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CUSTOM AS LAW IN ENGLISH LAW

NEIL DUXBURY[•]

ABSTRACT. *This article considers prescription as a customary standard of legal validity which enables judges to identify certain customs as law even though the status of those customs as law cannot be ascribed to a law-making authority. Although claims as to customs having prescribed are often bound up with claims as to the quality (as opposed to the validity) of custom as law, prescribed custom is properly conceived to be a feature of the rule of recognition – a criterion by which a court can identify, and declare, a custom as already existing law as distinct from both custom without the force of law and custom turned into positive law.*

KEYWORDS: *customary law, common law, prescription, rule of recognition.*

I. POSITIVISM AND CUSTOM

A law-making body might turn a custom into a law. And a community's respect for a custom might be such that the custom operates like a law. But could a custom ever *be* law without it having been made so? If a custom could be law in its own right, a court which decided according to that custom would not be making law but applying law which already existed. Only someone who believes in fairy tales would have it that there exists a body of hidden but perpetual customary law awaiting judicial detection, Lord Reid observed in 1972, and nobody believes in fairy tales any longer.¹ Yet around that very time no less a figure than Friedrich Hayek was insisting that the tale was true: "law existed for ages before it occurred to man that he could make or alter it",² and "those formulating the rules do no more ... than to find and express already existing rules, a task in which fallible human beings will often go wrong, but in the performance of which

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¹ Lord Reid, "The Judge as Law Maker" (1972) n.s. 12 J.S.P.T.L. 22.

² F.A. Hayek, *Law, Legislation and Liberty*, integrated 3 vol. ed. (London 1982), I, 73. (Volume I, *Rules and Order*, was first published in 1973.)

they have no free choice.”³ This article considers how Hayek’s core assertion – that a rule need not be made as law in order for it to be a legal rule – is distinctively affirmed in the history of English law.

Hayek rejected “the positivist doctrine stand[ing] ... in flagrant conflict with what we know about the history of our law”.⁴ Laws are coercive orders, the classical positivists argued, whereas customs are not. Customs can be turned into laws – a legislature might do this expressly (by enactment) or “obliquely”⁵ (by not abrogating and therefore tacitly assenting to a court’s decision to “impress [a custom] with the character of law”⁶) – but “[c]ustom of itself maketh no law.”⁷ A custom which has not been made into law “is nothing more than a rule of positive morality”, something “generally observed by the citizens ... but deriving ... force ... from the general disapprobation falling on those who transgress it.”⁸ The custom might be a source of legitimate expectations for its beneficiaries, and might be treated by those burdened by it as a reason for acting in a particular way, but it is only a law if it has been made law.⁹ There is no innately legal custom awaiting judicial discovery.

Like many others since, Hayek thought that anyone intent on grasping what eluded the classical positivists did well to reach for H.L.A. Hart’s *The Concept of Law*.¹⁰ Whereas classical positivists insisted that a custom only becomes a law when a legislature enacts a rule legalising it or a court applies it to a dispute, Hart set out an argument supporting the conclusion that a custom can be a law in its own right. Statutes do not become law only once judicially interpreted, Hart insisted, for, if they did, a person today found liable for breach of a statutory duty never previously interpreted by a court could reasonably object that she broke no law when she acted; a court’s first application of a statutory rule would always take effect retroactively. Might not the same reasoning be applied, he asked, to custom as a source of law? “Why, if statutes made in certain defined ways are law before they are applied by the courts in particular cases, should not customs of certain kinds also be so?”¹¹ To answer that the statute, “before it is applied by a court, ... has already been ‘ordered’” whereas “a custom has not” is but to assert “the dogma”

³ Ibid., vol. I, at p. 78.

⁴ Ibid., vol. I, at p. 73.

⁵ John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 2 vols, 5th ed. (London 1885), II, 531.

⁶ Ibid., vol. I, at p. 36.

⁷ Thomas Hobbes, *The Elements of Law*, ed. F. Tönnies (Cambridge 1928 [1650]), 151.

⁸ Austin (note 5 above), vol. I, at pp. 36, 102.

⁹ See Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford 1986), 223-30.

¹⁰ See Hayek (note 2 above), vol. II, at p. 56.

¹¹ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), 46.

that only orders ascribable to a sovereign or his subordinates can rank as law.¹² It is equally unsatisfactory to answer that a legislature's not having abrogated a court's decision enforcing a custom shows it tacitly to approve of that decision, for it is conceivable that the legislature dislikes a decision but leaves it undisturbed because it has bigger battles to fight, say, or because it does not want to be seen as meddling.¹³ Yet how can a custom be law, just as a statute is a law, before a court has ever pronounced on it? Because the criteria by which legal officials identify what counts as law within a particular legal system – the criteria which form the content of its “rule of recognition” – make it possible for officials to speak of customs of certain kinds as valid laws. A criterion of validity might be, for example, that a custom is to be identified as a rule of the legal system if it is established as “long customary practice”¹⁴ and if no statute or other legal source prevents legal officials from relying on this criterion to identify the custom as a legal rule.

It is by no means obvious that Hart prevailed over the classical positivists on the topic of customary law. These “customs of certain kinds” cannot be law simply by virtue of having long been practised without disturbance, Austin had observed, for there are “customs immemorially current in the nation” which “are not legally binding”, just as some customs which are legally binding “had no existence till times comparatively recent”.¹⁵ The claim that a custom has the status of law *sui generis* by virtue of some characteristic – its longevity, its popularity, its reasonableness or whatever – is unconvincing if customs can have this status yet lack the characteristic, or if they can have the characteristic without ever being, or needing to be, recognised as law. There must be some test of recognition by which legal officials can identify customary laws (as distinct from spontaneous customs and legalised customs). Hart drew no conclusions as to what the test might be.¹⁶

Could a legal system embody such a test? Hart's reflections on the legal status of custom (“not in the modern world a very important ‘source’ of law”¹⁷) were understandably sketchy, for the topic was not prominent on his agenda when he rejected

¹² *Ibid.*, at p. 47.

¹³ *Ibid.*, at pp. 47-8.

¹⁴ *Ibid.*, at p. 95.

¹⁵ Austin (note 5 above), vol. II, at p. 539.

¹⁶ “Austin ... held that ... customary practices were not law until the courts ... recognized them.... Hart reversed Austin on this point. The master rule [sc., the ultimate rule of recognition], he says, might stipulate that some custom counts as law even before the courts recognize it. But he does not face the difficulty this raises for his general theory because he does not attempt to set out the criteria a master rule might use for this purpose.” Ronald Dworkin, *Taking Rights Seriously* (London 1977), 42.

¹⁷ Hart (note 11 above), at p. 45.

classical positivism and made his case for a fresh start. The cursorness of the reflections should not mask their significance, however, for they have some basis in English legal history. Particularly before the emergence of *stare decisis*, judges and lawyers regularly sought to explain how some customs had the status of law even though no law-maker or court had ever invested those customs with legal validity. There is to be discovered in this history no single comprehensive test for ascertaining a custom's inherent legal validity – though the identification of a custom as law often involved the proposition that it had endured since time immemorial – and the courts, which would sometimes enforce a custom even though it did not satisfy any accepted test, were hardly immune to the classical positivists' charge that they impressed customs with the character of law. But the lack of a clear-cut test, and the fact that judges would sometimes legalise customs, does not negate the possibility of a legal system's ultimate rule of recognition embodying some criterion or criteria of validity enabling the courts to identify custom as a distinct source of law. Pre-*stare decisis* English judges and lawyers, we will see, would typically identify a custom as innately legal – as distinct from a custom which either was not law or had been made law – by virtue of its conformity to a standard of legal validity which was itself customary in nature.

This article is not a disquisition on the general topic of law and custom. Rather, it considers how, historically, English lawyers have tended to understand and explain custom as a source of law in its own right. English legal history does not so much flesh out Hart's own laconic observations on custom as a source of law as lend credence to a general Hartian perspective on the topic. If a criterion of validity by which legal officials identify a custom as law is posited rather than customary – as would be the case, for example, with a statute providing that a customary practice establishes a legal right if it has endured substantially unaltered for the past forty years – the custom which meets with the criterion is not customary law but custom made binding by positive law. A custom which is customary law has this status because the criterion of validity enabling its identification as law is itself customary. Note how this last proposition trades on two distinct conceptions of custom: a municipal court which identifies a community custom (what Bentham called custom *in pays*) as law is invoking a standard of legal validity which is customary in the sense of its being a custom of the courts and the legal profession (Bentham's custom *in foro*).¹⁸ So long as a legal system's ultimate rule of recognition

¹⁸ See Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. J.H. Burns & H.L.A. Hart (London 1977 [1774x1776]), 182-84. I use "community custom" to refer to national and local

allows for customs *in foro* as part of its content, it will be possible for judges and lawyers to identify a community custom as law (before it has been applied as law) on the basis that the custom conforms to a standard of validity which is identifiable as customary law of the courts.¹⁹ But what customary standard, or standards, of validity might courts ever invoke to identify community custom as already existing law?

Prescription is the standard of validity most often applied by English courts to identify a custom as binding law. Although prescription is nowadays commonly thought of as legislated rather than judicial doctrine,²⁰ the notion that a custom is law because it has prescribed is one which was accepted and refined in the courts and in legal writings. The history of the doctrine, even distilled, is messy. It yields no definitive explanation of prescription as a test of custom as law (not least because there is, we will see, more than one conception of custom as law), and although custom deemed already law is invariably taken to be prescribed custom, there were differences of opinion among pre-stare decisis English lawyers as to whether or not custom could be declared law solely on the basis of its having prescribed.²¹ The history confirms, nevertheless, that a feature of the rule of

customs as distinct from customs of the legal profession. Local (particular) and national (general) custom, we will see in the next section, are distinct concepts in English law.

¹⁹ See Joseph Raz, “Legal Principles and the Limits of Law” (1972) 81 Yale L.J. 823, at 852-3; also Grant Lamond, “Legal Sources, the Rule of Recognition, and Customary Law” (2014) 59 American Journal of Jurisprudence 25. Lamond’s account is particularly interesting because he sees the difficulties in squaring this line of argument with what is meant to be a positivist legal theory: if customs *in foro* are accommodated by the rule of recognition, he observes, we have a legal system in which the rule of recognition extends to standards which courts customarily treat as binding but which are not validated by statute, precedent, a constitutional provision or any other posited source of law (*ibid.*, at 34-5). Nevertheless, he appreciates that some squaring has to be done, because judges within municipal legal systems do enforce community customs which conform to “non-source-based” standards of legal validity (*ibid.*, at 35). Rather than invoking the rule of recognition to explain how they do so, he argues that judges understand the non-source-based standard as “authoritatively binding” – to be followed not because of “the merits of the standard itself?” but because “it is part of the law” and so is something which they “are duty-bound to apply” (*ibid.*, at 45). To say that judges identify community customs as having legal validity by virtue of their conformity to a standard which is “part of the law” seems to entail acceptance of the rule of recognition (modified to allow custom *in foro* to feature in its content). The point for emphasis is that Lamond, like Raz, accepts that judges try to identify community custom as law (rather than turn community custom into law) when they declare its conformity to a standard of legal validity which is accepted as customary law of the courts.

²⁰ Under the Prescription Act 1832, s. 2, evidence of 20 years’ continuous and uninterrupted enjoyment of an easement establishes a strong presumption that, at some time earlier, there was a (now lost) grant of the easement to the dominant neighbouring estate and that the holder of that estate enjoys the easement as a prescriptively acquired right. The presumption is practically unassailable because it can only be rebutted by proof that the grant could not have been made in the time before the prescription period but after the year 1189 (about which more later). In any event, once user has run for 40 years, the prescriptively acquired right becomes absolute.

²¹ Prescription stands as a vivid illustration of how lawyers can accept a standard of legal validity as part of the rule of recognition while disagreeing – not empirically but theoretically – over what is required for that standard to be satisfied. On empirical disagreement (over whether a rule satisfies a criterion of legal validity) as distinct from theoretical disagreement (over what the criterion of legal validity actually is), see Ronald Dworkin, *Law’s Empire* (London 1986), 4-6. Hart never denied the possibility of theoretical disagreement over criteria embodied in the rule of recognition: see Hart (note 11 above), at pp. 245-7.

recognition within a municipal legal system may be that its courts identify some community customs as legally binding by relying on criteria of validity which (notwithstanding possible legal disagreements over their specifics) themselves exist as custom *in foro*.

II. CUSTOMARY LAW AND COMMON LAW

Precedent and statute are the main sources of English law. But it was not always thus. Precedent emerges late in the history of the common law – it would take until the nineteenth century for the courts to become properly equipped to develop the common law according to the principle that like cases should be treated alike.²² Before then, a case (or line of cases) would typically be treated as persuasive rather than as binding authority – as something which judges might recognise as venerable legal opinion, and which a lawyer might rely on in court because it provided evidence of what the common law was rather than because it was itself common law.²³

The common law itself was a form of custom – though this observation cannot stand unqualified. A custom is a pattern of behaviour identifiable in a community. We do not, as individuals, have our own customs (we have habits), but we do *share* customs with others. Behaviour according to a custom is not compelled but rather, assuming the custom not to be in decline or obsolete, is expected – what the community considers the done thing rather than merely what it does. There is, of course, a difference between an aggrieved party complaining about my failure to do the done thing and her claiming that my failure to do the done thing was a breach of legal duty. Could my departure from custom amount to breaking the law?

Medieval courts answered that it could – that customs could bind as customary law. But it is important, for at least two reasons, to exercise caution with the concept of customary law. First, the popular depiction of customary law as unwritten law is slightly misleading. Although the earliest English legal writers set forth no distinct theory of law or legal origins, they were clear that laws need not be written: “if, merely for lack of writing, they [i.e., unwritten laws] were not deemed to be laws,” the prologue to Glanvill

²² See Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge 2008), 53-57.

²³ See e.g. Coke, 1 *Institutes* (Co. Litt.) 254a (“our book cases are the best proofs what the law is”); Matthew Hale (d. 1676), *The History of the Common Law of England*, ed. C.M. Gray (Chicago 1971), 45 (“Judicial decisions ... are less than a law, yet they are a greater evidence thereof than the opinion of any private persons”); also *Jones v Randall* (1774) Lofft. 383, 385 (Lord Mansfield) (“precedent, though it be evidence of law, is not law in itself”).

has it, “writing would doubtless supply to written laws a force of apparently stronger authority than either the justice [*equitas*] of him who decrees them or the reason of him who establishes them.”²⁴ It is no great leap from this reasoning to the conclusion that English law is composed of two types of law: “the written law” and “unwritten laws or customs.”²⁵ But customary law will usually have been documented in some way or other – in records of court proceedings, for example, or in legal writings. The observation that customary law is unwritten means only that it is not written *as law* rather than that it must be “merely oral.”²⁶

The second, and for our purposes more important, reason for proceeding with caution is that customs which were understood to bind as customary law were not common law. Blackstone described unwritten – un-enacted – law as falling into three categories: “peculiar laws” (Blackstone had in mind rules of civil and canon law) which “have been ... received ... by ... custom in ... courts” with jurisdiction to deal with religious, military, admiralty and university matters but which “bind not the subjects of England”;²⁷ “particular customs ... which affect only the inhabitants of particular districts”;²⁸ and “general customs, or the common law ... by which proceedings and determinations in the king’s ordinary courts of justice are guided and directed.”²⁹ The distinction between the last two categories is important. Late-medieval and Renaissance English lawyers typically understood binding customs to be not common law but rather customs which held good in a locality – examples would be local customs relating to trade, inheritance, tenure and wardship – as exceptions to the common law. In Anthony Fitzherbert’s *Abridgement*, first published in 1514, the entry for “custom” is devoted entirely to local customs tried before manorial court juries and held enforceable as *lex loci* in the localities where they prevailed.³⁰ A century later John Davies, in his account of the arguments presented before the King’s Bench in the *Case of Tanistry*, observed how “custom, in the intendment of the law, is such usage as has obtained legal force, and is in

²⁴ [Ranulf de Glanvill?], *Tractatus de legibus et consuetudinibus regni Angliæ* (London 1604 [c. 1187-89]), prologue, 3 (unnumbered). See also Henry de Bracton, *De legibus et consuetudinibus Angliæ* (London 1569 [c. 1230-35?]), 1 (“[I]t will not be absurd to refer to English laws (though unwritten) as laws ...”).

²⁵ Hale (note 23 above), at p. 3.

²⁶ See Blackstone, 1 *Commentaries* 63-4; also Andy Wood, “Custom and the Social Organisation of Writing in Early Modern England” (1999) 9 *Transactions of the Royal Historical Society* 257.

²⁷ See Blackstone, 1 *Commentaries* 79-84.

²⁸ *Ibid.*, at p. 74.

²⁹ *Ibid.*, at p. 68.

³⁰ See Anthony Fitzherbert, *La Graunde Abridgement*, 2nd ed. (London 1516), 277. Fitzherbert’s primary legal source was the year books, wherein “custom”, absent an indication to the contrary, refers to local rather than general custom.

reality a binding law to such particular place, persons and things which it concerns”.³¹ Thomas Hedley said much the same before Parliament in his famous speech of 1610 condemning the king’s impositions.³² A local custom was a tricky proposition. A court enforcing one was in essence declaring a special law to prevail, in the relevant locality, over the general non-statutory law of the land. Judges would understandably be disinclined to make such a declaration without being confident of what the customs of the locality were, and that the alleged custom really did exist.³³

The common law, then, was understood to be customary (derived from general custom), but there was also this other category of law – local customs enforced by local and royal courts so as to be binding within a locality – which was customary law but not common law. A “custom cannot be alleged generally within the kingdom”, Coke insisted in the late 1620s, “for that is the common law.”³⁴ With the common law – this was the crux of Coke’s point – nothing needed to be alleged as custom: law which was *common* law was by definition within the knowledge of judges, and so there was no reason for lawyers to mention it in writs or pleadings. The point was clearly on Henry Finch’s mind when, writing around the same time, he proclaimed mercantile custom to be general custom – part of the common law rather than something which merchants had to demonstrate; it was “not good” legal technique to “plead that there is a custom among merchants throughout the realm” regarding the recognition of bills of exchange, for “that which is current throughout the realm, is common law, not custom.”³⁵ This distinction between common and customary law was not always straightforwardly negotiated,³⁶ not least because judges had to be confident that a custom prevailed in every locality throughout the realm if it was to be treated as common law.³⁷ Lawyers had

³¹ *Case of Tanistry* (1608) Dav. 28, 31-2 (“custome, in l’entendment del ley, est tiel usage que ad obtaine *vim legis*, & est revera un binding ley al tiel particular lieu, persons & choses que ceo concern”).

³² Thomas Hedley, speech to the commons (28 June 1610) in E. Reed Foster (ed.), *Proceedings of Parliament 1610. Vol. 2: House of Commons* (New Haven 1966), 170-97, at 175-6 (“Customs are confined to certain and particular places, triable by the country, ... whereas the common law is extended by equity, that whatsoever falleth under the same reason will be found the same law”).

³³ See David Ibbetson, “Custom in Medieval Law” in A. Perreau-Saussine & J.B. Murphy (eds), *The Nature of Customary Law* (Cambridge 2007), 151-75, at 173-4 and also 158-61 (where it is shown that the perceived need for tests to ascertain the validity of special customs in derogation from general law is not unique to the history of English law).

³⁴ Coke, 1 *Institutes* 110b.

³⁵ Henry Finch, *Law or a Discourse Thereof* (New York 1969 [1627]), 77.

³⁶ Mercantile custom, for example, was more often local custom rather than, as Finch insisted, common law: see John Baker, “The Law Merchant and the Common Law Before 1700” (1979) in his *Collected Essays on English Legal History: Volume III* (Cambridge 2013), 1233-62, at 1238-44.

³⁷ The common law did not have to be proved but the presumption that a custom was common law could be rebutted. In section III, this point is raised in relation to customs presumed immemorial. Here, it is worth noting that a custom considered common law could lose this status if it became evident that the custom did not prevail in every locality, even though it prevailed in nearly every locality, throughout the

nevertheless conceived of the distinction long before the mid-sixteenth century, by which point they were drawing it regularly.³⁸

III. TESTING CUSTOM

What were the criteria of validity by which a lawyer could identify custom as law? Pre-stare decisis common lawyers were certainly not in perfect agreement on what the criteria were. Nevertheless, it is possible to discern, in English legal literature from the thirteenth through to the seventeenth century, some recurrent insights regarding how a custom might have the force of law without this force having been conferred on it by an appropriate authority. These insights, though they have little direct bearing on legal systems which recognise customary law but which make no pretense to antiquity,³⁹ are valuable for anyone intent on understanding customary law in the abstract because they illustrate how the identification of custom as law in its own right depends upon a workable test distinguishing custom which has this status from custom which is merely spontaneous or which has been made into law.

Longevity is sometimes considered to be the relevant test: a custom with the status of law is, on this account, a shared pattern of behaviour converging around a norm which is recognizable as a legal norm because that pattern of behaviour has persisted undisturbed for a long time.⁴⁰ Versions of the test have been formulated by various legal

realm. For one such custom (concerning recovery of a decedent's personal property), see Robert C. Palmer, *English Law in the Age of the Black Death, 1348-1381* (Chapel Hill, NC 1993), 92-3. On the counter-possibility – of a purportedly local custom turning out to be common law – see Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2 vols, 2nd ed. (Cambridge 1968 [1898]), I, 185-86. (There was also the difficulty of establishing whether local customary privileges extended to people from neighbouring boroughs as well as to the borough's inhabitants: see H.E. Salt, "The Local Ambit of a Custom" in *Cambridge Legal Essays* (Cambridge 1926), 279-94.)

³⁸ See e.g. *Reniger v Fogossa* (1550) 1 Plowd. 1, 9 (Atkins, apprentice counsel). Coke regularly made the distinction, claiming to find it in Fortescue and Littleton: see e.g. Coke, 1 *Institutes* 115b; *Rowles v Mason* (1612) 2 Brownl. 192, 198. For examples in Bracton, see Ibbetson (note 33 above), at pp. 163-4. The author of Britton (c. 1290) alludes to the distinction when remarking on "customs used in the county other than the common law". *Britton*, 2 vols, ed. & trans F.M. Nichols (Oxford 1865), I, 84-5. This example, along with examples from the year books, can be found in John Baker, "Prescriptive Customs in English Law, 1300-1800" in J.H. Dondorp, D.J. Ibbetson & E.J.H. Schrage (eds), *Prescription and Limitation* (Berlin, forthcoming). I am grateful to Professor Baker for providing me with this paper ahead of its publication.

³⁹ An obvious difficulty with depicting the common law as immemorial general custom is that the customary features of later common law systems cannot be fitted into the account: for an elaboration of the point with regard to the reception of English common law in America, see Randall Bridwell and Ralph U. Whitten, *The Constitution and the Common Law* (Lexington, Mass. 1977), 15-18; also David J. Bederman, *Custom as a Source of Law* (Cambridge 2010), 105.

⁴⁰ See e.g. John Gilissen, *La coutume* (Turnhout 1982), 20 ("We can define custom as a group of usages of the legal order, which have acquired obligatory force within a given socio-political group, through repetition of peaceable and public acts over a relatively long lapse of time").

anthropologists, and can be found in Roman law and in international law.⁴¹ In pre-stare decisis English law, a custom was considered already existing law because the relevant normative pattern of behaviour had prevailed fundamentally unaltered in the community for a long time, which was usually taken to mean that nobody could testify to a time when things were otherwise.⁴² Whereas it had to be proved that a local custom had persisted since time beyond memory, the antiquity of a general custom was treated as fact. “[T]he realm has been continuously regulated by the same customs as it is now”, John Fortescue asserted around 1470.⁴³ For Coke, writing almost a century-and-a-half later, “the grounds of our common laws ... were beyond the memory or register of any beginning”.⁴⁴ Both men would have understood the thinking of the fifteenth-century serjeant-at-law who proclaimed that “[c]ommon law has existed since the creation of the world”,⁴⁵ even if they might have opted for (slightly) more measured language.⁴⁶

It is, of course, one thing to claim that it has always been a custom and another to claim that it has long been a custom. Medieval civilians and canonists could seem very relaxed about the formation of custom (“[w]hen something is done twice,” one thirteenth-century civilian claimed, “this makes a custom”⁴⁷) and were inclined to treat customs as legally binding after the passing of but a few decades.⁴⁸ The concept of “immemorial” custom was not novel to England – canonists would sometimes refer to custom which conflicted with the laws of the church as *consuetudo quae excedit hominum*

⁴¹ As regards legal anthropology see e.g. Henry Maine, *Lectures on the Early History of Institutions*, 7th ed. (London 1914), 381; Bronislaw Malinowski, *Crime and Custom in Savage Society* (London 1926), 106; Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester 1955), 241-42 and also 244. Instances from Roman law and international law are briefly considered below.

⁴² Usually, but not always: for exceptions in Bracton and in the manorial court records, see, Ibbetson (note 33 above) at pp. 164, 167-8.

⁴³ John Fortescue, “In Praise of the Laws of England” (1468x1471) in his *On the Laws and Governance of England*, trans. S.B. Chrimes, ed. S. Lockwood (Cambridge 1997), 1-80, at 26.

⁴⁴ Edward Coke, “To the Reader” (1611) in *Eighth Part of the Reports of Sir Edward Coke, Kt* (London 1727), 1-33, at 2 (unnumbered pages).

⁴⁵ *Wallyng v Meger* (1470) 47 Seld. Soc. 38, 38 (Catesby sjt).

⁴⁶ There is no reason to think that Coke was not being deadly serious when he claimed that the common law dated from 2860 BC, when Brutus came from Troy (Edward Coke, “To the Reader” (1602) in *Third Part of the Reports of Sir Edward Coke, Kt* (London 1738), ii-xxiii, at viii).

⁴⁷ Pierre de Fontaine (d. circa 1289), *Le conseil, ou Traité de l'ancienne jurisprudence française*, ed. M.A.J. Marnier (Paris 1846), 492. Something, but not just anything: de Fontaine had in mind judicial opinions. Although Justinian’s Code eschewed precedent following (C 7. 45. 13), it was accepted that “customs and usage” should guide judicial rulings “where we have no applicable written law” (D 1. 3. 32 (Julian)). If an opinion had been repeated it was custom, and so, in the absence of written law, it could be cited as legal authority.

⁴⁸ The number of decades depending on the type of custom; the period appears never to have been less than ten years, and never more than forty. See J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore 2000), 26-7; T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston 1956), 307-8; Gilissen (note 40 above), at pp. 29-30.

memoriam,⁴⁹ and the idea of custom transcending memory is to be found in Roman law.⁵⁰ But in England after the Norman Conquest, the notion of a custom having existed throughout and beyond human memory came to be understood according to a distinct legal definition.

To settle on a point in history before which nobody currently alive could provide reliable testimony regarding events is to fix a date distinguishing time within from time outside human memory. If enforceable custom must be immemorial, judges and jurors might have their task made easier by a rule which states that legal memory began at a specific time; then, at the very least, any custom which can only have obtained since that time – which, for one or another reason, could not have existed at that time – could be ruled not immemorial and therefore unenforceable. But how, in English law, was time immemorial to be legally defined?

The answer is somewhat complicated. Medieval real actions for the recovery of possession of land (*seisin*) were subject to limitation by past events. In the late twelfth century, a claimant seeking to recover had to trace a right of *seisin* from ancestors who had held that right since, but not before, the accession of Henry I (5 August 1100). Around 1200, the reference point for establishing rightful *seisin* was changed to 1 December 1135 (the day of Henry I's death). The Provisions of Merton 1236 changed the date again to the accession of Henry II (19 December 1154), and the first Statute of Westminster (1275) changed it yet again to the year of the coronation of Richard I (3 September 1189).⁵¹

These were statutes, not judge-made law. Moreover, they were limitation statutes rather than rules enacted to legalise customs. But the last of these rules endured a peculiar fate: the limitation date established in the first Statute of Westminster was co-opted as custom *in foro*. By the early fourteenth century, attorneys and judges were using the date of Richard I's accession to the throne analogously so as to fix the outer limit of the prescription period for the acquisition of easements and other incorporeal

⁴⁹ See e.g. *Summa Iurisprudentiae Sacrae Universae, seu Ius Canonicum Secundum Quinque Decretalium Gregorii IX*, ed. R.P. Vitus Pichler (Augsburg 1741), 62; *Corpus Iuris Canonici*, 3 vols, ed. J.P. Gibert (Lyon 1737), I, 481.

⁵⁰ See F.C. von Savigny, *System des heutigen Römischen Rechts*, 8 vols (Berlin 1840-49), IV (1841), 481.

⁵¹ Statute of Westminster I 1275 (3 Edw. 1), c. 39: “en conte de decete en le bref de dreit qe nul ne seit oy por demaunder la seisine son auncestre de plus lointein seisine qe del tens le rey Richard, oncle le pere le Roy qe ore est” (“in making the count of the descent [from the last ancestor in *seisin*] in a writ of right, no one shall presume to trace the *seisin* of his ancestor beyond *seisin* at the time of King Richard, uncle to [Henry III,] the father of [Edward I,] the king that now is”). The idea that Richard I's coronation marked the beginning of legal memory was reinforced by Edward I's investigations into the exercise of jurisdictional franchises, which settled that peaceful enjoyment of such a franchise since 1189 would be an answer in a writ of *quo warranto*: Statute of Quo Warranto 1290 (18 Edw. 1).

hereditaments.⁵² Early year book cases quite often concern testimony “from time whereof there is no memory” (*du temps dount il ny ad memorie*).⁵³ Sometimes there is no basis for inferring anything other than that judges were interpreting this phrase literally: as meaning “beyond the memory of anyone still alive”. But sometimes they took the phrase to mean something else: “before the beginning of the reign of Richard I”.⁵⁴ Thomas Littleton, writing in the 1450s, remarked on how there was “title of prescription ... at the common law before any statute of limitation of writs ... where[by] a man will plead a title of prescription by custom. He shall say, that ...when ... a matter is pleaded ... no man then alive hath ... knowledge to the contrary.”⁵⁵ But there was also, Littleton observed, “a title of prescription” understood according to the statutory limitation on recovery of seisin (which ran “from the time of king Richard the First after the Conquest, as is given by the statute of Westminster the First”), whereby a failed action for recovery was presumed to vest lawful title in the person in possession or enjoyment of land.

Just what it meant to say that *a custom* had prescribed because it was beyond memory differed depending on whether the custom was local or general. When lawyers and judges referred to an immemorial local custom (or to an incorporeal right having been acquired by virtue of the doctrine of prescription) they originally meant that there was nothing to contradict testimony that the custom (or the enjoyment on which a prescription claim was founded) had continued without interruption since 1189. It seems unlikely that actual evidence of continuous user since this date would have been treated as a prerequisite to ruling that a local custom had prescribed, even in the late-thirteenth century, for providing such evidence was for the most part practically impossible. Certainly there were indications, by around the second half of the fourteenth century,

⁵² The association of a statutory limitation date with the limit of legal memory starts to become particularly evident from around 1300 – see *De La More v Thwing* (1308-09) Y.B. 176, 178; *The King v Wickham Breaux* (1313) Y.B. 179, 180 – though there are earlier instances: see Paul Brand, “Lawyers’ Time in England in the later Middle Ages” in C. Humphrey & W.M. Ormrod (eds), *Time in the Medieval World* (York 2001), 73-104, at 103, where a case from 1247 is cited in which, during pleading, the accession of Henry I appears to be asserted as fixing the outer limit of the prescription period for the acquisition of an easement; and also Brand, “Limitation and Prescription in the Early English Common Law (to c. 1307)” in *Prescription and Limitation* (note 38 above), forthcoming, where there is cited a case from 1241 (*de Columbers v de la Ryvere*), in which 1135 was used as the date marking the limitation period for a (pre-Provisions of Merton) claim made by writ of right. (I am grateful to Professor Brand for providing me with the second of these papers ahead of its publication.)

⁵³ From the reigns of Edwards I and II see e.g. (1305) Y.B. 45 (Bereford J.); (1305) Y.B. 431; (1306) Y.B. 206-7; (1308) Y.B. 29 (“du temps dount etc”); (1308-09) Y.B. 129.

⁵⁴ See e.g. (1294) Y.B. 502 (Metingham C.J.) (“... from the time of King Richard, whereof memory runs not higher”); *Coventry v Grauntpie* (1308-09) Y.B. 71, 73; *Noyers v Colwick* (1312) Y.B. 141, 142-3.

⁵⁵ Thomas Littleton, *Tenures*, ed. E. Wambaugh (Washington, DC 1903), 81-2. (*Tenures* was first published in 1481, though it was written in the 1450s.)

that the strict test was being supplanted by a more relaxed one: juries were ever more regularly instructed to infer the existence of a local custom since 1189 if there was evidence of the custom having continued throughout actual living memory.⁵⁶ Whatever interpretation might originally have been put on the test for proving immemorial local custom, and however the test might have altered over time, late-medieval and early-modern lawyers certainly understood that there *had to be* a test: if a local custom was to prevail, which meant its prevailing in derogation from the common law, its antiquity had to be established and could not be merely asserted.⁵⁷ Indeed, it was not only the antiquity of the local custom that had to be pleaded and proved: one had to be able to say what the custom was and show where it prevailed,⁵⁸ and a court would have to be satisfied that the maintenance of the custom was not unreasonable.⁵⁹

But general customs were treated differently. The common law was regularly described as immemorial general custom,⁶⁰ and Blackstone wrote of “a rule of the common law” being proved “by showing that it has always been the custom to observe it.”⁶¹ But the antiquity, as with the certainty and the reasonableness, of a general custom did not have to be proved.⁶² Rather, its antiquity was accepted unless somehow disproved. Even though English common law to this day treats the coronation of Richard I as the date distinguishing time beyond from time within legal memory, the requirement that there be evidence of continued practice or usage for a distinct period of time was never applied to customs from which the common law itself was derived.

Prescribed local custom conformed to the rule of recognition: a local custom bound as an exception to the common law because a jury thought it possible, from the

⁵⁶ See Littleton, *op. cit.*, p. 82; Samuel Carter, *Lex Custumaria* (London 1696), 30-1; also Alan Wharam, “The 1189 Rule: Fact, Fiction or Fraud?” (1972) 1 *Anglo-American L. Rev.* 262, at 269.

⁵⁷ The question of whether it had been established was for a jury, and jurors were not instructed that a standard fixed amount of time must pass before they could conclude that a custom had been proved beyond living memory. Sixty years was usually (though not always) considered a sufficient amount of time. Sometimes the period would be shorter. A range of instances is set out in Baker, “Prescriptive Customs in English Law, 1300-1800” (note 38 above).

⁵⁸ See Coke, 1 *Institutes* 113b.

⁵⁹ See Blackstone, 1 *Commentaries* 77-8. Although it was accepted that local customs had to be reasonable if they were to bind as law – see e.g. Littleton, *Tenures* (note 55 above), at p. 37; also the *Case of Tanistry* (note 31 above), at p. 32 – a binding local custom was enforced as customary law at variance with the common law (see Littleton, *op. cit.*, at p. 81). Since the common law itself was understood to be inherently reasonable (a point considered below), a court which enforced a local custom was in effect allowing a practice deemed reasonable in a locality (typically, a manor) to take priority over a custom considered reasonable throughout the realm.

⁶⁰ See e.g. John Davies, “A Discourse of Law and Lawyers” (1615) in A.B. Grosart (ed.), *The Works in Verse and Prose, Including Hitherto Unpublished Manuscripts, of Sir John Davies*, 3 vols (Blackburn 1869-76), II, 243-357, at 252.

⁶¹ Blackstone, 1 *Commentaries* 68.

⁶² See *Beaulieu v Finglam* (1401) B. & M. 557, 558; also F.A. Greer, “Custom in the Common Law” (1893) 34 *L.Q.R.* 153, at 157; Tubbs (note 48 above), at p. 191.

evidence available to the court, to identify that custom as having governed some state of affairs in some particular locality since time immemorial. Since the antiquity of a general custom did not have to be proved for it to be common law, how was the common law to be identified? The custom that carriers of goods compensate owners for damage incurred in transit might be accepted as general and immemorial, as might the custom that a woman takes a man's surname on marrying him. Why should only one of these customs be recognised as part of the common law? Some customs were immemorial and general yet – Austin, we have seen, was wise to the point – not legally significant. Did not the conformity of a general custom to the requirements of the rule of recognition have to entail more than assuming the custom to have persisted since time beyond memory?

Pre-stare decisis common lawyers seem not to have been exercised by this matter. Hayek observes that the immemorial customs affirmed as common law are ones which “give rise to expectations that guide people's actions” and about which “arbitrators ... have to decide.”⁶³ These customs answer disputes which litigants bring to the courts, and the fact that the customs answer litigants' disputes is something the litigants themselves should have been able to ascertain (when a court determines that a custom “ought to have guided their expectations”, it does so “not because anyone had told them before that this was the rule, but because this was the established custom which they ought to have known”⁶⁴). If a court is presented with a novel legal problem, it might have to declare as common law an immemorial custom which has never before received judicial affirmation or been accorded any legal significance – the late-medieval royal court which had no statute or charter to guide it when determining if a writ should be upheld, for example, would ascertain the parties' rights and obligations in accordance with long-remembered, long-operative common practices.⁶⁵ English common lawyers dwelled not on whether immemorial general customs without any apparent legal significance could be latent common law – the answer, implicit in the declaratory theory of the common law, had to be affirmative – but rather on whether the antiquity of a custom which *was* legally significant spoke to its quality as well as to its status as law. Fortescue put the point pithily. The king, ruling by hereditary right, had the power to interfere with the immemorial customs of the realm. Yet he showed little inclination to do this. Why? Because the king reasonably inferred, from the fact of these customs having endured, that they were “the best” laws possible; had they not been the best,

⁶³ Hayek (note 2 above), vol. I, at pp. 96-7.

⁶⁴ *Ibid.*, vol. I, at p. 87.

⁶⁵ See Greer (note 62 above), at pp. 159-62.

“some of those kings [from whom he descended] would have changed ... or ... totally abolished them”.⁶⁶

But “best” how? Common lawyers developed two broad, interlocking lines of response. Customs endure, first of all, because they are valued through use – customs not practised fall into desuetude. Matthew Hale wrote of how some pre-Conquest laws, though no longer valid as enacted laws, were nevertheless “now ... common law, or the general custom of the realm”, because their value to the nation had, over the centuries, been regularly affirmed in charters and coronation oaths.⁶⁷ Seventeenth-century lawyers sometimes characterised the common law as *customised* law – as long-accepted general custom which was not only valued through use but which had also evolved to complement the predilections of the users. A general custom not only “obtaineth the force of law” by virtue of “being continued without interruption time out of mind”, John Davies claimed, but, unlike enacted law, its “iteration and multiplication” – the fact that “people ... use it and practise it again and again” – shows it to be “agreeable to their nature and disposition”.⁶⁸

The common lawyer’s primary observation was not, however, that the endurance of an immemorial general custom showed that people valued and availed themselves of it. Rather, it was that the custom could thereby be seen to be reasonable: a general custom has the status of common law because it is custom which has continued since time immemorial, and it would not have continued thus if it was somehow contrary to reason. According to Christopher St. German an unreasonable custom was void, and a general custom, even if reasonable (by which he meant that it conformed with the law of nature), could not obtain the force of law by virtue of its reasonableness alone;⁶⁹ a reasonable general custom, if it was to be enforceable as law and alterable only by Parliament, had to be long accepted by the king and his subjects.⁷⁰ While St. German was not alone in associating long-established general custom with universal or natural

⁶⁶ Fortescue (note 43 above), at p. 26.

⁶⁷ Hale (note 23 above), at p. 4; and see also the more nuanced analysis (emphasizing that common law “on this side the Norman’s entrance” was more likely to be new law as opposed to law “kept up from the time of the Saxons”) in John Selden, *Jani Anglorum facies altera* (London 1610), 7-8 (unnumbered pages).

⁶⁸ Davies (note 60 above), vol. II, at p. 252, also *ibid.*, at pp. 254-5 (“the common law of the land ... is ... framed and fitted to the nature and disposition of this people ...”); and Hale (note 23 above), at p. 30 (“the common municipal law of this kingdom ... is singularly accommodated ... to the disposition of the English nation, and such as by a long experience and use is as it were incorporated into their very temperament”).

⁶⁹ See *St. German’s Doctor and Student*, ed. T.F.T. Plucknett & J.L. Barton (London 1974 [1531]), 13-15.

⁷⁰ See *ibid.*, at pp. 45-9.

reason,⁷¹ those who came after him were more inclined to connect general custom to a type of reason which they considered distinctive to law. Their argument linked the reasonableness of a custom to its use: a general custom was common law because, for so long as anyone could remember, it had governed an issue over which people would sometimes dispute, and if the custom had not governed that issue reasonably it would have fallen by the wayside long ago. Understanding general custom as law, Coke and others maintained, required long study, observation and experience – the “artificial” perfection of reason.⁷² But the better description for general custom itself (as opposed to lawyerly erudition on the subject) was “tried” reason. This idea, though it can be traced at least to the Elizabethan era⁷³ (and though it would in due course be associated with Burkean political thought), was particularly prevalent in the first half of the seventeenth century. Custom, on this view, was tested by “time, ... the trier of truth, author of all human wisdom, learning and knowledge”,⁷⁴ “proved and approved by continual experience to be good and profitable for the commonwealth”,⁷⁵ if a custom “had been found inconvenient at any time”, it would have “been interrupted, and” so would have “lost the virtue and force of a law”.⁷⁶

Not every late-Renaissance English lawyer endorsed this notion of general custom as tried reason,⁷⁷ and those who did endorse it were essentially refining the standard argument that the customs of the realm were immemorial and innately reasonable. It was a significant refinement, nevertheless, because it reveals common lawyers not confining their explanation of the status of a general custom as common law to the custom having persisted time out of mind. General custom identified as tried reason was common law because its application was not limited to particular places within the realm, because it was immemorial, *and* because lawyers and judges understood

⁷¹ See e.g. *Colthirst v Bejushin* (1550) 1 Plowd. 21, 24 (Morgan sjt); *Sharington v Strotton* (1566) 1 Plowd. 298, 306 (Thomas Bromley); Finch (note 35 above), at p. 76 (“the common laws of England ... may be altered ... so long as no alteration is permitted against the ... laws of nature and reason”).

⁷² See e.g. Coke, 1 *Institutes* 97b; also John Dodderidge (d. 1628), *The Lawyer's Light* (London 1629), 91.

⁷³ See *The Case of Mines* (1568) 1 Plowd. 310, 316 (“the common law, which is no other than pure and tried reason ...”).

⁷⁴ Hedley (note 32 above), at p. 175.

⁷⁵ Edward Coke, “To the Reader” (1604) in *Fourth Part of the Reports of Sir Edward Coke, Kt* (London 1826), iii-xxv, at v. Cf. Edmund Burke, *Reflections on the Revolution in France, And on the Proceedings in Certain Societies in London Relative to that Event*, ed. C.C. O'Brien (Harmondsworth 1968 [1790]), 193 (“the science of jurisprudence ... is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns”). Burke lauded Coke as “that great oracle of our law” (*ibid.*, at p. 117).

⁷⁶ Davies (note 60 above), vol. II, at p. 252.

⁷⁷ Bacon, for example, observed that custom-following could be irrational: see Francis Bacon, “Of Custom and Education” (1625) in B. Vickers (ed.), *Francis Bacon: The Major Works* (Oxford 1996), 418-20, at 419 (“We see ... the ... tyranny of custom.... I remember, in the beginning of Queen Elizabeth's time of England, an Irish rebel condemned, put up a petition to the Deputy that he might be hanged in a with [sc., with], and not in a halter; because it had been so used with former rebels”).

it – from learning, argument, memory and experience – to be both the reason that people behaved (and expected others to behave) in a particular way and a court’s justification for ruling as it did on a dispute.

IV. REASONING FROM PRESCRIPTION

It is bewildering, Austin thought, that people’s knowledge of the existence of the common law should depend on “the testimony of the judges”, given that the general customs associated with the common law were ones which “people had observed” over a long time.⁷⁸ The bewilderment endures only if one understands judges to be supplying testimony as to the existence of common law rules rather than deciding if the rules apply (just as they have to decide if existing statutory rules apply) to cases before them. More troublesome is the presumption that a general custom was common law because it was identifiable as reason which had been tested and proved good over time. The general customs which judges chose to legalise, Bentham observed, were not necessarily the embodiment of tried reason: the first court to rule any particular *mala in se* (Bentham gave the example of perjury⁷⁹) unlawful would have done so not because the custom of abjuring that action had been tested over time but because the wrongfulness of that action was self-evident. For Austin, the presumption that a general custom declared common law must have persisted since time beyond memory was simply unwarranted, because many such customs (he gave the example of bills of exchange) were very obviously of modern provenance.⁸⁰

Bentham and Austin belonged to the era when the association of the common law with general custom was very much in demise and its association with the doctrine of precedent in the ascendancy. Custom was exiting the stage even as it was being ushered off. What was being ushered off was, to recall Lord Reid’s description, the performance of a fairy tale – a tale about judges who, on appointment, learned the secret formula which gave them entry to the cave containing the common law’s treasure. The treasure awaited their discovery; all the judges had to do, when deciding cases, was correctly identify the treasure – declare what was already there – and put it to use.⁸¹ Classical

⁷⁸ Austin (note 5 above), vol. II, at p. 539.

⁷⁹ Bentham (note 18 above), p. 218.

⁸⁰ Austin (note 5 above), vol. II, at p. 539.

⁸¹ See Reid (note 1 above), p. 22.

positivists insisted (and the received wisdom is that they were right to insist⁸²) that the tale was far-fetched.

But was it? Certainly the declaratory theory is historically inaccurate if it is reduced to the proposition that judges never develop but only declare the common law. But a better estimation of the theory is perhaps that judges, in deciding on disputes between parties, have a primary responsibility to identify and apply the laws governing those disputes when the parties acted.⁸³ A court settling a dispute by reference to (local or general) custom would not be purporting to make that custom into law but rather identifying the custom as the law already in place to be applied to the dispute. If, when the parties acted, the law already in place was the custom – if there was no other law that could be identified as governing the dispute – the court is supposed to apply that law. Should you put your cattle out to graze on my land by virtue of local custom, and a court then penalises me because I build a fence which stops you doing this, I might object that the penalty is unfair because I had no way of knowing, at the time that I built the fence, that my action would incur a negative legal consequence. The penalty certainly would be unfair if, at the time that I acted, there was no identifiable custom directing me away from the action that I took (if, as Hayek put it, there was no custom providing an answer which I should have been able to ascertain). But if such a custom *was* identifiable, and there was no positive law overriding it, you might claim that the custom protected your action and that the real rule-of-law violation would occur if a court now declined to apply the custom and ruled that my stymieing your action was lawful. The success or failure of your claim that the court has a duty to enforce the custom depends on the custom being identifiable as already existing law.

Though English lawyers had no uniform answer to the question of what makes a custom identifiable as already existing law, their answer typically depended on the idea that custom could prescribe. The notion of prescribed custom can seem confusing, since custom and prescription are distinct concepts in English law. Individuals and juridical persons acquire title or forfeit legal actions by virtue of prescription, whereas the benefits

⁸² See e.g. Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford 2000), 27 (“So general is the acceptance of this [sc., Lord Reid’s] approach [to the judicial function] today that citation is scarcely necessary”); Lord Neuberger, “Twenty Years a Judge: Reflections and Refractions”, Neill Lecture, Oxford Law Faculty, 10 February 2017, www.supremecourt.uk/docs/speech-170210.pdf, at para. 51.

⁸³ See John Finnis, “Adjudication and Legal Change’ (1999) in his *Collected Essays. Volume IV: Philosophy of Law* (Oxford 2011), 397-403, at 400; also N.E. Simmonds, *Law as a Moral Idea* (Oxford 2007), 164-8.

and burdens of prescribed local customs are enjoyed and borne by communities.⁸⁴ It is presumed, furthermore, that a right acquired by a person through prescription was the subject of a lawful grant at some point preceding legal memory; all that can be proved is that the mode of user or enjoyment which occasions the prescriptive claim has prevailed openly, without force and without interruption – in other words as if, at some point in the past, the right was lawfully granted. A local custom, by contrast, prescribes not to the benefit of any specific (actual or juridical) person but rather to an amorphous community which, having no legal personality, cannot have rights conferred on it. And so whereas rights acquired by prescription are taken to have originated lawfully, “custom to some place ... cannot be by grant”.⁸⁵ Yet despite these differences between custom and prescription, lawyers from Bracton’s time to Coke’s are regularly to be found referring to local custom having prescribed, by which they meant that a custom had the force of law because it had been proved to have endured since time immemorial. The year books provide numerous instances of local customs being enforced because nobody alive could provide testimony contradicting long and continuous user,⁸⁶ just as they attest to occasions when local customs were adjudged not to bind because they had not prescribed.⁸⁷

General customs, we know, were assumed extant since the coronation of Richard I – their status as immemorial custom was notional rather than proved. Judicial proclamations regarding immemorial general customs could sometimes seem rather eccentric. In 1606, for example, Coke declared digging for saltpeter for the manufacture of gunpowder to be a custom of the realm, even though gunpowder production in Britain did not start until around the mid-fourteenth century.⁸⁸ For classical positivists,

⁸⁴ See Coke, 1 *Institutes* 113a-113b; *Harrison v Rooke* (1625) Palm. 420, 420 (“there is a difference between prescription which goes to the person [*va al person*], & custom, which is local”). On rights prescribing to corporate entities, see Paul Brand, *The Making of the Common Law* (London 1992), 403-4, 427-34.

⁸⁵ *Rowles v Mason* (1612) 2 Brownl. 192, 198. See also *Gateward’s Case* (1607) 6 Co. Rep. 59, 60 (“[E]very prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom.... [C]ustoms ... by common intendment ... cannot have a lawful beginning, by no grant, or act, or agreement, but only by Parliament”); *Case of Tanistry* (note 31 above), at pp. 31-2 (“[C]ustom ... as ... binding law to such particular place ... cannot be established by the king’s grant”).

⁸⁶ See e.g. (1306) Y.B. 205; (1305) Y.B. 370.

⁸⁷ See e.g. (1291) Y.B. 420; (1304) Y.B. 264 (Bereford J.) (“they have laid an interruption to your continuance [of the practice which you allege to be local custom], to which ... you must answer”); *Mabile v Bishop of Lincoln* (1311) Y.B. 117.

⁸⁸ See *The Case of the King’s Prerogative in Saltpetre* (1606) 12 Co. Rep. 12. Local customs, though they had to be proved, could occasion proclamations in the same vein: see e.g. *Chichester v Lettbridge* (1738) Willes 71, 72-3 (Wilkes C.J.) (“[As to the objection that] there cannot be a prescriptive right for coaches and chariots time out of mind, because coaches and chariots are of modern invention, ... the jury [has] ... found that there has been a way for coaches and chariots time out of mind ...; we cannot take notice judicially whether there have been coaches and chariots time out of mind or not, but must take it to be as the jury have found it”).

examples of this type were but demonstrations that the common law had to be judge-made. For the declaratory theorist, by contrast, they are evidence that judges can go awry – that they not only might mangle but (if they are identifying a custom as law for the first time) might even be expected to mangle the secret formula which opens the cave.⁸⁹ The judiciary is “sworn to determine” the “customs of the land” correctly, Blackstone argued, but if they do so incorrectly (if they make “determination[s] ... evidently contrary to reason”) they do not make law but rather make determinations which are “*not law*... not the established custom of the realm” – and a future court ruling on an allegation concerning the purported custom has the responsibility to “vindicate” the common law “from misrepresentation.”⁹⁰

But how would anyone know if the declarer of immemorial custom had got the formula correct? Many lawyers and others long into the Stuart period were wont to treat as unquestionable the proposition that the custom of the realm was custom time out of mind. Yet efforts to substantiate the proposition tended to yield contentious conclusions – especially notorious in this regard are the various seventeenth-century Whig accounts of how the privileges of the commons (as a co-ordinate third estate with the king and the lords) were established customs which pre-dated and had somehow survived the Conquest.⁹¹ Although, by the 1600s, English lawyers would still often reason *as if* every custom of the realm could be taken to have prevailed at least since the twelfth century, claims that some aspect of the common law truly was immemorial in character would often be based – as is perhaps nowhere more clear than in the prefaces to some of Coke’s *Reports* – on dubious, if not outright ludicrous, interpretations of the relevant history.⁹² Thomas Egerton (Lord Ellesmere), one of the ablest lawyers of the Jacobean era, seemed unconvinced by the case for the common law’s antiquity even as he sought to advance it. That a local custom should only bind if proved to have endured since 1189

⁸⁹ “The [customary] norm is indeterminate in its application until actually applied.... [I]t is easy to jump to the conclusion that the norm already regulates the present situation when in reality it is still indeterminate in respect to its regulation or nonregulation of the present situation.” John Gardner, “Some Types of Law” in D.E. Edlin (ed.), *Common Law Theory* (Cambridge 2007), 51-77, at 64.

⁹⁰ Blackstone, 1 *Commentaries* 69-70. Emphasis in original.

⁹¹ See e.g. William Petyt, *The Antient Right of the Commons of England Asserted* (London 1680); also Robert Atkyns, *The Power, Jurisdiction and Privilege of Parliament; and the Antiquity of the House of Commons Asserted* (London 1689).

⁹² See George Garnett, “‘The Ould Fields’: Law and History in the Prefaces to Sir Edward Coke’s Reports” (2013) 34 *Journal of Legal History* 245 at 258-9, 264 (“[By ‘time out of mind’] Coke ... did not mean what by his day was the limit of legal memory – 3 September 1189 – but something less precise, and which potentially reached back before 1189.... Much of [the historical evidence he chose to use] appears to be adduced tongue in cheek, especially when it came to immemoriality”). On why Coke should have read his historical sources as he did, see Ian Williams, “The Tudor Genesis of Edward Coke’s Immemorial Common Law” (2012) 43 *Sixteenth Century Journal* 103, at 115-18.

struck him as a preposterous notion.⁹³ As for general custom, it seemed obvious to him that some parts of the common law had, by the early seventeenth century, become “obsolete and worn out of use: ... judges found them to be unmeet for the time they lived in.”⁹⁴ So was it not necessary for judges sometimes to create new common law rules – rules which could not be said to have existed time out of mind? Egerton balked: were one to understand this to be my opinion, he insisted, “I would be misunderstood, as though I spoke of making new laws.... I speak only on interpretation of the law in new questions and doubts.... [T]he constitution or form of it, or how, or when it was first begun ... ought to be obeyed and revered, but not disputed”.⁹⁵ The idea of general customs surviving unbroken since antiquity troubled him all the same: “ancient common laws are so much neglected, contemned, and almost grown obsolete and out of use that for the most part we have not the substance but the shadow of the ancient common laws”.⁹⁶

Yet it seems no exaggeration to claim that every common lawyer of note between the thirteenth and seventeenth centuries thought the status of general custom as common law had something to do with that custom having endured for a very long time. Even Francis Bacon – who showed no interest in the temporal aspect of the common law and who disparaged “[h]e who holds fast to custom and retains the appearance of antiquity in the face of change”⁹⁷ – considered it “reasonable that the laws and basic customs of a kingdom or commonwealth be accepted, as ancient boundaries,” where “no event or change has intervened.”⁹⁸ Why did English common lawyers accord such significance to a custom’s longevity?

Certainly part of the answer was that the persistence of a custom justified inferences as to its possessing other qualities – its being innately reasonable, valuable to

⁹³ See *Bedle v Beard* (1606) 12 Co. Rep. 4, where Ellesmere was ruling on a local custom which could be proved to have existed for over three hundred years but which was known not to exist in 1189. Surely “all shall be presumed to be done,” he remarked, “which might make the ancient appropriation good.... God forbid that ancient grants and acts should be drawn in question” because continuous enjoyment over three centuries (“after the death of all the parties, and after so many successions of ages”) fell short of what was “necessary to the perfection of the thing” (ibid., at p. 5).

⁹⁴ Lord Ellesmere, “The Speech of the Lord Chancellor ... touching the *Post-Nati*” (1608) in L.A. Knafla (ed.), *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge 1977), 202-53, at 223.

⁹⁵ Ibid., at p. 249.

⁹⁶ Lord Ellesmere, “A Breviate or Direccion for the Kinges Learned Councell” (1615) in *Law and Politics in Jacobean England* (note 94 above), pp. 319-36, at p. 326.

⁹⁷ Francis Bacon, “Aphorisms on the greater Law of Nations or the fountains of Justice and Law” (1614x1622), trans. Mark S. Neustadt in his *The Making of Instauration: Science, Politics, and Law in the Career of Francis Bacon* (Ph.D. dissertation, Johns Hopkins University, 1987), 272-99, at 281. (“He who holds fast” surely being Bacon’s great nemesis, Coke.)

⁹⁸ Ibid., at p. 286.

its beneficiaries, an embodiment of the people's wisdom, suited to their dispositions and so on. But longevity was, first and foremost, a standard which custom with the status of law could be said to satisfy: this local (or general) custom was customary (or common) law because it had prescribed – because the custom could be proved (or presumed) to have endured since time immemorial. The common-law doctrine of prescription – prescription as custom *in foro* – was, and technically still is, a feature of the rule of recognition, a criterion of legal validity enabling a court to identify custom as already existing law.

Identifying prescribed custom as law entails distinguishing customs which are from customs which are not immemorial. Customs which a court considers legally valid are (if general) presumed or (if local) have been proved to extend beyond legal memory. Customs which, within legal memory, have altered substantially or have been abrogated (as both general and local customs could be by statute) cannot be said to have prescribed. It is perhaps instructive to turn briefly to international law to see how prescription cannot be a feature of the rule of recognition if a custom is understood to prescribe by virtue of having coalesced through acceptance over time but without the custom being shown or taken to have endured since a time – a specific date, the point beyond which reliable testimony no longer exists – legally accepted as marking out a prescription period. Article 38(1) of the Statute of the International Court of Justice, the original text of which dates back to 1920, provides (*inter alia*) that the Court shall apply “international custom, as evidence of a general practice accepted as law”. If an international custom is to apply as law, in other words, there has to be a practice which States have freely concurred in or converged on, and those States must also believe (the so-called *opinio iuris* requirement) that this practice is legally binding. While “it seems difficult to accept” that “prescription is part of treaty law”⁹⁹ if the applicability of international custom depends on evidence that a general practice which States accept as law has existed undisturbed since a time beyond legal memory, Verykios argues, prescription is a feature of treaty law if customs need not be immemorial in order to prescribe: so long as we “carefully distinguish ... immemorial prescription” from the “actual prescription” (*prescription proprement dite*) of international custom,¹⁰⁰ we might conclude that “prescription is ... a general legal principle as part of international law under art. 38”.¹⁰¹

⁹⁹ P.A. Verykios, *La prescription en droit international public* (Paris 1934), 40.

¹⁰⁰ *Ibid.*, at pp. 44-5.

¹⁰¹ *Ibid.*, at p. 50.

For Verykios, the “actual” prescribing of an international custom occurs through its maturation over time.¹⁰² Justice Gray famously endorsed this idea in *The Paquete Habana*: “[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels ... have been recognized as exempt ... from capture as prize of war.”¹⁰³ Actual prescription deems it irrelevant when a custom ripened into law. The crucial question is whether the custom’s state of ripeness can be determined “at the moment the appreciation is being made” by the court issuing a ruling.¹⁰⁴ “[I]t is not often that we need to know at precisely what moment the fruit became ripe: we are more interested in knowing, when we bite it, if it is *now* ripe or still too hard or sour.”¹⁰⁵ The analogy is question begging. A court does not make a determination for its own purpose but rather resolves a dispute between party *A*, who believes that a custom is ripe, and party *B*, who believes the opposite. For the court to rule in favour of either side on the basis of its “appreciation” of the custom’s ripeness leaves the losing side with no explanation as to why its belief that the custom had (or had not) ripened into law was incorrect.¹⁰⁶ If the court is not simply to take a side but rather to apply a custom as law (or decline to apply it because it is not law), it must rely on a standard distinguishing customary law from mere custom. Immemorial prescription is such a standard. “Actual” prescription is not.

If a custom is a rule of a legal system, it must conform to the requirements of the rule of recognition: there has to be some test of legal validity enabling legal officials to distinguish that custom from custom *simpliciter*. Immemorial prescription is not the only conceivable standard. In international law, for example, the standard is more likely to be formulated in terms of a practice being shared rather than having endured: solving and avoiding interaction and co-ordination problems in the international community requires clarity (to take the example from *The Paquete Habana*) on whether fishing vessels are exempt from capture as prize of war; many States might agree that it is inappropriate to capture these vessels and might believe that they have a legal obligation not to do so; and the agreement among and belief shared by these States might be sufficiently widespread to warrant the judgment that there is a rule of customary international law forbidding the

¹⁰² See *ibid.*, at p. 2.

¹⁰³ *The Paquete Habana*, 175 U.S. 677, 686 (1900).

¹⁰⁴ Maurice H. Mendelson, “The Formation of Customary International Law” (1998) 272 *Recueil des cours* 155, at 176.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Jack L. Goldsmith and Eric A. Posner, “Understanding the Resemblance Between Modern and Traditional Customary International Law” (2000) 40 *Virginia Journal of International Law* 639, at 641-54 (where the point is elaborated with regard to Justice Gray’s appreciation, in *The Paquete Habana*, that the fishing vessel exemption had ripened from custom into law).

capture of fishing vessels. For the custom on exemption from capture to function as a rule of customary international law, however, these States will have to concur on, among other things, what constitutes sufficiently widespread (as well as sufficiently long-standing) agreement on the inappropriateness of capture, and the extent to which States – and indeed, *which* States – must believe that their navies are under a duty not to treat fishing vessels as prize of war.¹⁰⁷ As with prescription, so too with convergence: it cannot be part of the rule of recognition if the identification of custom as law is deemed possible by subjective assessment, without the need to satisfy the requirements of some standard of legal validity.

V. CONCLUSION

English lawyers in the centuries separating Bracton and Coke understood (even if they might not have articulated the proposition) that if a custom was to be declared already law, there had to be some criterion or criteria of validity enabling a court to identify that custom thus. To state that prescription was *the* recognised criterion perhaps simplifies matters inordinately. What it meant to say that a custom had prescribed did not remain unaltered from one context to the next, and claims as to a custom's antiquity sometimes seemed to be but pretexts for other claims (regarding custom as the embodiment of tried reason, for example, or as suited to a community's dispositions). Prescription was, nevertheless, regularly invoked by judges and lawyers to explain how customs could have the force of law without having been legalised by the judiciary or Parliament, and how the court which treated such a custom as dispositive when ruling on a dispute could be said to be enforcing law which already existed rather than turning a custom into law and applying that law retrospectively.

Classical positivists offered a searching critique of this position – a critique which only the rash would dismiss outright. But this does not mean that we do well to join those positivists in concluding that custom which is law could only ever be custom turned into law. When declaring a custom to be law, judges were affirming that the custom satisfied a standard of legal validity which existed as custom *in foro*. A community custom which had prescribed was considered to satisfy a test identifiable not as a judge-made or statutory rule – though the classic formulation of the test was derived from a limitation statute – but rather as the judiciary's and the legal profession's broad and

¹⁰⁷ See John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford 2011), 244-45.

somewhat fluid understanding of what immemorial custom was (and, when the community was a locality rather than the realm, how custom was to be proved). No doubt judges would sometimes manipulate the test, declaring custom to be law when in fact they were turning it into such – or were instructing jurors in such a way that it ended up turned into such. But it would be a mistake to think that, in reasoning from prescription, judges could never genuinely have been declaring and enforcing custom as law in its own right, according to their responsibility to decide cases by applying the law as it governed the disputants' rights and obligations when the facts prompting the dispute occurred.