# CUSTOM AS A SOURCE OF LAW

A central puzzle in jurisprudence has been the role of custom in law. Custom is simply the practices and usages of distinctive communities. But are such customs legally binding? Can custom be law, even before it is recognized by authoritative legislation or precedent? And, assuming that custom is a source of law, what are its constituent elements? Is proof of a consistent and long-standing practice sufficient, or must there be an extra ingredient – that the usage is pursued out of a sense of legal obligation, or, at least, that the custom is reasonable and efficacious? And, most tantalizing of all, is custom a source of law that we should embrace in modern, sophisticated legal systems, or is the notion of law from below outdated, or even dangerous, today? This volume answers these questions through a rigorous multidisciplinary, historical, and comparative approach, offering a fresh perspective on custom's enduring place in both domestic and international law.

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*In Memory of Harold J. Berman*
*Colleague, Mentor, and Friend*

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# Preface

Few people today are likely to concur with the classical Greek poet Pindar's maxim, "Custom is the king of all."[1] Nevertheless, the thrust of this book is that custom – the unofficial and unenacted practices of communities – lives as a source of obligation in contemporary legal cultures and remains a potent jurisprudential force, for both domestic polities and international law.

A central puzzle in jurisprudence has been the role of custom in law. Custom is simply the practices and usages of distinctive communities. But are such customs legally binding? Can custom be law, even before it is recognized by authoritative legislation or precedent? Assuming that custom is a source of law, what are the elements of custom? Is proof of a consistent and long-standing practice sufficient, or must there be an extra ingredient that the practice is pursued out of a sense of legal obligation or, at least, that the custom is reasonable and efficacious? How does one actually prove a custom? Most tantalizing of all, is custom a source of law that we should recognize in modern, sophisticated legal systems, or is the notion of "law from below" outdated, or even dangerous, today?

I came to write this book as a consequence of my friendship and collaboration with the late Harold J. Berman, my colleague at Emory Law School. We co-taught a one-credit-hour course on customary law on four occasions during the late 1990s and drew a packed audience of students. The course unfolded over seven two-hour lectures and tried to answer a deceptively simple question: Is all law ultimately derived from legislation or administration or adjudication, or is it also formed from the informal usages and understandings that are considered legally binding by those who practice or share them?

Traditionally, such binding usages and practices have been called "customary law." One peculiarity of the modern law school curriculum is that we do not give much reflection now to the sources of law in contemporary legal culture, and law students reflexively assume that all law must be derived from

a legislature passing statutes or judges deciding cases. In short, we implicitly train law students from virtually their very first day of studies that law is a "top-down" social construct, an Austinian vision of authoritative commands. Harold Berman's insight for a course on customary law was to serve as an antidote to this assumption, to remind law students (as future lawyers and leaders) that law is as much made from the "bottom up" by relevant communities.

The course that Hal Berman and I taught together surveyed – like this book – the topic historically and comparatively, with material derived from anthropology and sociology (such as the law used by preliterate peoples) and legal history (especially the origins and evolution of the Western legal tradition and the English common law). The parts of the course that drew the most excitement (and epiphanies) from the students were the discussions of the use of custom in contemporary tort, property, commercial, and even constitutional law. When students realized that custom was all around us as lawyers (whether trade usages in the Uniform Commercial Code,[2] or industry practices as establishing a standard of care,[3] or in separation-of-powers disputes[4]), it became easier to accept its role in today's legal practice. This was especially so after Hal's set of lectures on international commercial custom – the *lex mercatoria* – for millennia used by global communities of merchants to regulate such aspects of trade as the content of bills of lading and cargo insurance (for ocean transport), letters of credit, and other forms of international documentary transactions.

There is a central set of paradoxes for customary law, and students were quick to recognize and exploit these in their questions and discussion: Isn't there something more that makes a community practice into a binding custom? Customs can be both good and evil; how does one distinguish between them? Is a custom binding even before it has been recognized by a court or legislature?

In response, Hal told a simple story, one that says much about him as a clever teacher, an insightful scholar, and a devoted family man. Hal was married to his wife, Ruth, for sixty-six years before he passed away in 2007. According to Hal, every Sunday for those sixty-six years, he would prepare a brunch for Ruth (provided they weren't traveling away from home). By any measure of consistency ("every Sunday") and duration ("sixty-six years"), this was an established usage and practice of a particular community – the Berman household. But, Hal asked the class (with an inevitable grin and accompanying laughter from the students), is this a binding custom? What if, Hal mused, one Sunday morning he just didn't feel like making brunch, or (in a fit of pique) he was angry with Ruth and wanted to withhold a meal? Could Ruth sue him for specific performance? Had an informal usage ripened into a binding custom?

Had the extra ingredient been added that converted a "mere" practice into a "legal" custom?[5]

Never in the course of our teaching did Hal and I reach a resolution on this simple example, freighted with great wisdom. This book reflects my humble attempt to provide a comprehensive survey of customary law. At the same time, I essay here a broad jurisprudential explanation for custom as a source of law, even though this subject has seemed to be impervious to previous attempts at consistent theorization.[6]

The narrative here unfolds in three steps. In Part One of this book, I survey the broad and rich interdisciplinary literature of customary law, focusing on ethnography and anthropology, cultural and legal history, sociology, psychology, and economics. The intellectual history of customary law that I trace in Part One has broad implications for the rest of the volume. It is indispensable in establishing the discussion in Part Two, which is a review of the role of customary norms in a variety of contemporary domestic jurisdictions, with examples drawn from European, North American, African, and Pacific Basin polities. Here, the narrative is organized around discrete realms of legal doctrine within which custom remains influential. These include family law, property, contracts, torts, and even constitutional law. This analysis naturally segues into Part Three of the book, in which the current role of custom in international law (both private and public) is assessed. While disputes about the relevance of customary norms in their transnational settings have been quite contentious – especially as to trade usages in the "new" law merchant and with regard to customary international law – these species of custom share many characteristics with those in domestic law contexts.

When viewed all together, I try to propose here an integrated (although not completely unified or complete) theory of custom. I argue that custom's jurisprudential foundations are strong and deep. They are premised on such diverse justifications as the functional reciprocity of obligations, the rationality and utility of customary rules, and the positive act of law-making by a community of legal actors. Also characteristic of customary legal systems is an acceptance and recognition of pluralism for norms, a robust mechanism for signaling the acceptance or rejection of new rules, and a general struggle for law. All of these attributes give customs their legitimacy and durability.

As for the elements of custom, I contend that the best algorithm for the creation of customary norms is the traditional notion that there must be *both* proof of an objective practice within a relevant community *and* a subjective determination of the value of the norm, whether expressed as a sense of legal obligation or the reasonableness of the rule. Lastly, I contend here that custom has a rightful place as a source of legal obligation in mature and sophisticated

legal cultures such as our own. More than that, custom is all around us. It is followed in a multiplicity of communities, recognized in a variety of jurisdictions, and enforced in many different doctrinal situations. Custom is alive and well, so it would be wise to grant it the jurisprudential respect it deserves.

I incurred many obligations in writing this book, the gestation of which took more than fifteen years. I have already acknowledged the intellectual debt I owe to my departed colleague, Professor Harold J. Berman. This project was nurtured through workshops at Emory Law School and completed during a sabbatical leave from my home institution. Superb research assistance was provided by reference librarians at Emory University and the University of Virginia School of Law (where I held a visiting appointment in 1996–97). I also profited from scores of conversations with colleagues, particularly through the American Society of International Law and its committees on International Law in Domestic Courts and International Legal Theory. Short passages in this book have previously appeared in print, including material in Chapters 3, 6, and 11.[7]

Particular thanks go to my editor at Cambridge University Press, John Berger, who encouraged this project at every step. As always, without the love and support of my family, this book would not have been possible.

# Abbreviations

| | |
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| AJCL | American Journal of Comparative Law |
| AJIL | American Journal of International Law |
| AJJ | American Journal of Jurisprudence |
| Ann. Dig. | Annual Digest of Public International Law Cases |
| Blackstone | William Blackstone, *Commentaries on the Laws of England* (1765–69) |
| BYBIL | British Year Book of International Law |
| CLR | Columbia Law Review |
| Eng. Rep. | Reports of English Cases (1094–1873) |
| F. Cas. | Federal Cases (U.S.) (1789–1880) |
| F.2d & F.3d | Federal Reporter (U.S. appeals) (1880-) |
| F. Supp. | Federal Supplement (U.S. districts) (1932-) |
| HLR | Harvard Law Review |
| I.C.J. | International Court of Justice |
| ICLQ | International and Comparative Law Quarterly |
| I.L.M. | International Legal Materials |
| I.L.R. | International Law Reports |
| JAL | Journal of African Law |
| JLE | Journal of Law and Economics |
| JLS | Journal of Legal Studies |
| LSI | Law and Social Inquiry |
| P.C.I.J. | Permanent Court for International Justice |
| RCADI | Recueils des Cours de l'Academie de Droit International de la Haye |
| Stat. | U.S. Statues at Large |
| UCLR | University of Chicago Law Review |
| U.N.T.S. | United Nations Treaty Series |
| U.N. Doc. | United Nations Document |

| | |
|---|---|
| U.S. | United States Supreme Court Reporter (when used in the Notes) |
| U.S.C. | United States Code |
| VCLT | Vienna Convention on the Law of Treaties |
| VJIL | Virginia Journal of International Law |
| VLR | Virginia Law Review |
| Y.B. Int'l L. Comm'n | Yearbook of the U.N. International Law Commission |
| YLJ | Yale Law Journal |

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