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Edited by Amanda Perreau-Saussine and James Bernard Murphy

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The character of customary law: an introduction

AMANDA PERREAU-SAUSSINE AND JAMES BERNARD MURPHY

A book on customary law, many modern lawyers might say, can have no relevance for them. And neither, many modern thinkers would echo, could it be of much interest. On many influential modern accounts, reliance on customary practices is a mark of inadequacy: acceptance of customs should be minimal and provisional since an unreflective attachment to customary ways of thinking is inimical both to practical thought and to political harmony. Modern societies and their legal systems depend not on enslavement to customary habits and laws but on reasoned principles and doctrines; customary laws grow up only where legislators have done a particularly poor job, leaving a need for elaborate statutory construction and legislative gap-filling. The more coherent and consistent a legal system, the less the need for such customary rules and practices: an interest in customary law reflects at worst what Jeremy Bentham called the ‘sinister’ interests of self-interested reactionaries, and at best the eccentric tastes of scholars, antiquarians and those purporting to be international lawyers who work in what, on such accounts, is really a lawless international world.

This brief chapter introduces the diverse views of customary law offered in this collection of essays, showing how, despite this diversity, the thirteen contributors are united in arguing that such rejections of the relevance of customary law are wrong.

Is custom all we have?

Some jurists and philosophers argue that customary practices are *all* we have to guide us in aiming to solve practical questions: moral principles, written laws, legal doctrines and philosophical writing are all articulations of pre-existing customs. Such accounts are deeply sceptical of arguments in the name of reason, arguing that those who claim a priority for rational principles said to be manifest within a set of conflicting customary practices are really claiming priority for their own preferred doctrines, doctrines which are themselves nothing but a

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rationalisation of a set of customary practices having no special status or claim to allegiance.

This sceptical account of practical reason is reflected in many of the contributions to this book by legal historians. As historians they are concerned to avoid allowing contemporary concerns to drive their study of earlier ideas and practices: instead they seek *first* to understand ‘the specificity of a past situation’, leaving readers to ask whether and how far ‘the very specificity’ of that earlier situation gave rise to problems analogous to those arising in the contingencies of our own age.¹ Thus David Ibbetson frames his comparative study of customary elements in the medieval laws of continental Europe and of England as a study of ‘the uses of the idea of custom’: his aim is to trace the different senses of custom in medieval law while prescinding from comment on the relationship between those different usages.² Such writers tend to treat doctrine not as leading changes in customary practice but as following and articulating the relevant changes in practice. Thus, for example, Randall Lesaffer argues that more humane customary practices and rules of siege warfare did not begin to be treated as binding rules in the early modern era as a result of doctrinal writings: ‘In the final analysis, doctrine acquiesced to the fact of life that customary law in reality was not and did not have to be in accordance with rationality and morality to be accepted by states as constituting law.’

In modern societies, valid law is usually said to require democratic legitimacy, exemplified by an elected legislature. Many traditional jurists argued that custom is the only genuinely democratic mode of law-making, reflecting the actual convictions of the ordinary people who practise them, people who vote by consenting to those customs. But thinkers and writers from within the sceptical tradition represented here tend also to be sceptical about suggestions that customary practices are binding and valuable because they serve ‘as a community building device for the group whose collective wisdom creates custom’.³ Instead, these scholars argue that notions of customary law as a distillation of *popular* practices tend to be indefensible, and that the relevant customs prove to be those of an influential group of insiders. Lesaffer argues that ‘the customs of war were still very much determined by the same professional elite that had dominated them for ages’, and it was the notions of this elite on the requirements of honour and reciprocity that

¹ See Tierney, Chapter 5 below, pp. 101–3.

² Chapter 7 below, p. 151. ³ Chapter 1 below, pp. 31–3.

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drove changes in the rules of siege warfare.⁴ Most modern historians of the common law, including three contributors to this book, argue analogously that the common law embodies a set of *insiders'* customs, the product of lawyers' practices – among those a claim that what is done in the name of the common law reflects popular custom:⁵

At a very basic level, no doubt, the values espoused by the common law would have been generally recognised by people in England, but the detailed working out of the rules derived from these values would certainly not have had any such populist grounding. This was all the work of lawyers, customary in the sense that the *communis opinio doctorum* might have been.⁶

Where customs conflict, hard moral, political or legal cases arise. In solving such cases, one's understanding of the nature of customary practices or laws, and in particular of the relationship between practice and legal doctrine, will become evident. Does custom provide the tacit but indispensable matrix for shared moral and legal reasoning or is it merely the dead hand of the past? Is the selection or preference of one custom over rival conflicting ones itself purely a matter of custom? And, whatever lawyers, judges and decision-makers claim, how far and in what ways (if at all) are they really constrained by past customary practices?⁷

The relation between reason and customary morality

Kant's position illustrates an extreme approach to the relationship between reason and custom. For him, customary *moral* rules and practices are only ever conditionally binding, forms of reasoning 'private' to those groups of unreflective, dependent people who accept as

⁴ Chapter 8 below, pp. 201–2.

⁵ Cromartie questions whether the common law 'can be indefinitely sustained on such a meagre basis' as Hale's and Blackstone's related notions of artificial reason. See Chapter 9 below, p. 227. See in particular the influential essays by A. W. B. Simpson, 'The Common Law and Legal Theory', in A. W. B. Simpson, *Legal Theory and Legal History* (London and Ronceverte, WV: Hambledon Press, 1987), p. 359; and J. H. Baker, *The Law's Two Bodies* (Oxford: Oxford University Press, 2001), pp. 59–90.

⁶ Chapter 7 below, p. 165.

⁷ See Frederick Schauer's contribution to this volume, tracing five 'sceptical' questions, interpretative questions which 'anyone seeking to develop a theory of customary international law, or a theory of the role of custom in common law decision-making, must at least attempt to answer'. Chapter 1 below, p. 14.

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authoritative the relevant practices.⁸ ‘Public’ practical reason is of value not least because it renders moral knowledge accessible and justifiable to reflective individuals without the need for a mediating tradition: practical reason can pull itself up by its own boot-straps. So moral solutions to conflicts among customary practices are not to be found by seeking one winning principle incipient within the relevant customs. Instead, a Kantian aims to *impose* upon those practices a moral meaning conceived in line with prior rational principles, principles one imposes upon oneself because of their rationality. This means that a moral interpretation of customary practices may ‘appear to us as forced – and be often forced in fact; yet, if the text can at all bear it, it must be preferred to a literal interpretation which either contains absolutely nothing for morality, or even works counter to its incentives’.⁹

Such accounts of moral principles as imposed upon custom are challenged by three contributors to this volume. Writing within the tradition of Anglo-American analytical philosophy, Ross Harrison offers an argument designed to show that morality both requires and reaches beyond convention. James Bernard Murphy traces an Aristotelian argument for why ‘our choice is not between reason and prejudice or between custom and law’, developing an account of custom as both conventionalising human nature and naturalising human conventions:

Custom, Janus-like, faces toward human nature and toward stipulated law. Custom turns our natural propensities toward eating, competing, and mating into complex conventions of dining, gaming, and marrying; custom also turns our deliberate rational and legal conventions of arguing, evaluating, and judging into tacit practices as spontaneous and fluid as natural instinct.¹⁰

⁸ See e.g. *Groundwork* 4:408: ‘Nor could one give worse advice to morality than by wanting to derive it from examples. For, every example of it represented to me must itself first be appraised in accordance with principles of morality, as to whether it is also worthy to serve as an original example, that is as a model; it can by no *means* authoritatively provide the concept of morality.’

⁹ Kant is writing here of the rational interpretation of scripture: *Religion within the Limits of Mere Reason* 6:110. On Kant on interpretation in this context, see Allen Wood, ‘Rational Theology, Moral Faith, and Religion’, in *The Cambridge Companion to Kant* (ed. Paul Guyer, Cambridge: Cambridge University Press, 1992), pp. 394–416; and Onora O’Neill’s Tanner lectures, in *The Tanner Lectures on Human Values*, vol. 18 (ed. Grethe B. Peterson, Salt Lake City: Utah University Press, 1997), pp. 269–308 (also reproduced at www.tannerlectures.utah.edu/nopq.html).

¹⁰ Chapter 3 below, pp. 78 and 58.

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While some jurists like Bentham argue that custom cloaks the sinister interests of a dominant elite, Savigny and his fellow jurists of the historical school argue that custom is morality made visible, that there can be no further moral standard to erect over it. In his contribution to this volume, Christoph Kletzer defends Hegel's attempt to transcend such polar views by arguing that reason and custom evolve together towards concrete universality. Comparing the role of custom in Hegel's philosophy of right and Savigny's legal science, Kletzer develops a Hegelian argument that 'Custom and habit are not social expressions opposed to freedom, they are not expressions of the "daily grind" to be overcome by self-expressive, heroic subjectivity but they rather are conditions of this subjectivity, play-forms of freedom.'¹¹

The relation between reason and customary law

Kant's approach to the relation between reason and law again illustrates an extreme position. In strong contrast to his approach on moral reasoning, Kant argues that lawyers aiming to resolve conflicts between *legal* rules and practices must *not* appeal to rational principles of justice: lawyers' reasoning must remain exclusively within the reasoning internal to legislative commands and authoritative customs. If a faculty of law 'presumes to mix with its teaching something it treats as derived from reason, it offends against the authority of the government'; a jurist 'as an authority on the text, does not look to his reason for the laws . . . but to the code of laws that has been promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant)'.¹²

Kant's position is one that many practising lawyers would find staggering. As one Kant scholar remarks, 'it is hard to see how the practical tasks of the practising lawyer, and in particular the practical task of the judge, can be fully guided by norms set by state authority. That might be possible if legal rules were true algorithms – but it does not seem at all plausible to think that any practical rules are algorithms: they may specify what is to be done, but always under-specify what is actually done.'¹³ No written law *can* give exhaustive directions on its own interpretation and application, so customary rules and practices will be needed, not just to resolve faults in codification, but to guide judicial interpretation – and these guiding

¹¹ Chapter 6 below, p. 138. ¹² *Conflict of the Faculties* 7:22–3.

¹³ Onora O'Neill, 'Kant on Reason, Authority and Interpretation' (unpublished conference presentation, Newnham College, Cambridge, September 2004), p. 12.

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customary rules and practices will themselves be subject to change and development through interpretation.¹⁴

While for many thinkers this is enough to show that customary rules are an immanent part of any legal system, some would insist that instead custom is at best a *source* rather than a part of law and that a formal legal act such as a judicial decision is needed to convert custom into customary law. On the latter account, custom is not itself a valid part of law (akin to legislation) but at best the raw material out of which a legislature or a court might fashion genuine positive law. Thus Frederick Schauer argues that ‘the important questions about customary law are questions about formal law’s use of pre-legal normative practices as the basis for legal norms’.¹⁵ And Michael Lobban offers a detailed study of the way in which nineteenth-century English common lawyers approached customary international law in very much this spirit, working on the assumption that ‘international law was a source of English law without being itself part of it’.¹⁶

In reflecting on the nature of such customary rules and practices, while the question of how to resolve hard cases is important, it is at least as important – and as difficult – to understand ‘what it is that makes the easy cases easy’.¹⁷ This returns us to the question of what effect, if any, doctrine or reason has on customary practices, and the contributors to this volume offer diverse responses. As already seen above, the approach to the question taken by many legal historians is to offer an account of lawyers’ own views

¹⁴ Related arguments have been made against the positions of contemporary legal positivists. To argue that a particular formulation is the correct view of a rule of law, as do teachers, textbook-writers, judges and counsel, is, as Brian Simpson argues against H. L. A. Hart, ‘to participate in the system, not simply to study it scientifically’. See A. W. B. Simpson, ‘The Common Law and Legal Theory’, in *Oxford Essays in Jurisprudence* (ed. A. W. B. Simpson, Oxford: Clarendon Press, 1973), p. 97. Gerald Postema builds a powerful critique of Bentham’s position on a similar point: ‘what the courts do has an important (though not necessarily decisive) impact on what the law is and what it requires.’ See Gerald Postema, *Jeremy Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), pp. 456–7.

¹⁵ Chapter 1 below, p. 18. Schauer follows Raz’s reading of Hart in treating a rule as a ‘content-independent’ reason for action, and distinguishes a custom (such as waking at 6 a.m.) from a rule. Taking the example of the contemporary prohibition on slavery, he also draws a sharp distinction between the morally right and ‘a series of national normative acts (not in the legal sense, and certainly not items of international law)’. Other contributors to this volume, notably Murphy (Chapter 3 below) and Harrison (Chapter 2 below), would contest such a disjunction between custom and morality.

¹⁶ Chapter 11 below, p. 277. ¹⁷ Chapter 1 below, p. 28n34.

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of the relation between practice and doctrine while aiming to avoid imposing or relying on a view of their own. In the most extreme cases, reason or legal philosophy is rejected as ‘a waste of time’, an enterprise ‘of interest only for people too idle to engage in the intricacies of the positive law’: thus Savigny writes sarcastically of how ‘until today we come across people who take their own juristic concepts and opinions to be purely reasonable, only because they lack knowledge of their genealogy’.¹⁸

But, in his comparative study of Savigny and Hegel on customary law, Christoph Kletzer contends with Hegel that, if legal history understood as a scholarly enterprise is to be rational, then legal history understood as a series of events ‘must at least be understood as making the rationality of this historical inquiry possible, as being the history of the rationality of historical inquiry. Now, historical research is not an isolated enterprise, but can be rational only in a context of freedom, i.e. in the modern rational state. Thus, rational historical enquiry is the enquiry into the development of reason as such.’¹⁹

And, in her study of Gratian’s *Decretum*, a text which attempted to show how diverse and seemingly inconsistent canons could be interpreted and applied in a consistent way, Jean Porter concludes in Aristotelian fashion:

Because written laws serve to formulate and correct custom, they will normally supercede and override customary law; yet, because they find their context and point within a broader framework of customary law, the customs of a people will provide the necessary context for their interpretation. What is more, written law will have no purchase on a community, unless it reflects the practices of that community in some way; even a law that sets out to correct custom will necessarily reflect other aspects of the customary practices of a community, or it will lack purchase in the community for which it is intended. Far from being a minor adjunct to the law properly so called, custom is seen from this perspective as the one essential component of any legal system, sufficient to sustain a rule of law under some circumstances, and one essential component of the rule of law under any and every circumstance.²⁰

¹⁸ Chapter 6 below, p. 128, summarising Savigny’s position on legal philosophy: and quoting from Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Hildesheim: Georg Olms, 1967), p. 115.

¹⁹ Kletzer recognises that this line of thought makes sense only to one who believes, like Hegel, that ‘reason has already actualised itself in the world . . . in the French Revolution, in the advent of the rational liberal state that guarantees mutual recognition and free citizenship to all’. Chapter 6 below, p. 145.

²⁰ Chapter 4 below, p. 100.

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Codify it, repeal it, abolish it; some form of customary law will inevitably reappear. But how far, if at all, does a lawyer need to rely on reasoned argument in offering an account of rules of customary law? The issue of democratic legitimacy is especially contested in the case of customary international law, which some jurists claim threatens the democratic sovereignty of national law-making. This is one of the broader questions at stake in four of the contributions to this volume on customary international law.

Two of these essays focus mainly on English approaches to international law in the nineteenth century. In chapter 10, Perreau-Saussine argues that nineteenth-century English treatises on the law of nations reflect three distinctive accounts of the relationship between reasoned argument and the practices of states. The question of the relationship between reasoned argument and customary international law also plays a key role in Michael Lobban's account of the view of the law of nations taken by English courts in the nineteenth century. Lobban suggests that the attitude of English courts to the law of nations hinged both on nineteenth-century common lawyers' own understanding of the common law (as deriving not from custom itself but from judicial decision and ultimately 'artificial reason') and on their understanding of how far the relevant rule of customary international law was understood to be rationally defensible:

As with their use of the law of nature, it was drawn on not for the moral content of its precepts, but as a means of reasoning on the nature of the problem. In novel cases, where English law offered no clear answers, courts (particularly before the mid-nineteenth century) were content to draw on the classic natural law works of Grotius, Bynkershoek or Vattel. However, insofar as the law of nations was made up of contingent and changing state practice, it was not regarded as of itself part of the common law.

For 'sceptics' who believe that custom is all we have, to suggest that particular jurists or treatise writers could have an attributable influence on the development of international law is akin to suggesting that assisting at the delivery of a child makes one a biological parent. A history of the influence of a particular writer or jurist can and must be a history of the work of a professional tradition, of advocates' and judges' 'shared attempt at addressing and resolving the problematic of

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order in a diverse world'. On such accounts, 'there is a fundamental problem with assigning and measuring influence in international law, which is the ultimately collective character of so much of the work': the collective work of international lawyers is rooted in a reflective professional tradition whose customs have a long history. Central to this tradition, it is usually argued, is a style and culture traceable to Grotius and other creators of modern international law and one 'still-existing, and no longer merely European'. It is a tradition that individuals 'may influence but hardly decisively', not least since 'its outcomes at any time, though expressed definitively in terms of current international law, are at the same time part of a process, and are to that extent provisional': 'Rise and fall, rise and fall, that is its enduring significance.'²¹

In contrast, the two final contributions to this volume defend accounts of customary international law that do aim to reach beyond legal practice to fundamental principles which it is argued are in some sense prior to and constraining of that practice. Arguing that 'human institutions exist and are capable of acting intelligibly . . . only insofar as they and others recognize them as defined and governed by norms, capable of grasping and following norms *as norms* (rather than merely strategic markers of the parameters of their anomic choices)', Gerald Postema sketches a general account of custom as a 'normative practice', an account which he suggests can 'illuminate the nature and typical mode of operation of customary international law'.²² And John Tasioulas argues that 'the account of custom we should favour is that which is best justified by a political morality that offers the most attractive specification of the values served by international law'. Tasioulas offers an interpretative understanding of customary international law in which the ethical appeal of a candidate rule of international law figures among the criteria for determining whether it is a valid rule: this account, he argues, can serve as 'a template for guiding judicial decision-making and assessing its correctness'.

While the studies in this book focus mainly on the common law and on customary international law, customary practices underpin *every*

²¹ J. Crawford, 'Public International Law in Twentieth-Century England', in *Jurists Uprooted: German Speaking Emigre Lawyers in Twentieth Century Britain* (ed. J. Beatson and R. Zimmermann, Oxford: Oxford University Press, 2004), pp. 692, 699 and 700–1.

²² Chapter 12 below, p. 306.

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legal system. Customary rules of interpretation play a part in any legal system, however codified: no written law can give exhaustive directions on its own interpretation, so customary rules and practices inevitably guide judicial interpretation. And those customary rules and practices themselves in turn will be subject to change and development through interpretation. Ancient and modern, international, civilian and common law: every interpretation and application of a written law relies on a complicated set of shared customs. And, once given, each interpretation and application of a written law itself extends that same set of customs. As James Bernard Murphy writes, ‘Like a beaver, law is both adapted to its customary environment and transforms that environment . . . Many of our customs began as laws and all successful law eventually becomes customary.’²³

²³ Chapter 3 below, p. 77.