Opinio Juris and Theorizing Law

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Customary law has its own way of posing problems that, as such, are fundamental problems of legal philosophy in general. Part of the specific way in which customary law makes us see certain issues is related to its character as »autonomous« law in the sense that it is a body of rules that emerge unpredictably and that have more or less unpredictable content. Even its subject matter is prima facie unamenable to effective legislative regulation. Its emergence seems independent of political institutions, in fact historically, customary law antedates any even halfway modern concept of a state. It may transgress the borders of a constituted community just as well as be law in but a part of such a community. Customary law seems to cater for polycentrism or pluralism and seems to be to some extent conceptually isolated from questions of reliable enforcement. On the other hand, with its claim to obligatory force in spite of its inscrutable emergence and its uncertain relation to the respective legal propositions which are used to express it, customary law poses a great challenge for attempts to justify and legitimate it.

Now, whereas in the national context customary law has often been either marginalized by statutory law formally legislated by political authorities, or absorbed by common law with its reliance on »artificial reason« and on the authority of judicial precedent, the distinctive mark of international law is the categorical absence of sovereign authority above the particular legal subjects, and here customary law is of lasting, central importance. And you can see how customary international law is of particular interest for debates about cosmopolitan law.

As David Bederman has observed, after nearly half a millenium of debate and »over-theorizing«, it seems we are no closer to conclusive answers to those
peculiarities and challenges. But at least there exists a wealth of doctrinal and jurisprudential responses to them and it is to some of them that I mean to turn in order to venture a bit into the most general question of what it is that makes law... law.

The point then, is not to criticize or to justify the present regime of customary international law or one of the theoretical or doctrinal accounts given of it, but to develop an informative picture of whether there is a specific contribution of customary international law to a general theory of law and if so, of what this could be.

I will proceed by first, in a glance at the historical development of customary law doctrine singling out two typical ways of understanding it – the »consensual« and the »convictive« approaches, if you will, showing their relevance for judicial practice, then pointing out a few difficulties and paradoxes that have ensued and then I will conclude with some general considerations about how to approach the question of law as such, taking into account the nature of customary law.

I. Historical development

Roman Law

The institution of customary law has a long tradition in Roman (Private) Law. One definition can be found in Cicero:

Law by custom is considered to be that which antiquity has sanctioned by the will of all, without statute.\(^1\)

As you can see, the reason for its obligatory force – which, as many texts emphasize, is equal to that of written law – is to be seen in the convergence of the will of all, i.e. in the supposed tacit consent of all.\(^2\) However, classical authors had not developed an actual theory of customary law, discussing requisites for custom, its effects, scope etc. This was left to medieval authors who had to integrate the more or less universal *ius commune* that was based on the Roman Law of the *Corpus Iuris Civilis* with the local customs, e.g. that of the many Italian city-states. The most prominent of these certainly was Bartolus de Saxoferrato, who defined customary law like this:

\[^1\]Consuetudine autem ius esse putatur id quod voluntate omnium sine lege vetustas com-probarit. (*De inventione* 2, 67)

\[^2\]Actually Roman Law had a couple of terms for custom: *mos*, *usus*, *consuetudo*. But over the course of time, *mos* was often understood to mean the *mos maiorum*, the original »ways« of the founders and not a body of law that would form and develop over time; and *usus* was usage in a non-legal meaning, merely any regular behaviour of a society. As *consuetudo* was emphasizing more the social universality of adherence than the temporal duration, it was often coupled with specifications, giving *consuetudo longa*, *c. diuturna* etc. Most norms of the *Corpus Iuris Civilis* are assumed nowadays to have been customary law originally, recorded in writing at a later time.
Consuetudo is a kind of right, accepted as law, instituted by the mores. This is a good definition, where the term »a kind of right« (jus quoddam) reflects the difference of this consuetudo from the one that is merely factual; and »instituted by the mores« reflects the difference to the other parts of the law (aliarum partium juris).  

Also, he explained the reliance on the tacit consent of the people in more detail. Discussing a dictum of Petrus de Bellapertica, who asserted that »not usage, but the tacit consent of the people is the cause of custom«, Bartolus held that usage and habits (usus et mores) are causes of custom, but I say remote causes, for the proximate cause is the tacit consent, which is found from usage and habits.

Factual usage was strictly required, but as »ratio cognoscendi«, whereas the tacit consent of the people was required as the actual »ratio essendi« of customary law. So being pushed to explain the character and the validity of the required consent, Bartolus’ arguments were based to a great extent on analogies to the roman law of contracts. However, in contrast to »pactum« and »praescriptio«, »consuetudo« did not only constitute subjective rights but objective laws. The parties gave their consent not as private individuals, but as members of the political community: »singuli consentiunt tamquam universi.« This political character of customary law allowed for the application of its obligatory force to non-consenting individuals.

Since the actual ground of customary law was the consent of the people, for Bartolus the significance of judicial and extra-judicial acts was their function for the identification of the will of the people, and anything that could serve that function was to be taken into account, meaning that even the non-compliance with a judicial decision could be as much generative of customary law as the decision itself. Both statutory law and customary law and both compliance and non-compliance with law and with judgment were to be interpreted as possible expressions of the consent of the people, to be confirmed by further instances of that practice.

Yet, and although Bartolus had distinguished between factual and juridical consuetudo, in fact there was not much he had to offer in order to qualify the consent of the people as a specifically legal or juridical one, i.e. in contrast e.g. to a moral convention of the society. As one of the crucial authors in the further
development of the consensual approach, Francisco Suárez is always mentioned. But since we have Suárez experts on the table I will skip his theory. At the latest the problem of differentiating law from non-law was addressed by the so-called Historical School of the 19th century.

The Historical School

Scholars such as Savigny and Puchta had developed a doctrine of a collective legal consciousness associated to the culture and spirit of a nation. They called it the Volksgeist. And like Bartolus, they held this consciousness to be the actual depository of norms and the actual source of obligation. However, in order to make sure that one was dealing with legal, and not moral convictions or considerations of expediency, they resorted to requiring that people understood themselves to be under a legal obligation to comply with the norm in question. Needless to say, the idea that people had to feel a legal obligation imposed on them is fundamentally different from the idea of tacit consent. Placing the central emphasis on conviction, it is usually referred to as the »convictive« approach. Insofar as it was a function of the collective consciousness, the conviction of individual legal subjects was merely »declaratory« of what was objective law anyway. Now while this provided a solution to the problem of distinguishing legal from non-legal customs, it necessarily supposed that the norms were pre-existing when each individual assessed his being obliged by them; we will return to this issue.

Another worry of contemporary theorists was that the identification of the collective legal consciousness would pre-empt formal legislative and juridical practice, including democratic legislation, in favour of jurisprudential hermeneutics. In fact it could even make the resort to factual usage superfluous and would thus – in spite of its emphasis on »Volksrecht« – lead in the end to a mere »Juristenrecht«. And that is not even to mention the questionable plausibility of the univocal Volksgeist as an ontological concept.

François Geny

In 1899, François Geny offered a definitive account of the »convictive approach«. He argued\(^7\) that it was not necessary to resort to the »somewhat mystical idea of a collective consciousness« (I.II, §115, 344). Rather, it was sufficient to explain how a common will could emerge from individual acts – mystical enough. Like the Historical School, he insisted on the subjective element, meaning that the subjects had to feel legally required to behave according to the norm in question. Only he did refrain from deducing this feeling from a collective entity or consciousness.

\(^7\)in his Méthode d’Interpretation et Sources en Droit Privé Positif
Moving from the general to the concrete, he first justified customary law by identifying the social functions that it fulfills: providing security to the private interests, stability to the individual rights, satisfying the need of equality that is the ground of justice and the respect for one’s ancestors. Then he went on to specify the conditions of legal custom. In fact he asserted two positive elements, and a negative one, where negative means that, in the case that this negative condition holds, the coincidence of the two positive elements that is normally sufficient to establish customary law, is prevented from forming valid customary law. The two positive ones are the material and psychological elements we already know, usage and conviction; the negative one is summarized under the heading of »irrationabilité« and means the running counter to the social functions customary law is supposed to perform in the first place.

Here are the two positive elements then:

one, of a material nature, a long and constant usage; the other one, of a psychological kind, the conviction of a juridical sanction, specifying and qualifying the usage as legally obligatory custom. 8

[...I skip something...]

Besides this first, in a way material and sensible element [a more or less uncontroversial notion of consistent factual usage], legal custom requires for its positive existence, an immaterial and psychological condition, the diagnosis of which is infinitely more delicate and fine, and which is often translated by its traditional qualification: *opinio juris seu necessitatis* [...] When one says that custom is constituted only with a *opinio juris*, that means that the usage in question, to become custom, must possess, on the part of those who practise it [...] the character of an exercise of a subjective right, which contains the expression of a rule of objective law. 9

Against the »Volksgeist« theories, Geny holds that the psychological element is much more simple, and tied closely to the material usage. It qualifies that usage and consists in the feeling of those who practise it, that they are acting under a non-explicit norm that imposes itself upon them as a rule of objective

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8 ces éléments se ramènent essentiellement à deux: l’un, de nature matérielle, un long et constant usage; l’autre, d’ordre psychologique, la conviction d’une sanction juridique, spécifiant et qualifiant, l’usage, comme coutume obligatoire. L’usage, qui forme le premier élément, et comme le *substratum* nécessaire de toute coutume juridique, suppose, de la part des intéressés, une série d’actes ou de faits, parfois même, mais plus rarement, d’omissions, de nature à constituer un rapport bien défini de la vie sociale, et susceptible en même temps d’une sanction juridique.”(I.II, §119, 356f.)

9 À côté de ce premier élément, matériel et sensible, en quelque sorte, la coutume juridique requiert, pour son existence positive, une condition, immatérielle et psychologique, dont le diagnostic est infiniment plus délicat et plus fin, et que l’on traduit souvent par sa qualification traditionnelle: *opinio juris seu necessitatis*. [...] [Quand on dit que [la coutume] ne se constitue qu’à condition d’une *opinio juris*, cela signifie que l’usage, pour engendrer la coutume, doit avoir, chez ceux qui le pratiquent [...] le caractère d’exercice d’un droit subjectif, qui contienne l’expression d’une règle de droit objectif”(I.II, §119, 360f.)
law. That has been picked up almost immediately in international law and it thus was Geny who coined International Law’s talk of a subjective or even of a »psychological« element as one of the two components of legal custom, and his was the formulation of *opinio juris sive necessitatis* that has been so influential in international law. And in spite of the conceptual difficulties, this, still somewhat intransparent I would submit, doctrine, rather than a more obviously consent-based approach is maintained and pursued in international legal practice.

Also, it should be noted, that the general obligatory force of customary law for Geny is based on and tracking the social link of a substantive community.

**Practical employment of *opinio juris***

One of the most important decisions concerning customary international law was rendered by the Permanent Court of International Justice in 1927 in the so-called *Lotus* case (which dealt with criminal jurisdiction over ship personnel). In it, we find a strong emphasis on international law emanating from the free will and consent of sovereign States. But in the Court’s negative assessment of France’s claim of existence of a rule of customary law, we also find the idea of *opinio juris* as a necessary component of customary law. France asserted factual, continuous usage, in this case abstention from exercising jurisdiction, but the Court explained that this would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom.

The successor to the Permanent Court is the International Court of Justice, in the statute of which Article 38 (1) specifies the law that can be drawn upon by the court in its decisions on general public international law. Under heading (b), we find a formulation that has been taken over from the statute of the Permanent Court. One of the sources of general international law is

> international custom, as evidence of a general practice accepted as law

which, by the way, is a formulation that has got it backwards: it’s not custom that is evidence of the practice, but practice accepted as law that is evidence for the custom. Interestingly, in spite of that blatant flaw and of many occasions to do so, the text has never been modified.

In the *Asylum* case of 1950, the court asserted that
The party which relies on custom ... must prove ... that the rule invoked ... is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

Although the exact meaning of the term *opinio juris* has been and is still a matter of contention, in the *North Sea Continental Shelf* case of 1969, the court nonetheless required it to be part of the argument, and it confirmed this in the *Nicaragua* case of 1986. Here is the latter decision, citing the earlier one:

as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned »amount to a settled practice«, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is »evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*«. (ICJ Reports (1969), 44, para. 77)

II. Paradoxes and Difficulties

In this last passage resurfaces one of the crucial paradoxes of customary law as specified by the *opinio juris* doctrine. For here it is said that »for a new customary rule to be formed«, the acts constituting it have to be »evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.« Belief in the obligatory force of the rule has to precede the rule itself.

From François Geny to Michael Akehurst, from the Permanent Court to the ICJ, new customary law is said to be formed when there are expressions declaring that it is already law. So either it is a non-starter or, as Geny even asserted explicitly, it is a doctrine supposing that *necessarily* an error must stand at the beginning of custom formation.

But what are the alternatives? Attempts to abandon *opinio juris* altogether and thus to reduce customary law to usage alone can not distinguish between rules of courtesy, fairness or morality and legal rules. But practice suggests that this distinction is made and appreciated by the actors.

The main rival to the »declaratory« conception is the so-called »constitutive conception« of customary law that seems better equipped to explain how customary law emerges. The most prominent candidate here is explanation by tacit
consent. But this again seems to inadequately reflect the self-understanding of the actors. James Brierly’s point of 1928 still holds:

A customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not felt by those who follow it to depend, on the approval of the individual or the state to which it is addressed.

Also, and more concretely, the consensual approach cannot explain the scope of obligation that customary law in fact has. For, in a strictly consensual approach, it is hard to see why the obligatory force remains when the parties later withdraw their consent. Apart from the so-called »persistent objector«, customary norms also bind those who did never consent to them. In fact, it is customary law that, with its jus cogens norms, seems to provide the only possible weight to counter-balance the persistent objector doctrine.

[Finally, an interesting approach seems to be to in a way externalize the subjective element not into an objective idea that had to be declared, but on an intersubjective level: Anthony D’Amato and Michael Akehurst agree that the candidate formulations of customary law rules are not to be found in mental states but in statements inscribing themselves into a global public discourse about the customs of mankind. (They then disagree about the exclusivity of »physical« acts as usage and about the role of protests.)]

III. Conclusion: General remarks

Where does this all leave us? To me, the »eternal« competition between consensual and declaratory views itself suggests that none of them can simply be dropped, that each of them provides us with important insights. It seems we want custom to be (at least eventually) constitutive, but it’s somehow not adequate to conceive it as consensual; and we want it to be (at least eventually) universally binding but it’s somehow not adequate to conceive it as merely declaratory.

I would like to understand the problems presented here as meaning to incite questioning law as such and our attitude to it. What kind of instrument is law, and what kind of instrument is international law? Or, talking of instruments, can it be used instrumentally at all? Customary law exemplifies that one is exposed to law and constitutes it at the same time. It might seem that customary law is an instrument of deconstruction – that the political and judicial practice refuses to abandon.

And does this hold in one way or another for law as such, for any law? Or just for one particular modality of it?
At least, in customary law we can observe how we react towards law the recourse to the legitimation of which is in a certain way cut off. Since we do not know how customary rules come about, we must assume that their obligatory force does not depend on their legitimacy, at least if we understand that to be concerned with »input legitimacy«. Neither is the obedience to be explained by extra-juridical factors – that’s exactly what the opinio juris is supposed to warrant. So maybe customary law helps us to understand what it is for a legal rule as a legal rule to be a reason for behaviour. In other words, it may allow us to study the obligatory force of »the Legal« as such! (And, inversely, to find out which points are not covered at all simply by the legality of a rule.)

On the other hand, it might be worth to reflect, like Geny, on the »output legitimation« of the legal.\(^{10}\)

The uncertainty associated to the »eternal« competition surely serves also to keep customary law open for political deliberation – in an extraordinarily reflexive way.

I want to conclude by connecting these questions to the conference’s topic of cosmopolitanism: I think they relate to it in at least two ways.

First, given the absence of authority in the global context, chances are that CIL is the only realistic way to create cosmopolitan law. For this, it is necessary to understand CIL as a process that can, and must, in many different ways include »norm entrepreneurs« other than states. Opinions and acts of actors such as the International Committee of the Red Cross have begun to play a role in custom formation, this should and probably will be expanded on, for good or bad.

Second, the persistence of opinio juris means that, even on a tacit consent reading, in CIL one is exposing oneself to an obligation that is not, or no longer, under one’s control, but under that of international society, one is »always already« transnationally responsible – or at the very least, responsive. While this implies the absurdity of some conceptions of sovereign control and power, it should not make us forget political and social power dynamics. Since the legitimacy of CIL is so precarious, maybe we need defense or safety measures put into place: e.g. in the form of explicit legislation (fundamental rights treaties, tendencies of constitutionalization etc.) or in the form of the possibility of opting out of CIL regimes – only these mechanisms again should work at the benefit of people, individually and perhaps also collectively, and not just of states and powerful interests.

\(^{10}\text{At the very least, I think the case of customary law and opinio juris suggests that the following questions should be distinguished: The factual existence of law taken for granted, a) how should its factual working be described b) how should its genesis and change be explained c) how should we legitimate or justify it, and d) how can we and how should we further develop it? Should we base our concept of customary law on our or the subjects’ perception of its validity and obligatory force, or on the process of formation? At which point should legitimation arguments set it? Two concepts necessary?}\)