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Abstract

The terms used to refer to the sources of law are still marked by the influence of Rome: *lex* and *consuetudo*. Despite this semantic legacy, it is difficult to know what those terms referred to in the Roman period. Of course, it would be presumptuous to transpose our modern categories and to consider laws as impersonal and general rules issued from sovereign powers, and customs as spontaneously generated uses that have been accepted by the social groups concerned.

Though Roman *jurisconsultes* did not deal with the theoretical question of custom, the problem of the relationship between laws and customs did occur in the practice of law. Everywhere in the provinces, local rules persisted alongside Roman law, and judges had to reconcile the discrepancies. Obviously, it is impossible to grasp the realities of native laws. When texts mentioned the *consuetudines* of some cities, those customs were only considered in light of their interactions with Roman law. Legal anthropology has emphasised that the very existence of custom does not simply reflect popular will. Rather, it is linked to a legal order anxious to choose from among local traditions those to be deemed customs. In the Late Empire, customs are mainly visible in administrative matters, and those administrative customs could be part of the very legacy of Rome. Indeed, they helped to shape particular identities.

My paper will promote the view of legal anthropology to understand the role of the custom in Late Antiquity. I focus on the fact that custom can be understood as a privilege (*privata lex*), especially in the case of the first national laws given to barbarian tribes established in the Late Roman Empire.



Soazick Kerneis

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The terms used to refer to the sources of law are still marked by the influence of Rome: *lex* and *consuetudo*. However, even if this semantic legacy is certain, it is much more difficult to ascertain the meaning of those terms in the Roman period. It would be presumptuous to transpose our modern categories and to consider *leges* as impersonal and general rules issued from sovereign powers, and customs as spontaneously generated uses that have been accepted by the social groups concerned.

There is much to say about the concept of *lex* in Roman antiquity, but this is not the place to do so.¹ As for customs, Cicero thought that they were sources of law and that their authority was based on their venerability and on popular will, but his discussion was quite general. In Late Antiquity, the problem of the relationship between laws and customs emerged with the expansion of Roman citizenship in 212. Customs could be considered *praeter legem*, *secundum legem* or even *contra legem*, depending on the specificity of the context and the solutions applied to the cases concerned. Various criteria were suggested to identify customs as such, like venerability, observers' support or rationality. But, as has been noticed, there is no general theory of custom in Late Antiquity. Moreover, in the first book of the Theodosian Code, there is no mention of customs among the sources of law.² Custom as a general concept seems to be a medieval, rather than ancient, invention. Nonetheless, the influence of Late Antiquity in the very representation of the idea of custom remains fundamental.

Though Roman *jurisconsultes* did not deal with the theoretical question of custom, the problem of the relationship between *leges* and customs did occur in the practice of law. Everywhere in the provinces, local rules persisted alongside Roman law, and judges had to reconcile the discrepancies. Of course, it is impossible to grasp the realities of native laws, for when texts did mention the *consuetudines* of some cities, those customs were only considered in light of their interactions with Ro-

man law. In the Late Empire, customs were mainly visible in administrative matters, and those administrative customs could be part of the legacy of Rome. Indeed, they helped to shape particular identities.

My paper will promote the view of legal anthropology to understand the concept of custom in Late Antiquity. Many anthropologists are quite sceptical, considering custom to be a figment of the lawyers' imagination. They argue that the very existence of custom does not simply reflect popular will, but is rather linked to a legal order anxious to choose from among local traditions those it will deem customs (I. The custom as a lawyer's idea). But what about Rome? Does this insight apply to the Roman Empire? Rome produced the word *consuetudo*, and it informed many European terms, such as custom, *consuetudine*, *costumbre*. Words, though, are not concepts. Going back to the very origin of the term, we can trace the relationship between law and customs, examine how custom interacted with formal law, and observe the first steps involved in the process of writing customs (II. Writing down local laws). Finally, I shall consider another aspect of the custom, the administrative custom given, mainly at the end of the Roman Empire (fourth-fifth century), as a privilege to a community (III. Administrative custom and the privilege of law).

I. The custom as a lawyer's idea

Much time has passed since custom was considered as a *Volksrecht* able to express directly the spontaneous rules of a community, what Kletzer terms a »spiritualistic conception of customary law«. ³ Thanks to legal anthropology, custom is currently seen as a more problematic concept. Many problems deserve consideration, especially as regards the relation between customary law and a formal legal system. It has been pointed out that

1 MANTOVANI (2012), FERRARY (2012). 3 KLETZER (2007).

2 GAUDEMET (1956) 147–159.

the concept of custom can be a tool able to frame indigenous law, often deemed informal law, in terms of formal law, and so to promote the acculturation of indigenous societies. It would be naive to think that what is called »custom« is consistent with indigenous rules, an independent and self-contained »local law«. Scholars studying colonial systems have stressed the role of the State in the qualification process of customary law. In fact, »custom« is what the colonising power wants to label as custom. Consequently, customary law does not necessarily reflect the traditional rules that existed in a region before the arrival of colonial powers, but only with the traditional rules that State power admitted. It is also worth noting that local rules become intertwined with State law, not to mention the fact that colonising powers transformed some customs, giving birth to what is sometimes called »Euro-customary law«. Thus, in a colonial context, acculturation pervades the concept of custom in that it emphasises the predominant place of the State, with customary law being considered as a subordinate kind of law in the legal system. It is also a way of impoverishing the normative life of a community.⁴ To paraphrase Malinowski, it is the duty of anthropologists to translate the rules of the primitive customary law into the terms of our modern administrative institutions.⁵

One of the most vivid critiques of the concept has been expressed by Llewellyn and Hoebel in their book *The Cheyenne Way*.⁶ They intended to promote a »realistic sociology« presented through »cases of trouble and how they were resolved« in Cheyenne society. Using this »troubled case« methodology, they were able to contest scholars' common views on custom. Custom, they said, is a »slippery« concept, an »ambiguous« word that »fuses and confuses the notion of practice«; that is, a socially relevant idea of what constitutes proper behaviour. Further, it lacks clear edges: »Such terms as customs diffuse their reference gently and indiscriminately over the whole of relevant society«. They »have come to lend a seeming solidity to any supposed lines of behaviour to which they are applied, and a seeming uniformity to phenomena which range in fact from the barely emergent hit-or-miss, wobbly groping which *may*

some day find following enough to become a practice, on through to an established and nearly undeviating manner in which all but idiots behave«. With such a fluid concept of custom, the authors agree with philosophical doctrines postulating that a norm is not a categorical imperative, but rather a statement of rules that tolerates deviation, and precisely this tolerance is the norm's principal feature.⁷

Many scholars go so far as to deny that a coherent theory of custom can exist even in principle. Among them, and concerning the case of China, Jérôme Bourgon argues that, contrary to this commonly held belief that China is the »Empire of customs«, the very idea of custom was foreign to Imperial China. China discovered its customs under the influence of administrators trained in Europe and who subscribed to the German Historical School of Jurisprudence. In that respect, Chinese scholars were able to frame the legal history of their country in the same way as their western counterparts did for Europe and with the same chronological steps: first customs and then State law. But the Chinese data resisted conversion into foreign legal terms, as illustrated by the directive given in 1908 to the local committees charged with studying customs, which Jérôme Bourgon quotes: »Les termes juridiques [occidentaux] ne pourront être laissés de côté: si l'on se conformait à la langue vernaculaire de chaque lieu, on ne pourrait dégager une unité d'ensemble. Les enquêteurs devront veiller à ce que leurs rapports soient exempts de tout parler vernaculaire, afin que leur réponse ne soit pas une source de confusion«. To translate the term »customs«, the Chinese had to use a Japanese term itself created in the 19th century under occidental influence. And finally, because the categories of German civil law framed the questions, the data of the *Rapport des enquêtes sur les coutumes en matières civiles* was unusable.⁸

The imputed confrontation between legislation and customs in the analysis of normative systems was a feature of colonisation in general. What is ostensibly a universal scheme is in fact a result of this western impact, the legacy of the Occidental rules.

In this sense, custom would appear to be no more than a State rule among other rules inte-

4 HUMFRESS (2011).

5 MALINOWSKI (1934).

6 LLEWELLYN/HOEBEL (1941).

7 LE BLANC (1998).

8 BOURGON (1999) 1073–1107.

grated as such into the normative order of a State in a manner reminiscent of legal pluralism. Considering legal pluralism as concurrent legal systems in the same area, different laws being used for different groups in the same territory, autonomous custom would have a place. But does that fit with the reality of law? Many scholars are sceptical. That model is utopian because it ignores the inevitable presence of a dominant model able to frame other rules around its core values.⁹ Boaventura de Sousa Santos points out the mutual influences between different legal orders. No legal order can be »pure« or »autonomous«, as all of them shift inside the legal constellation. Consequently, the main features are »porosity« and »interpenetration«, which produce »legal hybrids«; »that is, legal entities or phenomena that mix different and often contradictory legal orders or cultures, giving rise to new forms of legal meaning and action«.¹⁰ This should come as no surprise, as Leopold Pospisil emphasises that, in any given society, there is a discrete legal system corresponding to each subgroup within the society, which is a forward-thinking observation that improves our understanding of plural legalities.¹¹

Hopefully, doubt is contagious and there is also room for it in the field of legal history. In the late 20th century, sources were re-evaluated in order to investigate the nature of medieval custom.¹² As for the example of the books of customary law written in the 13th century, the very word »custom« appears to be missing. The purpose of the books is to lay down the law, and the term »custom« is used to indicate the margins of the law, either in the form of court practice or fiscal rules. As if, to paraphrase Robert Jacob, the customary books of the 13th century ignored the concept of custom. In fact, the concept of custom was invented in the context of the university, earlier in France than in Germany.¹³ From several texts of Roman law discussing custom, medieval glossators created a general theory of the custom, emphasising the discrepancy between a written law based on the authority of the text and a non-written law founded on the popular will (Just. Inst. 1.2.9: *Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur*).¹⁴

Does that discredit the concept of custom? Like the European colonial empires, the Roman Empire integrates custom into normative orders as an inferior kind of rule. Let us now examine the origins of this construction in the very first customary books.

II. Writing down local laws

Romanists generally hold that classical Roman law ignored custom as a source of law. For example, Pomponius pejoratively compared custom in his *Enchiridio* (*incerto magis iure et consuetudine aliqua*) to the certainty of legislation sharing the same origins as the constitution of the *plebs* in *populus* (D. 1.2.2.1–40).¹⁵ Indeed, custom is missing in book I of the *Codex Theodosianus* devoted to the legal sources (though it appears in book V in another context CTh. 5.20 *De longa consuetudine*).¹⁶ But the fact that custom was not deemed a source of private law does not mean that it was without normative value. On the contrary, many sources emphasise the intertwining of Roman law and customary law. But which sources reveal this perspective? For that, it is necessary not only to consider official sources, but to look at a broad spectrum of sources, to step into the reality of the law through popular sources. I take the example of Egypt due to the quality and richness of its documentation and its numerous Greek papyri that give a vivid view of the law in action in Roman Egypt. What appears is a blossoming provincial legal culture that simultaneously imports legal elements from Rome while resisting pure assimilation. As Bryen says, when considering the place of the law in the Eastern provinces, we have to move away from the idea of law as a culture, a body of rules shared by a community, to focus rather on law in practice, a utilitarian view of law using all available bodies of law.¹⁷ The literature also reports the influence of judicial organisation on the representation of norms, especially the drafting of books for judges.

A text (*P. Yale* 1.61) attests that in March 209, the Roman prefect, Subatianus Aquila, during his visit to Arsinoe, received 1804 petitions in two and half

9 MILLARD (2004) 295–300.

10 BOAVENTURA DE SOUSA (2006) 46.

11 POSPISIL (1958) 273–278.

12 KRYNEN (1998) 59–89.

13 JACOB (2001) 102–119.

14 CONTE (2009).

15 MANTOVANI (2012) 718–719.

16 GAUDEMET (1957) 119.

17 BRYEN (2012) 786.

days, which amounts to 700 to 750 per day.¹⁸ Recent research stresses both this awareness of the provincials that, as inhabitants of the Roman Empire, they had rights and the capacity to claim and perform them as well as the important role of women's petitions until the fourth century.¹⁹ As Bryen argues, »the ideology of the Roman legal system in the provinces was that fundamentally it was a system which could be accessible to all free individuals«, which petitions made possible.²⁰ Becoming Roman in Egypt meant developing a legal culture, gaining the conviction that access to the courts was the key to justice.

But which laws did the provincials claim? Roman law? Provincial laws, like Greek or Egyptian law? This question might seem irrelevant, because the idea of personality law does not apply. Claims of litigants were often based on arguments that combined previously judged cases, edicts, precedents, rescripts, and all sorts of texts litigants quoted indiscriminately. They saw both a venerable and manipulable artefact of law. People played by the rules in order to exploit them, which scholars currently describe as »forum shopping«. This is a very selfish use of law that nevertheless reflects deep faith in the system. As Bryen says, court was the place »where individuals faced down other individuals in the hope of obtaining justice; but even more importantly, it was also the place where individual subjects of empire faced down their governors and used the language of law to articulate normative visions of the world«.²¹

But what was the source of legal knowledge? The question applies in two contexts: for the provincials of course, but also for Roman governors ignorant of local rules. As for the latter, papyri show the intervention by the second century CE in court of experts on »local« laws, the *nomikoi*. Their advice »would have consisted of a combination of vague knowledge of local practices and a good deal of improvisation«.²²

As for Roman law, texts were displayed, including legal rules and individual decisions as a reasonable representation of legal knowledge. But the main feature of the early Empire is the process of

drafting local laws in the form of law-books that provide access to local rules. The Egyptian example emphasises this process of compiling imperial constitutions, edicts, and judicial decisions to make practice easier. These textbooks were not official but private, and they were used by legal practitioners moved by professional interest.

The development of local laws would seem to be the result of this normative trend. Still for Egypt, in the Roman Empire, papyri refer in the second century CE to the »law of the Egyptians«. According to Yiftach-Firanko, provincial legal practices would have been written down for the benefit of Roman judges and native lawyers.²³ Perhaps as a mark of distinction from nationalist Egyptian circles, there appeared a translation in the second half of the second century CE of an ancient Egyptian law book that went back to the time of Ptolemy II Philadelphus (P. Oxy XLVI 3285).

Legal writing also occurs elsewhere, for instance in Gortyn on the island of Crete, where a fifth century BCE law code, the so-called »code of Gortyn«, was re-enacted between the first century BCE and the first century CE. It is worth noting that the inscription was in a very archaic language, doubtfully still comprehensible, and provided for monetary compensations in an outdated denomination. Other examples might include a papyrus containing a fragmentary copy of some Ptolemaic marriage laws (P. Fay. 22).²⁴

If one were to compare this ancient trend with modern phenomena, such as what happened in India during colonial rule, when Brahmanic dharma, an esoteric set of rules, was considered specifically Indian legislation, one important aspect would be the influence of the judicial organisation on the creation and representation of the norm and its use as a vector of national identity.²⁵

A final question relates to the binding force of the rule, though the idea of legal pluralism demands caution. Local law was not automatically applied. Roman judges checked the content of the rules, which had to be consistent with Roman values to be applicable. For example, whereas Greek law gave fathers the right to terminate their

18 TURNER (1968) 142.

19 BAGNALL (2004) 53–60.

20 BRYEN (2008) 181.

21 BRYEN (2012) 800.

22 BRYEN (2012) 797.

23 YIFTACH-FIRANKO (2009) 543.

24 BRYEN (2012) 794.

25 LEFEBVRE (2006) 158.

daughters' marriages (the *apheresis*), Roman judges deemed this right to be inhuman and cruel and forbade it.²⁶

In 212 CE, Roman citizenship was granted to all the inhabitants of the Empire, but did this imply that local laws were abandoned in favour of the »universal law of the Romans«? Papyri show that, on the contrary, they remained active. According to Joseph Mélèze-Modrzejewski, the main effect of generalising Roman citizenship was to convert the local indigenous laws into Roman provincial laws. As long as they conformed to Roman values, they were integrated into the Roman body of laws. Rather than thinking in mutually exclusive terms of Roman law versus local laws, Roman law served as a sort of yardstick by which to measure situations. This yielded a complex system with a central power surrounded by many bodies of law that all looked to Rome. The tendency was to validate customary law and integrate it into the Roman order. It is not by chance that the theory of custom was written in the late Roman Empire.²⁷

III. Administrative customs, the privilege of law

In the Late Empire, the unification of the law was achieved through the great codification issued in 438. All previous imperial constitutions not included in the code were abolished, and the code prescribed the generalisation of the law. But at the very moment the code was issued, the legal value of other rules was consecrated. In the constitution that promulgated the code, there were two exceptions to the exclusivity of the law. Administrative rules »kept in the imperial Headquarters« were deemed still valid, and these so-called »customs« concerned fiscal and military fields (*NTh.* 1.6 (438)).²⁸

The same power that organised the codification of the law tolerated and even encouraged the proliferation of customs (D. 39.4.4.2; CTh 12.13.5; CTh 11.17.3). The literature is unanimous that customs had legal force, and by the sixth

century, the terms »law« and »custom« were equivalent, as the expression *consuetudo legis* indicates. Let us examine these administrative customs from the fiscal to the military.

The fiscal customs

The great diversity of the fiscal regimes in the Roman Empire is well-known, but this plurality of rules was not without difficulty. Administrative offices required a series of textbooks, a technical literature devoted to the practice of law. Beside these references, offices kept the appropriate records useful for the administration of the Empire. It was in these archives that the fiscal customs validated in 438 were kept.

To understand the meaning of these customs, one must grasp the significance of the petition in the Roman Empire, which could link the emperor to his subjects directly. Private people and communities could solicit favours directly from him or seek a privilege (*a privata lex*) to avoid the general rule. Fiscal matters were a common topic of such petitions, and these fiscal customs had great future influence. Because they sounded with the concept of solidarity, they emphasised the sense of community, an important feeling when public frames finally vanished.

Customary laws for soldiers

Beyond these fiscal customs, there was also a customary law for barbarian soldiers serving in the Roman Army. Taking the example of Late Roman Gaul, Frankish and Celtic populations were established on public lands as military populations. Because they were mostly former conquests, they were in an unfavourable situation. They had no civil rights and were subject to military *imperium*. Therefore, until the fifth century, there was no legislation to regulate their conflicts but the *disciplina militum*. In the mid-fifth century, however, their situation improved: barbarian soldiers had become the most important part of the Roman Army and, in the general trend toward legal

26 MÉLÈZE-MODRZEJEWSKI (1988) 393.

27 MÉLÈZE-MODRZEJEWSKI (2014).

28 *Nou. Th.* 1.6 (15 févr. 438): *Impp. Theod(osius) et Valent(inianus) AA. Florentio P(raefecto) P(raetori)o Orientis ... Falsitatis nota damnandis quae ex*

tempore definito Theodosiano non referentur in codice, exceptis his quae habentur apud militum sancta principia, vel de titulis publicis expensarum aliarumque rerum gratia quae in regestis diversorum officiorum relata sunt.

codification, law books arrived in the *castra*. Thus, Frankish and Celtic populations received »national laws« to outline the judicial power of the military hierarchy.

The nature of these laws is complex because they combined Roman law and tribal usages. Of course, these laws have to be analysed in their own context, and they were all quite different. Further, there are many discrepancies between two of them, maybe the most ancient ones: the *Pactus legis salicae* given to the Frankish tribes and the *Excerpta de libris Romanorum et Francorum* received by the Celtic populations in Western Gaul.²⁹ Several factors influenced their composition, such as the power relationship between Rome and the tribes or the duration of the accommodation of the barbarians. In any case, it is worth noting that these »laws« were to be considered *leges datae*, national laws given to barbarian military communities. Those grants had a double purpose of providing military judges with books to help them solve difficult conflicts involving barbarians and of promoting tribal peoples of the Empire as subjects with rights. Moreover, the content of these laws sought to conform to very different legal traditions. Contrary to a widely held opinion, those barbarian laws did not represent pure »customs« of the barbarian tribes. They mainly tended to adapt tribal usages to the Roman values, the so-called »public order«. In that sense, they are bodies of Roman vulgar law and maybe one of the most vivid legacies of Rome, since they persisted after the fall of the Roman Empire.

Concerning the idea of custom and the process of committing it to writing, the pattern repeats: a major legal order within which other normative figures were settled so long as they conformed to the dominant one. It would be naive to assume popular usages were integrated directly with that scheme and validated without discrimination or restriction. Rather, the Roman government played a significant role, as is evidenced by the fact that some of the customary books, including the most ancient of them, were issued by the Administration in order to bring tribal usages into line with Roman values. Depending on the context, they may also have collected and kept some of the most important judgments as *exempla*. In that sense,

they are part of the law-in-practice in the Late Empire, a series of law that, in distinction to official law, used straightforward language, like the syntactic structure »if ... then« rather than the political jargon of the time, which may explain its persistence after the Empire.

To explain this longevity, it is worth noting that those barbarian laws eventually became an element of national identity. Customary law was dispensed as a privilege (*privata lex*), especially in the case of the first national laws for barbarian tribes. One of the main devices used by the imperial administration was the petition to ground a direct relationship between the emperor and his subjects, which probably explains why the beneficiaries were so tied to their customs. In a fiscal sense, customs were the basis of group solidarity. Technically speaking, they formed mutual obligations towards taxes, but beyond this, they also reinforced the feeling of belonging to a community, which grew stronger when other public structures vanished. When Rome was nothing but a memory, this idea of a privilege granted by the Prince remained.

Conclusion

To conclude, in Roman times, customary law books were bodies of imperial law, and custom has to be seen as a subordinate kind of rule integrated into the legal order that initially created it. But it does not invalidate the concept of custom because these customary books also bore meaning for the people they concerned. Custom is undoubtedly a State creation, but it keeps, to quote Llewellyn and Hoebel, the flavour of the culture it concerned. When the Empire disappeared, custom remained in force, because it was linked to the idea of collective identity, to the foundational events of the past, and so was able to foster the sense of belonging to a community of mutual support. In that sense, the story of custom has yet to be written in light of this power relationship between a dominant power and normative communities. And maybe that would help us think the *Cultural Time of Law*.³⁰



29 KERNEIS (2014), POLY (1993).

30 ASSIER-ANDRIEU (2001).

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