NEW CUSTOM: CUSTOMARY LAW AS A PROGRESSIVE FORCE IN CONTEMPORARY INTERNATIONAL LAW

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Abstract

This paper examines the emergence of a new form of customary international law and its use as a progressive law making tool in the field of international law. It discusses the definitional problems with the orthodox tests of customary law, state practice and *opinio juris*, and how these ambiguities have been exploited by States wishing support for a particular norm they feel should get customary law status. It is argued that through this laxity, customary international law has inadvertently provided a new forum for the development of progressive law. The paper begins with an examination of the difficulties in defining traditional custom, and subsequently attempts to identify this ‘new custom’ that has emerged. It concludes with a discussion on the relationship between the two.
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“Perhaps it is time to face squarely the fact that the orthodox tests of custom – practice and opinio juris – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term it would be difficult to imagine.”

- Sir Robert Jennings

Traditional Custom

Customary international law is something that is easy to define but difficult to identify. There are two traditional tests to custom: state practice and opinio juris. State practice is a consistent and regular practice done by states, and opinio juris is the belief by these states that the practice is legally required. This kind of custom is a fundamentally inductive process in which specific examples of state practice are used to infer general custom.¹

Traditional custom is evolutionary rather than innovative and it is not well suited to being a progressive source of law. While it can change and

adapt, this is a very slow process and can require large amounts of evidence to prove consistent practice and *opinio juris* in states\(^2\). As Cassese bluntly states, “custom is not the most suitable instrument for achieving legal change\(^3\).

Nevertheless, as Sir Robert Jennings correctly points out, the custom that we see emerging today is a new breed. It is no secret that the traditional tests of custom are notoriously problematic, so much so that they can be easily exploited by States wishing support for a particular norm they feel should get customary law status. Through this laxity, I argue that customary international law has inadvertently provided a new forum for the development of progressive law.

By first examining the difficulties with state practice and *opinio juris*, I will attempt to show how the definitional problems with these orthodox tests of custom have in fact allowed states the leeway to develop progressive customary law. I will then try to identify this ‘new custom’ more specifically, and finally comment as to its relationship with traditional custom.

**Problems with State Practice**


Proving consistent state practice is a problematic affair. In the *North Sea Continental Shelf Cases*, the International Court of Justice (ICJ) qualified that state practice should be ‘extensive and virtually uniform’\(^4\). There are two main reasons why this is no easy task. Firstly, it is unclear what types of behaviour can be counted as legitimate state practice for the purposes of identifying custom. Secondly, even if we did have a clear understanding of what to look for, teasing out relevant practice from the white noise of all state behaviour is an incredibly difficult, not to mention incredibly subjective, exercise.

The first difficulty lies in identifying what elements of state behaviour are considered state practice. Some theorists argue that only acts and not statements should count towards practice\(^5\). But that ignores a huge amount of behaviour, not to mention the State’s ‘public face’. Other writers have argued that “any instance of State behaviour - including acts, omissions, statements, treaty ratifications, negotiating positions (as reflected in *travaux*...
préparatoires) and votes for or against resolutions and declarations – may constitute State practice⁶.

This latter approach seems more in line with the understanding of the ICJ as is evidenced, for example, by the decision to include press releases and policy statements as practice in the Asylum Case (1950)⁷. Likewise, the International Law Commission has included national legislation, diplomatic correspondence and even ‘the opinions of national legal advisers’ in its understanding of practice⁸. That being said, there is no explicit decision on the matter, and theorists remain divided as to whether statements belong in the realm of state practice, of whether they should be confined to opinio juris.

Jennings points out another difficulty in trying to identify state practice, lamenting that there can be at the same time too much and too little evidence to make a confident assessment⁹.

Because the definition of what actually constitutes state practice is so vague, anyone trying to identify consistent practice is left with a huge amount of information that may or may not be able to translate into custom¹⁰.

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⁶ Byers, Ibid.


Moreover, certain aspects of state practice happen with such frequency, trying to identify a consistent pattern is daunting, to say the least. Jennings takes as an example trying to identify consistent international practice concerning the passage of foreign ships through territorial waters, when every day thousands of ships enter and exit foreign seas all around the world. It would never be possible to investigate each of these events, despite them all being eligible to contribute towards state practice\textsuperscript{11}.

Similarly, the abundance of state actions make it so that any States submitting before an international court can pick and choose whatever is relevant to their argument. States can claim to be operating off of the same body of evidence for state practice, yet use it to prove completely different customary norms. As remarked by Jennings in regards to his experience at the International Court of Justice, “not surprisingly, each Party is always able to give [an] identical body of practice the stamp of its own particular thesis”\textsuperscript{12}. An example of this occurred in the *North Sea Continental Shelf Cases* (1969), where Germany, Denmark and the Netherlands attempted to prove the existence of completely opposite customary law, using the same body of practice as their evidence\textsuperscript{13}.

Conversely, state practice can often provide too little evidence to establish customary law. Unilateral actions of states have even sometimes

\begin{footnotes}
\footnotetext[12]{Ibid, pp.12.}
\footnotetext[13]{Harris, Op. Cit, pp. 36.}
\end{footnotes}
been used as evidence of practice to establish custom, such as in the case of the declaration by the United States of the contiguous zone for their territorial sea\textsuperscript{14}.

Moreover, customary international law seems overwhelmingly dominated by a few powerful Western states\textsuperscript{15}. Kelly explores several reasons for this, including that fact that only large and wealthier states make an effort to document and publish their state practice\textsuperscript{16}. Even then, the practice of non-Western states is rarely used as evidence for custom, something that Kelly attributes partly to hubris, and partly to the language barrier\textsuperscript{17}. He ends his assessment with a somewhat pessimistic thought, that “the practices of non-Western cultures are just not taken seriously”\textsuperscript{18}.

**Problems with Opinio Juris**

State practice alone is not enough to determine the existence of customary law. Indeed, decisions in the *Lotus Case* (1927), the *Asylum Case*


\textsuperscript{17} Ibid, pp. 472-3.

\textsuperscript{18} Ibid, pp. 473.
(1950) and the *North Sea Continental Shelf Cases* (1969) have all emphasized the necessity of *opinio juris*. In theory, *opinio juris* serves an important function to distinguish between voluntary state practice, and state practice that is required by law. However actually identifying *opinio juris* can be even more difficult than it was to identify consistent practice.

Many authors again point out the lack of a clear definition as to what can constitute *opinio juris*. As with state practice, there is a seemingly unlimited supply of sources, none of which are clear or consistent with each other. As Jennings himself puts it, “how is one to distil an ‘*opinio juris*’ from a welter of ostensibly authoritative but mutually incompatible opinions?”

Moreover, Kelly is sceptical about any way in which we can measure a State’s opinion, arguing that “[t]here is no methodology that will assure an accurate measure of the normative attitude of states. The means currently in use reduce opinio juris to a mere fiction.” Kelly is also dubious about the seemingly arbitrary point at which a State’s opinion suddenly becomes a rule for others. Goldsmith and Posner share this doubt, suggesting that this uncertainty undermines the entire concept of *opinio juris*: “definitional problems with *opinio juris* flow in part from more serious conceptual difficulties. There is no convincing explanation of the process by which a

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voluntary behavioral regularity transforms itself into a binding legal obligation”\textsuperscript{23}.

In sum, \textit{opinio juris} is just as poorly defined and subjective to identify as state practice. While theoretically these two traditional tests of custom should provide a method of establishing what constitutes customary law, in practice, they fall short. Indeed, it seems more and more that the identification of custom by this traditional approach is less a matter of what actually exists, and more a question of States picking and choosing what behaviours they think should apply to support whatever norm they wish to advance at the moment\textsuperscript{24}.

But this is not necessarily a bad thing. Jennings is right that what we now call custom has very little to do with what custom was once understood to be, but he is also right to call it innovatory. States are using this procedural laxity in the definition of custom to advance progressive law.

\textbf{Modern Custom}

So if Jennings is right in saying that this new law ‘does not even resemble custom’ as we know it, just what is it?


The quotation by Jennings emphasises what is most important about this modern customary law. He remarks that the custom we see today is “innovatory, it involves topical policy decisions, and it is often the focus of contention”. Indeed, what is significant about modern custom is that now more than ever it is being used as a source of progressive law.

While indeed the concept of ‘progressive custom’ may seem like an oxymoron, looking at the development of history, it becomes clear how such a thing could come to be.

Both Jennings and Cassese identify a shift towards this mentality beginning at the end of the Second World War. Two key things happened in this period. Firstly, the post-war period saw much of what was once customary law become written law, as many long-established norms finally became codified in international treaties and conventions\textsuperscript{25}. Likewise, Cassese notes that in the years directly following the war, there was a widespread international opposition to customary international law. He suggests that States shied away from custom because it represented the traditions of a flawed past they wished desperately to change\textsuperscript{26}.

But it was this will to change things that sparked what David Fidler calls the ‘dynamo’ approach, which welcomes modern custom as “a progressive source of law that can respond to moral issues and global

\textsuperscript{25} Jennings, Op. Cit, pp. 10.

\textsuperscript{26} Cassesse, Op. Cit, pp. 124.
challenges. While traditional customary law was easy to define but hard to change, this new custom embraces its role as an innovative force. States had the very real desire to change international relations, and were able to use the ambiguous tenets of customary law to do this.

Byers suggests that nowadays States act not thinking that their actions are law, but rather should be law. In this way, traditional views of opinio juris have been adapted to reflect a spirit much more of law making intent rather than belief in a pre-existent obligation. There seems to be an increasing awareness of the ability to create custom. No longer do States simply look back to the status quo and call that custom - there is a genuine attempt to actively create customary rules.

As was previously mentioned, traditional custom was inductive by nature. Roberts points out that modern custom is in fact a deductive process, “that begins with general statements of rules rather than particular instances of practice”. This has literally turned the customary process on its head, with the emphasis being on enforcing desirable rules rather than identifying pre-existing ones.

29 Ibid.
The prime example of this new customary law in action would be the *Military and Paramilitary Activities in and against Nicaragua (Merits)* (1986) case. Nicaragua claimed that the United States had violated the international customary law on non-intervention by supporting anti-government *contra* guerrilla fighters on Nicaraguan soil. The ICJ was left to confirm whether non-intervention was indeed a customary law.

While the court was able to identify *opinio juris* consistent with the principle of non-intervention, it was faced with a body of state practice that seemed to frequently contravene this standard. Acting within the previously mentioned ambiguity as to what can actually be considered as state practice, the court decided on this occasion to accept General Assembly resolutions as evidence of practice as well as other ‘subjective elements’\(^\text{31}\). With the resolutions supporting the principle of non-intervention, the court decided that there was sufficient state practice to uphold non-intervention as a customary law. By doing this, they were able to maintain the customary rule despite the numerous state acts to the contrary.

In this case I would make the argument that the courts were able to exploit the ambiguities of traditional customary international law to secure a decision they thought was in their best interest. It is not far-fetched to suggest that it was the intention of the court to maintain the understandably desirable normative rule of non-intervention. If they had taken a strict approach to state

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\(^{31}\) *Military and Paramilitary Activities in and against Nicaragua (Merits)* (1986). Par. 185.
practice, like that espoused by Wolfke or D’Amato, and only taken into account the actions of a state, it is likely that it would have been deemed contradictory to the *opinio juris*, and therefore failed the test of customary law.

However, the court was able to interpret the vague definition of what can be included in state practice to be able to accept evidence that was in support of the *opinio juris*, and therefore affirm the non-intervention as a principle of customary international law. By taking advantage of the ambiguities present in the orthodox test of custom, the court was able to support a norm they found desirable.

**The Demise of Custom?**

In the discussion about this new kind of custom, many authors have made the prediction that custom is on the way out. Roberts describes how the rift between old and new has undermined custom as a source of law entirely, ultimately threatening the ‘demise of custom’\(^{32}\). Cassese notes that since the end of the Second World War, custom has been used less and less to settle international disputes\(^{33}\). Kelly argues for customary law to be replaced by a clearer consensual process which would support democratic values\(^{34}\).

It is not wrong to worry what such a poorly defined and easily manipulated source of law may do to international law as a whole. Indeed, the


new customary law often seems like just a vehicle, as Kelly puts it, “to justify the universalization of preferred norms”\(^\text{35}\). But custom, both in its old and new form still have a place in the world. Cassese points to three areas where customary law still plays an important role: In areas of emerging economic interest, for law dealing with major political and institutional conflicts, and in aiding with the updating and revision of prior customary norms\(^\text{36}\).

Likewise, Cassese discusses the role of international organizations in the creation of this new law, pointing especially to forums like the United Nations General Assembly for their role in providing normative, non-binding statements that are easily translatable into a new kind of custom\(^\text{37}\). Modern custom has granted new normative power to these international organizations, something which many would argue adds an additional element of democracy to the creation of new laws.

If custom is to die, it will probably not be through the conscious abandonment that Kelly calls for, but rather by a slow fading out of its relevance. As more principles of customary law are put to paper, and the law making power of international institutions increases, custom may indeed move to the background of international law.

But another option exists, and that is to embrace modern customary law for its progressive power. If we can acknowledge that customary law is

\(^{35}\) Ibid, pp. 452.


\(^{37}\) Ibid, pp. 125.
not what it once was, it may possible to adapt this new source of law into a more regulated system. By accepting that the traditional tests of custom are no longer suited to modern uses, new tests may be developed that are more appropriate. Instead of viewing modern custom as a corruption of the old, it may be possible to foster new custom as a truly innovative force of its own.
Bibliography


