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The Law of Customs and Usages

Matsugu Takemura
Cornell Law School

THE LAW OF CUSTOMS AND USAGES.

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A THESIS
for
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Presented by

Matsugu Takemura, LL.B.

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Introduction.

In regard to the division of law into two classes, written and unwritten law, the pen of every jurist in the civilized world has not failed to touch upon. We cannot say, however, that each argument and definition produced by them precisely agreed with the others as if all emanated from the same stock. On the contrary, differences and conflicts of opinion prevail here and there. By the Roman lawyers themselves, little importance was attached to the distinction between the classes. And. in every instance in which they make the distinction, they understand it in its literal sense. When they talk of written law, they do not mean law proceeding directly from the supreme Legislature, but law which was committed to writing at its origin: *quod ab inito literis mandatum est.* Law not so committed to writing, they call unwritten. This distinction of the so called "grammatical meaning" is too unimportant to attract our attention and we shall not pause to dwell upon it, but shall dismiss it, as Mr. Austin justly did, with a glance.

Our modern authorities took the foundation of the dis-

tinction to be with reference to the sources of law, and constructed their definitions upon that basis. This distinction of judicial meaning is, in its turn, very important for scientific accuracy and practical research. The modern Civilians say: *"Written law is law which the supreme legislature makes immediately and directly. Unwritten law is not made directly and immediately by the supreme legislature, though it owes its validity, or is law by the authority, expressly or tacitly given, of the sovereign or state."*

This demarkation of distinction, in some respects, has been adopted by Sir Matthew Hale in his History of the Common Law and transferred by Sir William Blackstone into his Commentaries.

Indeed we appreciate highly this distinction of judicial meaning and can not put it on a parallel in value with that of Roman writers. But at the same time we regret that it is at a distance from the most glorious perfection and not free from all objections. I can appropriately cite here Mr. Austin's criticism about it: *"The distinction between written and unwritten law, in what I have called the judicial meaning of the terms, is important. But as I have already indicated, nothing can be less significant or more misleading than the terms written and unwritten as thus applied. For, first, law, though it originate with the*

though it originate with the supreme Legislature, may be, and in many cases has been, established and published without writing. And law flowing from another source, though obtaining as law with the consent of the supreme Legislature, may be committed to writing at its origin. Such, for instance, are the laws of Provincial and Colonial Legislatures. And such especially, as I shall show hereafter were the edicts of the Praetors."

And in another place he directed his attention to the argument of Blackstone, and says:

"Speaking of the unwritten law, Blackstone says I style these parts of our law <u>Leges non scriptae</u>, because their original institution and authority are not set down in writing, as acts of Parliament are, but they receive their binding power, and force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.' Now according to this, the division of Blackstone and Hale stands thus: Acts of the supreme Legislature are <u>Leges scriptae</u>. But any law, not created immediately by the supreme Legislature, is <u>non scriptum</u>; Provided, that is, that its original institution be not set down in writing. Now, according to this division in which the two distinctions are manifestly confounded, what becomes of laws made immediately by subordinate Legislature?

And what would be the class of law made by judicial decisions of subordinate judges authoritatively recorded?"

After the subtlest criticism of the authorities, he remarked that *"It may be observed that the terms themselves, written and unwritten law, are foreign to the language of English law though found in Brocton (who evidently borrowed them from the Roman writers) and in Hale and Blackstone subsequently. The terms proper to the English law are not written and unwritten law, but statute law and common law."*

This is true and one cannot bring forward any objection to it. Nevertheless we are fully authorized, and even Austin himself justly conceded as much through the valuable work of his jurisprudence, to say that we cannot reject entirely the terms written and unwritten law as a result of their general and universal application.

What, then, is the true demarkation of the distinction? I do not believe that I can more briefly and more accurately mark out the line that Prof. Holland did. He remarked upon Legislation as the source of law. thus,-

"Legislation, whether by the supreme power, or by subordinate authorities permitted to exercise the function, tends with advancing civilization to become the nearly exclusive source of new law. It must be remarked that the making of general orders by our judges, or of by-laws by a

railway company under its act, is as true legislation as is carried on by the crown and the three estates of the realm in Parliament."

And finally he speaks about written and unwritten law in these terms:-

"In legislation, both the contents of the rule are devised, and legal force is given to it by simultaneous acts of the sovereign power which produce 'written law'. All the other law sources produce what is called 'unwritten law', to which the sovereign authority gives its whole legal force."

This distinction must be far beyond any objection. Indeed the terms statute and common law denote the same distinction as this, but the terms themselves are confined to English law and are not generally applicable. So, too, it seems clear, from the criticism above cited, that Mr. Austin conceded it. Moreover, I cannot help thinkcng that he laid down, prior to any other, the foundations of the above mentioned distinction.

Having ascertained what is written and unwritten law, next our attention is called to the sources, or rather contents of written and unwritten law. But the sources or contents of written law are not within the boundary of my present purpose. So I would be satisfied here to say simply that they are devised by Legislature, or more accur-

ately, they flow from the treasures of the mind of legislature under the oversight of the constitution, or in some countries, political morality or usages.

What, then, are the sources of unwritten law? To answer this question the modern authorities permit me to put forth the following arrangement:-

1. Customs and usages.

2. Religion.

3. Adjudication; "Res Judicatae".

4. Scientific discussion.

These constitute the chief sources of unwritten law. The explanation, which would consume a great deal of time and a large amount of paper, is needed to fully comprehend these constituents. But I will not concern myself to consider more than one of them. If I do, I must wander in a tedious and limitless way from my destination. So I will go the right way and turn at once to the goal at which my present purpose aims.

In this treatise, I propose to discuss the law of customs and usages, which constitute a part of unwritten law. That much of unwritten law is derived from customs and usages, needs scarcely any proof or authority. So I shall examine in the ensuing pages, the following questions:

1. How large a part of unwritten law of both England and America is derived from customs and usages?

2. When are customs transformed into law?

From my last remark upon unwritten law it would appear to any one that the last question does not deserve to be asked. But eminent jurists in different schools do not agree with our observation. Their vigorous objection to our authorities and their profound argument on the subject. challenge all our depth of thought to the full examination. If I were to say that the subject, at the present time, is one of the main fields of dispute in Jurisprudence, I would be safe from the criticism of exaggeration.

Finally I must remark that custom is such a usage as by common consent and uniform practice will become the law of the place, or of the subject-matter, to which it relates. So it is evident that custom and usage do not mean different things, but the same. The title of my present treatise stands only for the sake of scientific accurary. Hereafter I shall, sometimes, use the accustomed words "customary law" and "custom" for the law of customs and usages, &c after the frequent use of jurists.

The Extension of Customary Law.

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I have already remarked that I shall discuss in this place how large a part of unwritten law, both in England and in America, was, at one time, in an amorphous form of heterogeneous custom. But it is not an easy task, nor is it possible to mark out accuratly its boundary. The field is too large and some parts of demarkation are sunk into an inaccessible shadow of uncertainty. If we should endeavor to approach to precision and take up, one by one, the customary laws prevailing in England and the United States, we would require numerous large volumes, and finally would be obliged to give up the task with a penetration to a darkness of uncertainty whether it is derived from custom or religion or scientific discussion. But is a large voluminous work the purpose of my present treatise? No. Then is it of any interest to throw light upon the darkness of uncertainty? Certainly it is in some respects but the service, if I should render it, would not be repaid with abundant fruits. Above all, if we compare this question with the second subject which I proposed in the latter part of the introduction, we find it far below that in value.

By this observation and assumption I shall not delay

here for a long time and engage myself to collect a dry and fruitless harvest. I can not, however, quit this subject without slightly touching upon it. If I hurry immediatly to my main field I must necessarily dismiss, to a great degree, the appreciation of my present purpose. History may be studied as history, without any attention to the geographical map; but we can not appreciate its real value or understand completely its intrinsic merits unless we can fully get the geographical knowledge. I would say the same about customary law. To map out its general extension or situation is most necessary for our further progress. It is obviously beyond any controversy to assert that a large part of unwrittem law is derived from popular customs. I say here "a large part" and not more than that. Some of the classical jurists of Rome and a few of the modern jurists of the civilized nations have employed the term "customary law" as a synonym with that of unwritten law. But this presumption is certainly the result of over-estimation and exaggeration of it, and arose from obscure knowledge as to the nature of judicial law.

A still more objectionable assumption is that of Mr. Brown, who says: *"Indeed, all laws have been in practice before they were put in words, just as every act had its origin in intention. Laws have to do with the conduct of*

mankind, but they are themselves the result of the conduct of men. They are the result of the enduring sentiments and protests of the good against the ephemeral backslidings of the evil. All laws float in men's minds long before they send down a precipitate of imperative words. It must have been understood by men that theft—the act of taking the property of another without his consent—was wrong before they made a law to punish the thief, with a view of preventing similar depredations. But long before man made a law, they had bolts to their doors, and if they caught the robber they exercised their right by taking his booty from him and possibly even inflicting upon him a vengeful punishment. This was not done by one party but by many, and we see in it the embryonic custom out of which the law has developed. There has been a gradual evolution of law from the nebulous justice which was scattered in men's minds and found an expression in their conduct, to the statute book and the whole body of text-book law. The real legislature is the people and the legislative machinery which exists in this country, including the Queen, the houses of Lords and Commons and courts of law, are only a means by which the will of the people may be ascertained and reduced to writings. What I here argue is, that the legislature is second in point of time to the executive,

that custom went before law, and that law is nothing but agreed upon usage."

This argument has, to a certain extent, a vigorous strength, but is too general and vague to the scientific eye. To criticise minutely here this principle of observation would be to encroach upon the question of the subsequent subject, but I can not omit to make one point. It is a fundamental error to assert that all sources of law, written and unwritten, are nothing else but customs and usages. Wise legislation should no doubt pay prominent attention to the popular customs; but that is not all. Beyond it they should look inevitably for some other things, such as public policy, circumstances of the time, or equitable reason. &c. So it is justly said, and I entirely agree with the statement, that *"In legislature, both the contents of the rule are devised, and legal force is given to it, by simultaneous acts of the sovereign power which produce 'written law'."*

Turning to unwritten law, I equally object to the view of Mr. Brown. Our tribunals do not confine themselves to taking up popular sentiment as the only source of unwritten law. They should go sometimes to the fields of religion, or more often to scientific discussion, &c. I will not however repeat here the components of unwritten

law sources, already arranged in the introduction. I shall put forth simply the extension of customary laws in English common law, which has been adopted by the United States.

Customs are said to be either, (1) General, or those which prevail throughout the kingdom, or (2) Particular, those which for the most part affect only the inhabitants of a particular place, or the members of a particular class. Concerning general customs we need say little, just because so much might be said. By these, whenever they are applicable, the proceedings and determinations of the ordinary courts of justice are guided and directed as to the course in which land should descend by inheritance, the method of acquiring and transferring property, the requisites and obligations of contracts, the rules for the construction of wills, dees and statutes, and by these also the respective remedies for civil injuries, and many other important particulars are settled and determined. Those decisions of courts, which favored the general customs, constitute general customary laws.

As to particular customs I must say a little more, but a precise treatment of these is also beyond the scope which I have intended. It is doubtless true that these particular customs, which are contrary to the general law of the land, are the remains of a multitude of local cus-

toms prevailing, some in one part, some in another, over the whole country, while it was divided into separate dominions. When these separate dominions united under one rule, a unity of customs was the inevitable result. And just as many races under one peaceful rule will become one race, so many systems of laws will under one rule become one system. But, further, just as in ethnology we discover instances in which a race, even under the most favorable conditions, has remained distinct and separate in the midst of another race, although living under the common rule and associated in peace, in intercourse, and in commerce, so we find in the study of jurisprudence that certain customs, or systems of laws, have remained separate and distinct in the midst of a wide and uniform law, and have retained their characteristic peculiarities in spite of many conditions which favored an amalgamation and a unification of these various systems. These so called customs have in many cases been taken into account and clothed with legal force by the tribunals. These would be justly said in England to be Gavelkind, Borough-English, customs of London and customs of Manors.

The customs of merchants affect certainly the members of that class. Many writers exclude from the term custom those rules relative to bills of exchange, partnership, and

other merchantile matters, which have been classed under the head "Customs of Merchants" by Blackstone on the ground that their character is not local, and that their binding force is not confined to a particular district. It has been remarked that the law of merchants is in truth only a part of the general law, and courts of law must take notice of it as such. Doubtless where the customs of merchants are established and settled by known decisions, it is the "general law of the land." But there are some questions the decision of which depends upon the customs amongst merchants, which have not hitherto met with judicial recognition, and in such cases it is fit and proper to take the opinions of the merchants thereon. At any rate I will not contradict at any length this principle of so many writers. My postulate is that law which is derived from the customs of merchants should be, without question, ranked among customary laws, for they affect the particular class only, among the general people of the state.

2. When does custom become transformed into law?

Having ascertained the situation and sphere of customary law in unwritten law, we have now come to the subject of transformation of custom into law. In explianing it. wide differences of opinion have been raised among differ-

ent schools of jurists. Each of them discusses and argues it from his own point of view. So the result is we are carrying, at the present time, entirely disagreed weights of authority as to the subject. Of course I cannot discharge the task and decide the differences. But we may justly hope to approach on a clear reason if we compare carefully their differences, and examine minutely the points of error which we think they have obviously committed.

Before we proceed farther I must say, aided by several eminent authorities, that heterogeneous customs in a nation are transformed into law on the instant they get legal force from tribunals authorized by the supreme power of the state. But there are a good many jurists, ancient and modern, who do not accept this doctrine. It is commonly supposed by writers on jurisprudence, Roman, English and others, that law shaped upon customs obtains as positive law, independently of the sanction adjected to the customs by the state. Ulpian, who is in all practical law a clearer and more trustworthy writer than any of the other Roman jurists, remarked as to the validity or binding force of custom, that long custom, in matters which do not come to us on the authority of scriptum, is wont to be observed *Pro Jure et Lege*. which we may perhaps translate "as statute law". The same theory is clearly imported into Justinian's Institutes.

And we cannot help thinking that Hale and Blackstone also committed the same error by the adoption of these Roman authorites. It is supposed, for example, by the English writers that customary law exists as positive law by force of immemorial usage; and that the decisions of courts have not created, but have merely expounded or declared it. But it is an erroneous hypothesis, and one pregnant with numerous absurdities and inconsistences.

We must necessarily sacrifice a few lines to criticise the hypothesis of the foregoing paragraph. All the customs immemorially current in the nation are not legally binding. But all these customs would be legally binding, if the positive laws, which have been made upon some of them, obtained as positive law by force of immemorial usage. And positive law made upon custom is often abolished by legislature or by judicial decisions. Indeed the writers in question admit that the continuance of the rule as law depends on the sovereign pleasure. But supposing it existed as positive law by virtue of the *consensus utentum*, it could not be abolished, conformably to that supposition. without the consent and authority of these, its imaginary founders. At any rate there is in the hypothesis no line of demarkation between mere custom and customary law. So we can never maintain it as a correct one.

Elsewhere Ulpian gives a ground for the binding force of custom as "statute law", where he defines *mores* as the tacit agreement of the people confirmed by long custom. This tacit agreement was suggested probably by that Greek idea of a common agreement of the state, which Papirian introduced from Demosthenes into his definition of *lex*. The same theory is carried further by Julian, into an inexact comparison between the general following of a custom by the people as a number of individuals, and the formal passing of a law by the people as an assembly. This "conceit", as it is termed by Austin, is eagerly adopted by Blackstone, for which the former author justly takes him to task. Mr. Austin says:

"The conceit that customary law obtains as positive law by virtue of the consensus utentum, was suggested to its numerous modern partisans by certain passages in Justinian Pandect, particularly the following passage of Julian:

'Inveterata consuetudo pro lege non immerito custoditur; et hoc est jus quod dicitur moribus constitutum. Nam quum ipsae leges nulla alia ex causa nos teneant, quam quod Judicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, populus suffradio voluntatem suam declaret, an rebus ipsis et factio?'

Without pausing to analyze the passage, I shall briefly remark on a few of the errors with which it overflows. First, it confounds an act of the people in its collective and sovereign capacity with the acts of the members considered severally, and as subjects of the sovereign whole. Secondly, the position maintained in the passage is this: that a customary rule which the people actually observes, is equivalent to a law which the people establishes formally; since the people, which is the sovereign, is the immediate author of each."

Still he continues:

"Now admitting that the position will hold, where the people is the sovereign, how can the position possibly apply where the people is ruled by an oligarchy, or where it is subject to a monarch? During the virtual existence of the Roman commonwealth, the position maintained in the passage might have been plausible. But it is strange that the author of the passage, who lived under Hadrian and Antoninus, after the Roman world had become virtually a monarchy, did not perceive its absurdity. He must have known that the laws formally established by the virtual monarch, and customs observed spontaneously by the subject Roman community, could not be referred in any sense whatever, to one and the same source."

As to Blackstone he criticises thus:

"Blackstone borrows this passage of Julian's, enhancing its original absurdity by adding nonsense of his own. Thus", he remarks, after he has cited the passage, *"did they reason, while Rome had some remains of her freedom. And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people. Now customary law, as positive law, is established by the sovereign. And, consequently, whether it be introduced, or not, by the consent of the people, depends upon the form of government. If the people are the sovereign, or if they share the sovereignty with one or a few, customary law is the law introduced by their consent, in the strict acceptation of the term. But if the people have no share in the sovereignty, they have no part whatever in the introduction of positive law, customary or otherwise: and can only be said to consent to its introduction in the remote sense that they acquiesce, whether by reason of fear or some other motive, in the existence of the government which establishes the law."*

Finally he remarked that:

"Sir William Blackstone's meaning may have been this:

that the antecedent customs, which are the ground work of customary law, are necessarily introduced by the consent of the people: or, in other words, are necessarily consonant to their interests and wishes. But even this is false. If the people be enlightened and strong, custom, like law, will commonly be consonant to their wishes and interests. If they be ignorant and weak, custom, as well as law, will commonly be against them &c."

These criticisms of Mr. Austin as to the authorities above referred to should not be objectionable, and I can not but entirely agree with him. But Mr. James C. Carter of New York city recently made an address before the American Bar Association on the Origin and Growth of Law, and objected powerfully to the assertion of Mr. Austin.

Mr. Carter, after criticising Mr. Austin's definition of law, says:

"It seems to me that this attempted explanation of the genesis of law by the hypothesis of a command is wholly illegitimate. There is no occasion for any hypothesis. The whole process is open to observation, as a matter of fact, and the solution of the question lies, like that of any other similar problem, in the scrutiny of actual facts. We know that we have judges, and all we know of the law comes from their decisions. The statute book, indeed, is

open to us; but we do not know the meaning of this, in any controverted cases, except from the declarations of the judges. All the knowledge, therefore, which we really have of the law comes from the judge. But how does he get at the law? Does he make it? If he did it would be his command, and not that of a sovereign. But any such imputation of sovereignty to a judge would be contrary to the observed and manifest fact. The exercise of any such power would be ground for his impeachment. We all know the method by which he ascertains the law. . . . . That the judge can not make the law is accepted from the start. That there is existing already a rule by which the case must be determined is not doubted. Unquestionably the functions of making and declaring the law are here brought into close proximity: But, nevertheless, the distinction is not for a moment lost sight of. It is agreed that the true rule must be somehow <u>found</u>. Analogous cases are referred to. The customs and habits of men appealed to. Finally a rule is deducted which is declared to be one which the existing law requires to be applied to the case.

The conclusion from this is that our unwritten law— which is the main body of our law— is not a command nor a body of commands, but consists of rules springing from the social standard of justice and which have been found in the

course of the application of that standard through a long period to the transaction of men!

In another place he concluded his argument:

"If the foregoing views are well founded, I am now justified in stating the conclusions to which they lead. Those are, that law is not a body of commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by the representatives of society itself. It exists at all times as one of the elements of society, springing directly from habit and custom. It is, therefore, the unconscious creation of society, or, in other words, a growth. For the most part, it needs no interpreter or vindication. The members of society are familiar with its customs and follow them; and in following custom they follow law. It is only for exceptional instances that judicial tribunals or legislative enactments are needed!

Whether law is the command emanating from the supreme power to an inferior in the state, or not, is a great question which needs a long and limitless argument. But we are far from the assumption that custom, which prevails among people, itself is law, through the historical phenomena or philosophical reason of jurisprudence. What were the ancient *Themistes* (*Θεμιστες*) in Greece? Were they

collections of customs? If custom itself is law, what is the function of Legislature? It is far beyond any controversy that from the primitive stage of society to the present time, the management of law, to make new ones or decide any case, has been confined to the function of the supreme power in the state. Moreover there is no doubt that any one can not break law without incurring on himself the evil, or more technically, the sanction flowing from the supreme power. What, then, would be the law but the command of that power? Certainly the judge can not take upon himself the task which assumes the legislative function. Yet the moment the judgment is rendered and reported, he passes unconsciously or unavowedly into a new language and a new train of thought. We admit that the new decision has modified the law. In fact it has changed the old rules, and a clear addition has been made to the precedents. This is clearly to be seen from the nature of the judicial function, or he could not administer justice, and keep pace with social progress.

By the above argument it seems to me that the judges can adopt customs to be the sources of unwritten law, as the Legislature takes them up as sources of written law. I assert positively that they are fully authorized to do so by the supreme power of the state. Prof. Holland says: *"The*

state has in general two, and only two, articulate organs for law-making purpose—the legislature and the tribunals. The first organ makes new law, and the second attests and confirms old law, though under cover of so doing it introduces many new principles."

In truth we can not see any organ, outside these two, for law-making purposes in the state. So it would be well to conclude that custom itself is not law, but custom, and to deduce logically. to follow custom is not to obey law, but custom.

When is it transformed into law? As we have often seen before, it becomes for the first time law at the moment it is adopted by the courts of law. Professor Holland says: *"Morality plus a state enforcing the observance of certain parts of it, is customary law."* And in another place he continues,- *"The state, through its delegates the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness."* More emphatically Mr. Austin remarked that *"Independent of the position or establishment which it may receive from the sovereign, the rule which a custom implies is merely a rule of positive, or actual morality, and derives its obligatory force from the sentiments called public opinion."*

In the next paragraph he continues,- *"Now a merely moral, or merely customary rule may take the quality of a legal rule, or law, in two ways; it may be adopted by a sovereign or subordinate legislature, and turned into law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into law after the judicial fashion. On the first of these suppositions, the legal rule which is derived from the customary is statute law; on the second of these suppositions, the legal rule which is derived from the customary is a rule of judicial law."*

Before I finish the present treatise, the collateral question, To what customs should our judges lend legal force? naturally suggests itself to me to be slightly touched upon. Some authorities put down the conditions which customs must fulfill before they can be taken up by the judges. The conditions may be enumerated as follows:-

1. That custom must have been used so long, that the memory of men runneth not to the contrary.

2. It must have been continued.

3. It must have been peacable.

4. It must be reasonable.

5. It ought to be certain.

6. It must be compulsory.

7. It must be consistent with others.

No doubt these are necessary conditions to be fulfilled before any custom will ask the hand of the state. Yet I wish that I might add one more condition which is that it must be expedient to the general welfare of the nation.

Now I shall conclude the foregoing arguments thus:- At the time when salutary customs which prevail among the people are adopted or enforced by the judges they are transformed from customs into laws; namely, customary laws; and these customary laws form no doubt a large part of unwritten law.