Bad Custom

The Meanings and Uses of a Legal Concept in Premodern Europe

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The place and function of custom as a species of law—distinguished from custom as simply polite manners or cherished cultural traditions—has long been a source of research and debate among legal theorists and historians. One school of thought, reflecting the authority of written statute in modern jurisprudence, has relegated custom in a juridical sense to "primitive" societies, whereas proper law belongs to a world of state sovereignty.[1] Other scholars have revisited the continuing validity of custom, including a trenchant body of work on the use (and manipulation) of custom in modern colonial regimes.[2] At the same time, some have seen benefits in the acknowledgment of custom as a source of norms. A 2006 collection of articles, for instance, explored ways in which customary law might serve as a better foundation for the sustainable development of natural resources.[3] As David Bederman has written, "Custom can be a signal strength for any legal system—preliterate or literate, primitive or modern."[4]

Among scholars working on premodern Europe, custom has attracted attention because of the protracted coexistence of written law alongside the persistent relevance of practice and usage in semiliterate societies. Indeed, as Donald Kelley has shown, the theme of custom, along with that of nature, cuts across the entirety of the Western legal tradition from the Greeks to the aftermath of the French Revolution.[5] Focusing on the millennium from imperial Rome to the later Middle Ages, a clear (if not uncontested) narrative can be traced. In Roman jurisprudence, despite a strain of thought suspicious of custom's purchase over against the written law of state institutions, orators and jurists from Cicero to the Beirut school emphasized the role of *consuetudo* as the will of the people, the legal gravity of which was "not insignificant," in the words of Constantine the Great.[6] To be sure, the "popular" basis for custom in the Roman Empire was more intellectual conceit than social reality, and, on the whole, Roman jurists did not theorize much about custom as a legal problem. Nonetheless, in the view of Caroline Humfress, "custom" offered a tool for imperial officials (in Roman provinces much as

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in British Nigeria or French Morocco) to assert state power while giving the appearance of control to local litigants.[7] Over time, custom assumed greater weight, and with the accommodation of barbarian peoples into the fabric of late and post-imperial society, regional hybrids of tribal usage and Roman law emerged.[8]

If custom occupied an ambivalent place in Roman legal society, the early Middle Ages are a different story. As Manlio Bellomo has written of the period, what little written law existed was but an "archipelago of tiny islands in the vast sea of custom."[9] By the turn of the eleventh century, as the remnant "public" authority of the Carolingian regime devolved into a patchwork of "private" lordships in "feudal" France, a picture vividly drawn by Georges Duby and others, aristocratic custom came to be a dominant form of law in the West.[10] The revolutionary changes in legal culture in the twelfth century, associated with centralization both in the Latin church and in royal government and spearheaded by an increasingly numerous and well-trained class of jurists, prompted a vigorous engagement with the question of custom. According to David Ibbetson, in this period law (*lex*) and custom (*consuetudo*) came to be seen less as counterparts in the same juridical system than as distinct and ultimately opposed: *lex* as "ius scriptum" ("written law") and *consuetudo* as "ius non scriptum" ("unwritten law"). The latter could only be accepted if it were, in effect, disciplined by the former.[11] (We will leave aside here the concomitant emergence of "natural law," against which statute and custom alike were to be judged.)

During the High Middle Ages, both legists in the civilian tradition and canonists in the sphere of church law, such as Azo and Gratian respectively, sought to define and circumscribe custom. Drawing inspiration from these trends in legal thought, ambitious kings saw the co-opting of usage as a way to strengthen their power. In the process, usage came to be an integral part of the legal system of emerging monarchical states. Custom was at the heart of English common law (sometimes referred to simply as the "consuetudo regni," the "custom of the realm"), while France, at least in the north, comprised a patchwork of regional jurisdictions defined by their usages, the *pays de droit coutumier*, though these had much in common as reflections of a French *droit commun*.[12] Although the custom that developed in such a context was by no means an authentic, "bottom-up" lawmaking of the people, but rather a lawyerly approximation (or perhaps a legal fiction), processes were developed to ascertain communal practices, whether juries or, most famously, Louis IX's use of the *enquête par turbe*.[13] Finally, amid the urbanization of medieval society, especially from the twelfth century onward, rulers endorsed the usages of burgeoning cities across Europe, thus creating a body of civic custom in the form of town charters.[14]

The acceptance of usage as a form of law occasioned a number of difficulties. While custom as social practice allowed for a strategic ambiguity, once codified or litigated, usage became fixed in statute or precedent.[15] What is more, allowing custom to occupy a place in the hierarchy of legal plural-

ism implied a sifting: some practices were accepted as consistent with written law, while others had to be discarded. Yet the specter of bad custom was not inconsiderable, and before they were rejected, dangerous usages might gain purchase. In Bederman's view, "A perennial worry for any legal system that seriously entertains customary norms is that 'bad' customs will be encouraged to thrive."[16] Yet if custom as a conceptual and practical problem in premodern law has been studied with intimidating thoroughness, surprisingly little attention has been devoted to the theme of "evil usage." In the setting of late tenth- and early eleventh-century France, scholars like Dominique Barthélemy, Stephen D. White, and Tracey Billado have made valuable inroads when looking at both the rhetorical uses of bad custom and the specific practices that were labeled wicked.[17] In particular, monastic communities strategically indicted "bad custom" to assert their privileges over against an aristocracy painted as violent and rapacious. A century later, as Thomas Bisson argues, princely regimes burnished their credibility to no small degree with promises to abolish *malae consuetudines*.[18]

Building on this pioneering, but still limited, body of scholarship, there is considerable work to be done on the question of bad custom, particularly concerning the processes by which and the reasons why certain practices were judged perilous and evil. The articles in this forum seek to explore the rhetoric and use of bad custom amid a variety of times and places in premodern European legal history. Soazick Kerneis's contribution deals with the sorting of normative practice in the later Roman Empire, especially the ways in which judgments on custom strengthened state control of violence. I frame the discourse of bad custom in the high-medieval church as a problem of social history and the questioning (and reassertion) of clerical prerogative. Looking at English borough customs from the fourteenth to the sixteenth centuries, Esther Liberman Cuenca details the efforts by lawmakers to fix usages and thus protect them from corruption. Turning to a different urban context, the cities of northern Italy, M. Christina Bruno treats the refashioning of bad custom by fifteenth-century preachers as a facet of their social and economic critique. Accepting that "wicked usage" was a protean discourse whose significance was contingent on the context in which it was used, these studies revolve around a few key (and overlapping) questions. Who decided what customs were bad, and to what ends did those in power direct concerns over *prava consuetudo*? To what extent did debates over custom (and the condemnation of certain usages) reveal fault lines between different groups in society? How did a language of bad custom express the anxieties of those in power at times of change? In what ways was the assault on "wicked practice" tied to a notion of legal time and a fear of corruption, decline, and desuetude? How can interpretive lenses from outside history (theology and anthropology, for example) help us make sense of bad custom as a matter of law? We hope these articles will stimulate further discussion of why "trop mauvese coustume," in Philippe de Beaumanoir's thirteenth-century phrase, mattered in so many settings across the landscape of European legal history.

Notes

1. Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 43–48, 89; Stanley Diamond, "The Rule of Law versus the Order of Custom," *Social Research* 38, no. 1 (1971): 42–72.
2. For examples, see Gordon R. Woodman, "Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria," in *People's Law and State Law: The Bellagio Papers*, ed. Antony Allott and Gordon R. Woodman (Berlin: De Gruyter, 1985), 143–163; Peter Fitzpatrick, "Custom as Imperialism," in *Law, Society, and National Identity*, ed. Jamil M. Abun-Nasr, Ulrich Spellenberg, and Ulrike Wanitzek (Hamburg: Helmut Buske Verlag, 1990), 15–30; and Katherine E. Hoffmann, "Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930–1956," *Comparative Studies in Society and History* 52, no. 4 (2010): 851–880.
3. Peter Ørebech et al., *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2006).
4. David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010). Bederman's work is heavily indebted to Harold J. Berman's classic study *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).
5. Donald R. Kelley, "'Second Nature': The Idea of Custom in European Law, Society, and Culture," in *The Transmission of Culture in Early Modern Europe*, ed. Anthony Grafton and Ann Blair (Philadelphia, PA: University of Pennsylvania Press, 1990), 131–172.
6. Peter Stein, "Custom in Roman and Medieval Civil Law," *Continuity and Change* 10, no. 3 (1995): 337–344.
7. Caroline Humfress, "Law and Custom under Rome," in *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages*, ed. Alice Rio (London: Centre for Hellenic Studies, 2011), 23–47.
8. Soazick Kerneis, "*Consuetudo Legis*: Writing Down Customs in the Roman Empire (2nd–5th Century CE)," *Rechtsgeschichte-Legal History* 24 (2016): 244–250; Paul Barnwell, "Emperors, Jurists, and Kings: Law and Custom in the Late Roman and Early Medieval West," *Past and Present* 168 (2000): 6–29.
9. Manlio Bellomo, *The Common Legal Past of Europe*, trans. Lydia G. Cochrane (Washington, DC: Catholic University of America Press, 1995), 42.
10. For a synopsis of Duby's views on the subject, see Robert I. Moore, "Duby's Eleventh Century," *History* 69, no. 225 (1984): 36–49 (especially 37).
11. David Ibbetson, "Custom in Medieval Law," in *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2009), 151–175, here 153–155.
12. See André Gouron's essay, "La coutume en France au Moyen Age" [Custom in France during the Middle Ages], in his Variorum Collected Studies volume, *Droit et coutume en France aux XIIe et XIIIe siècles* [Law and custom in France during the twelfth and thirteenth centuries] (London: Routledge, 1993), no. XXI (originally published in 1990). See also Ada-Maria Kuskowski, "Inventing Legal Space: From Regional Custom to Common Law in the *Coutumiers* of Medieval France," in *Space in the Medieval West: Places, Territories, and Imagined Geographies*, ed. Meredith Cohen and Fanny Madeline (Farnham: Ashgate, 2014), 133–155.

13. For more on the processes for compiling customary law in France, see Esther Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden: Brill, 1993), especially 28–39.
14. The subject is summarized by David Nicholas, "Lords, Markets, and Communities: The Urban Revolution of the Twelfth Century," in *European Transformations: The Long Twelfth Century*, ed. Thomas F. X. Noble and John Van Engen (Notre Dame, IN: University of Notre Dame Press, 2012), 229–258, here 240–246.
15. On this problem, see Emily Kadens, "Custom's Two Bodies," in *Center and Periphery: Studies on Power in the Medieval World in Honor of William Chester Jordan*, ed. Katherine L. Jansen, G. Geltner, and Anne E. Lester (Leiden: Brill, 2013), 239–248.
16. Bederman, *Custom as a Source of Law*, 175.
17. Dominque Barthélemy, "The Year 1000 without Abrupt or Radical Transformation," in *Debating the Middle Ages: Issues and Readings*, ed. Lester K. Little and Barbara H. Rosenwein (Malden: Blackwell, 1998), 134–147, here 134–137; Stephen D. White, "Bad Customs (*malae consuetudines*) in Eleventh-Century France," in *Custom: The Development and Use of a Legal Concept in the Middle Ages*, ed. Per Anderson and Mia Münster-Swendsen (Copenhagen: DJØF Publishing, 2009), 51–65; and Tracey L. Billado, "Rhetorical Strategies and Legal Arguments: 'Evil Customs' and Saint-Florent de Saumur, 979–1011," in *Oral History of the Middle Ages: The Spoken Word in Context*, ed. Gerhard Jaritz and Michael Richter (Budapest: CEU Press, 2001), 128–141.
18. Thomas N. Bisson, *The Crisis of the Twelfth Century: Power, Lordship, and the Origins of European Government* (Princeton, NJ: Princeton University Press, 2009), especially 47–56, 95–111, 168–81, and 229–243.