs,” applicable to almost the entirety of the population except where there had

been extensive European or Asian settlement. Later, in all colonies, there developed various degrees of both normative and institutional recognition. Institutional recognition has declined since these states gained independence, the governments not wishing to share authority and legitimacy with institutions that did not originate from the state. Normative regulation has continued, although this also has declined to some extent with modernizing influences.

Religious Law

It might appear that religious laws are not within the scope of custom, since they derive their authority and **[p. 381 ↓]** content from religious inspiration rather than popular observance. However, in state practice, jurists often treat religious laws as indigenous customary laws, and these laws have been accorded recognition in the same terms as other customary laws. This has been most notably the case in South and Southeast Asia, where Islamic law and Hindu law have received widespread normative and institutional recognition. In India, both Hindu and Islamic laws, but also the traditional customary laws of the “scheduled tribes,” receive state recognition.

International Law and Lex Mercatoria

In the field of international law, jurists accepted customary international law as an important component of the substantive law. This consists of norms that states have long observed and about which they have evidenced an *opinio necessitates* or *opinio juris*, a conviction that observance of the norms is obligatory (as law). This differs from the customary laws so far considered in that the subjects of international law, traditionally states, are the units that provide the observance that gives rise to custom.

Lex mercatoria, the customary norms of the transnational merchant community, were developed to facilitate the transactions of members inter se. State laws have given normative recognition to this body of rules. This recognition sometimes goes no further than a presumption, applied when interpreting contracts made between members. The presumption is that the business parties entered into their contracts on the implied common assumption that norms of the community would apply to the relationship

between them. The state makes similar assumptions in interpreting contracts between members of other professional or mercantile communities.

Folk Laws, Social Law, and the Common Law

More controversially, one might proceed to a large variety of other normative orders that have arisen in the practices of various types of communities. These “folk laws,” as one may conveniently call them, may arise in groups that form voluntarily for economic purposes, in which case the notion merges into, but is not identical with, that of the commercial or professional community norms mentioned earlier. They may also be formed for noneconomic purposes, such as engagement in a pastime or sport or in groups formed by external coercion, such as prison inmates.

A further possible extension of the notion of customary legal norms comes from an examination of the judicial process in state law. Some scholars argue that state law comprises not only bodies of rules derived from regular official sources, such as statute, precedent, and custom, but also large numbers of “principles.” These supplement the rules in the decision of cases, and jurists derive them from norms accepted within the society. This view may be more easily tenable in respect to a common law country than of a codified, civil law system. Finally, a historical study of the theory and practice of precedent in the common law could give rise to the conclusion that the norms declared in case law are, in truth, customary norms accepted by the legal profession that operates the system. However, these last instances give the concept of customary legal norms a wider connotation than is usual or, indeed, customary.

Gordon R.Woodman

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See also

- Aboriginal and Indigenous Peoples, Legal Systems of
- Colonialism

- Custom and Law
- Customary Legal Norms in India
- Customary Legal Norms, International
- Pluralism, Legal
- Private Legal Systems
- Social Norms, Emergence of
- Transplants, Colonization as Legal

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