

its equivalent – is well established in most domestic legal systems, both in criminal law and, more importantly for state responsibility, in civil law.

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Amanda Perreau-Saussine and James Bernard Murphy (eds). ***The Nature of Customary Law. Legal, Historical and Philosophical Perspectives***. Cambridge: Cambridge University Press, 2009. Pp. ix, 338. £28.99. ISBN: 9780521115568.

In order to make ‘headway’ in one of the most intractable debates in our field – the nature and workings of customary international law – authors seem to employ one of three tactics. One is to repeat and rehash the same narrow, doctrinal debates that scholars have been having for the last forty-odd years.¹ Another and far more courageous approach is for the author to seek to completely re-imagine (and remake) customary international law.² A third, finally, is to reflect on the nature of customary law more widely and to include insights from jurisprudence/legal theory, legal history, and moral/political philosophy.

An example of that third approach is the book under review, *The Nature of Customary Law*, edited by Amanda Perreau-Saussine and James Bernard Murphy and based on a conference at the University of Cambridge in 2005. It is decidedly the most notable and the most accomplished project in recent years. The two editors have assembled 13 authors, who have undertaken to elucidate certain historical and philosophical/theoretical aspects of the *problematique* resulting, it must be said, in a very well-executed *bricolage*. The more pragmatic readers are warned at the outset that neither is it a book on customary law in international law nor, for the most part, does it purport to describe how customary law comes about or is ascertained. But, as mentioned above, this was a conscious choice and one that has a great deal of merit. Beyond international legal scholarship and practice’s narrow account lie the very rich ‘domestic’ debates in the common law culture as well as parallel efforts in moral philosophy and (legal) historiography. The conscious decision of the editors to take account of these debates, coupled as it is with their choice of collaborators, does result, however, in a significant cultural bias. This bias, one hastens to add, does not detract from the high quality of the book, and in some ways enlivens the debate. One must, however, be aware of the limitations of this choice. Of the 13 authors in this volume, all but two hail from an Anglophone background, and the lawyers among these also had their legal education in a common law system. Continental legal traditions are represented only by Christoph Kletzer (Austria) and Randall Lesaffer (Belgium).

It may be best if we retrace how the reader may stumble upon this bias, as indeed the present reviewer did while reading the book. Jean Porter’s chapter on Gratian’s *Decretum* is an excellent

¹ The beginning of the ‘modern’ era of debate on customary international law can conveniently, if not accurately, be fixed with the publication of A.A. D’Amato, *The Concept of Custom in International Law* (1971).

² Brian Lepard’s recent book could be counted amongst these: B.D. Lepard, *Customary International Law. A New Theory with Practical Applications* (2010), reviewed in this *Journal* by Niels Petersen, ‘[Book review:] Brian D. Lepard, *Customary International Law. A New Theory with Practical Applications* (2010)’, 21 *EJIL* (2010) 795.

summary of what the most important part of the *Corpus Iuris Canonici* has to say on the topic of customary law. One wonders, however, why there is no twin chapter describing customary law in the *Corpus Iuris Civilis*. This is a quibble, but soon one becomes aware that the book contains very little information on the civilian tradition on customary law. David Ibbetson's chapter on custom in medieval law contains a section on the civilian Roman and medieval tradition (at 151–161), and several other chapters discuss Roman law *en passant*. Kletzer writes on Puchta and von Savigny, who revived interest in the Roman origins of the civil law in the early 19th century, rather than have us continue with the 'impure' medieval *ius commune* and the *usus modernus pandectarum*. Again, however, he does so *à propos* a debate on the difference of philosophical basis between von Savigny and Hegel, and is not primarily concerned with customary law. He does go into considerable detail with respect to von Savigny's conception of customary law, however (at 130–137). For a book that deals with the nature of customary law, a chapter on the civilian tradition should have been included. At first, one is tempted to ascribe this omission to an oversight which can be explained by the vagaries of a conference volume. However, the strong focus on international law in the volume combined with the Anglophone choice of contributors mean that this omission is both centre-stage and seems to be part of the editors' conscious choice.

The role and origins of *opinio iuris (sive necessitatis)* would have been a central issue at least in the historical, but also in the philosophical, chapters of this book, had it focussed less strongly on the common law tradition. It is relatively undisputed that classical and post-classical Roman law did not conceive of customary law as we do in international law (and in continental European systems). *Usus* and *opinio*, the two-element doctrine, was, at best, conceived of as usage accompanied by *tacitus consensus populi*,³ and even this is less than clear. The doctrine might, for example, have been a product of the German Historical School⁴ or even of late 19th century private law scholarship;⁵ it might also have been part of the ordinary gloss to the *Decretum Gratiani*,⁶ though the point is not made by Porter (at 92). Several of the authors in the book mention and discuss the historical origin of the subjective element, e.g., Brian Tierney (at 117–118), Kletzer (at 135–136), Lesaffer (at 198–199), and Gerald J. Postema (at 280). These and others contain a wealth of information which would have been put to better use had this topic been consolidated into one chapter. As it stands, we do not find a historical retracing of the development to today's *opinio iuris*.

Most of the chapters with a philosophical-theoretical focus are not overly concerned with in-depth discussions of the subjective element or with the necessity of distinguishing *customs* from customary law (see below). Among the philosophers John Tasioulas does define *opinio iuris* (at 320–324), but not only is his chapter concerned with customary international law, he is also engaged in what the present reviewer – just slightly less imbued with 'the quest for global justice' (at 307) than that author is – would call a proposal for the law as it could be, rather than a description of the law as it is. This lack of focus on the subjective element, viz. the distinction

³ The clearest (post-classical) source for this is D.1.3.35: '[s]ed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt iura servantur': 'those rules which have been approved by long established custom and have been observed for many years, by, as it were, a tacit agreement of citizens, are no less to be obeyed than laws which have been committed to writing'.

⁴ G. Puchta, *Das Gewohnheitsrecht* (1828–1837) 2 vols; F.C. von Savigny, *System des heutigen Römischen Rechts* (1840), Vol. 1.

⁵ See, e.g., Zitelmann, 'Gewohnheitsrecht und Irrthum', 66 *Archiv für die Civilistische Praxis* (1883) 323; S. Brie, *Die Lehre vom Gewohnheitsrecht. Eine historisch-dogmatische Untersuchung* (1899); F. Gény, *Méthode d'interprétation et sources en droit privé positif* (1919), Vol. 1.

⁶ See Brie, *supra* note 5, at 171, referring to the *glossa* 'institutum' to *Decretum* D.1 C.5 (col. 3 in the Rome 1582 edition) and 'consuetudinem' to D.8 C.7 (col. 31).

between custom and customary law, in both historical and philosophical chapters may be due to the dominant legal culture in this book. In other words: it may just be the relative homogeneity of the contributors to this volume that has brought out this difference less clearly than if it had a more mixed authorship.

The historical chapters which deal with custom are a real eye-opener for international lawyers not trained in the common law and English legal history. It is not surprising that the chapters by Ibbetson, who primarily deals with custom in medieval law (at 151–175), Alan Cromartie, whose paper explores the notion of the common law in relation to custom(s) (at 203–227), and Michael Lobban, who describes the role of international law in 19th century common law courts (at 256–278), are very well written. What is striking, however, is the consistency with which the authors – and, indeed, the courts and learned writers of their respective periods – use the word *customs* and avoid the words *customary law*. In connection with the dispersed but discrete deconstruction of the inevitability of customary law's subjective element in general European legal history from Roman law to the late 19th century in this book, we may say that this is not much of a revelation. English legal historians merely confirm what continental legal historians would tell us: *opinio iuris* probably does not have as much of a tradition as we may think. But it seems that there was a discrete distinction in European legal history between *usus* and customary law (even if it was 'only' called *consuetudo*), between behavioural regularities and the law, even if this difference was due to factors like *tacitus consensus* or *recta ratio*. In the history of the common law tradition, so our authors seem to tell us, 'custom-as-law' (at 161) is not based on the categorical distinction between usages-as-factual-regularities and usages-plus-*opinio*/consent-as-norm. The former seems to imply the latter – thus, 'customs are not merely *patterns of behavior*; rather they set *standards for behavior*' (at 285). When looking for concrete and specific evidence for the usage/norm distinction in the relevant historical chapters, however, things are shown to be much less clear. Thus, Lobban can claim, with limited acuity with respect to orthodox international law doctrine but revealingly for the outside observer of English legal history:

Unlike international lawyers, who argued that customary norms grew out of developing practices which became binding as result of general use, common lawyers did not feel that community practices could by themselves generate binding norms. In their view, while community custom provided the historical foundation of common law, its development was the preserve of judges [at 256–257].

For this reviewer, it remains unclear exactly what the historical status of a possible custom/customary law dichotomy was in English law, i.e., whether there was a clear distinction between regularities and norms or whether the judgments of common law courts transformed regularity into law. It might just be the case that the historical situation is slightly more muddled in that tradition than on the Continent. It might also be the case that the English legal language gives the words 'custom' and 'customary law' the same meaning, but that the former is simply used more often.

That the equivocation is caused only by the common use of the words is unlikely, though: certain features of the Anglo-Saxon jurisprudential tradition seem to support the idea that facts alone become law (Ought from Is alone); a tradition that is congenial to an understanding of a single-element customary 'law'. This is one of the major subcutaneous elements of the general jurisprudential chapters in this volume, which are written to as high a standard as the others, but by virtue of the commingling of fact and value become much less palatable to this reviewer. Three chapters in particular exhibit elements of this jurisprudential approach: Frederick Schauer on the interpretation of customary law (at 13–34), James Bernard Murphy on Aristotle on customs and habits (at 53–78), and Gerald J. Postema, applying the Anglo-Saxon jurisprudential method to the problems of customary international law (at 279–306). The decision to leave the legal-philosophical aspects of customary law exclusively in the hands of a tradition

which focuses on a rather narrow canon of literature and topics is a great pity, as the inevitable blind-spots are multiplied. Consider a brief example. Frederick Schauer writes:

Only when pre-legal normative customs are taken as (not-necessarily-conclusive) content-independent sources of authority do the genuine issues arise, and thus my question is about determining the content of those customary normative sources that have already been socially or culturally but not-yet-legally determined to be authoritative [at 18–19].

The attendant footnote is enough to prove the point of cultural insularity: Schauer cites Hart, Raz, and Regan on Raz – what more do we need on the concept of authority of law, he seems to be saying. But continental legal philosophy, for example, would perhaps not see the point of a continuum of customary norms from social to legal ('not yet') and would not assert the identity of the norm just because the contents of a non-legal and of a legal norm happen to be identical. Continental legal philosophers would perhaps not speak of a 'determination to be authoritative', but of rules on rule-making which constitute – *make* – the norm, rather than declare a norm to be authoritative. A non-authoritative norm could be called a *contradictio in adiecto* – but this is the point: Schauer's assumption that this tradition is the only way to talk about legal philosophy should have been counterbalanced by chapters written by scholars from other traditions. Imagine, by way of comparison, a book on international constitutionalism written almost entirely by legal scholars trained in Germany. How likely is it that the culture of constitutional law scholarship in the Federal Republic, wedded as it is to the quasi-naturalistic spirit of the *Grundgesetz*, or its implicit submissiveness to the Federal Constitutional Court, would not heavily influence the authors' arguments, as it tends to do?⁷ Would this not result in an insurmountable bias and imbalance in the arguments of that book?

This reviewer's root problem with this view of the Anglo-Saxon tradition of jurisprudence is that it seems that the sources of law are to be found on one level only and exclusively determined by extra-legal factors. When Murphy says that Aristotle 'has no easy way to distinguish habit from custom. Not all habits are customary habits; many are purely idiosyncratic' (at 61), he is staying within the framework set by Hart. Is it really the case that custom (a behavioural regularity) alone without an act of will or belief, without meta-law to authorize this law-creation, becomes law by some magic non-legal process? Is it really the case that the sources of all possible legal orders are determined by, in the last instance, 'mere' customary/habitual obedience, as with Hart's Rule of Recognition (which clearly is not just an epistemological tool)? Consider the very English phrase: 'it's just not done'. In contradistinction, several of the historical chapters, e.g., Tierney on Suárez (at 118) and Kletzer on Savigny (at 133–134), discuss the difference.

Custom *qua* behavioural regularity is congenial at least to the Hartian approach: Hart's jurisprudence is, on the one hand, a sociological account. On the other hand, however, Hart is not as consistent as a proper realist would be in denying all Ought. Hence, Ought needs to be created solely from Is, and hence all law is necessarily based in 'customs', i.e., pure behaviour, and the Rule of Recognition necessarily consists of customs as basis, foundation, cause, and *Erkenntnisgrund* of law. Nobody is saying that other traditions are better, but this reviewer would have liked to see less unanimity, particularly as it does not reflect unanimity amongst the worldwide community of legal philosophers on this point.

How customary international law is to be created is still the subject of intensive dispute among scholars. This has been a constant for much of the 20th century and will not change in the

⁷ On the *modus teutonicus* in constitutional law scholarship see Jestaedt, 'Die deutsche Staatsrechtslehre im europäisierten Rechtswissenschaftsdiskurs', 67 *JuristenZeitung* (2012) 1. For a critique of the *Grundgesetz* bias in international constitutionalist scholarship see Somek, 'From the Rule of Law to the Constitutionalist Makeover. Changing European Conceptions of Public International Law', 18 *Constellations* (2011) 567, at 577; Kammerhofer, 'Constitutionalism and the Myth of Practical Reason. Kelsenian Responses to Methodological Confusion', 23 *Leiden J Int'lL* (2010) 723.

foreseeable future. The main reason for this is as well known as it is difficult to ‘remedy’: we do not know where to look to find the rules or mechanisms for its creation (or, at least, we disagree more than on other issues). The ‘meta-law on law-creation’, as this reviewer has called it elsewhere,⁸ is singularly unclear, and in discussing whether this or that proposed rule of customary law has actually become part of law we *assume* certain meta-laws (*Rechtserzeugungsbedingungen*) to apply, but have no proof that they do. We take from long legal tradition that the two ingredients are *usus* and *opinio*, but (i) we do not know what they mean; (ii) we doubt (with good reason) that legal history will bear out the claim that they are as old and inveterate as we usually believe they are; or (iii) we doubt that modern international law contains these two requirements in this form.

Those who expect specific information regarding immediate doctrinal problems from this book – or even about problems of customary international law’s ‘low theory’ (e.g., the exact formulation of the *opinio iuris sive necessitatis*) – will be disappointed. No such information is forthcoming – or, indeed, is intended to be given.⁹ But that is entirely apt for this book. The information to be gleaned from this tome is perhaps best described as ‘circumstantial’ or ‘subconscious’; by exploring the legal-philosophical issues and legal-historical roots of custom(ary law), the book tries to give indirect pointers and to stimulate the intellect of those working on a more concrete level of enquiry. Of course, every scholar will respond to different *stimuli*, and some will be too pig-headed to respond at all. It is abundantly clear that a very wide range of such *stimuli* is provided in this book. For the present reviewer, it has been a singularly enjoyable learning experience which exposed and challenged his own strong cultural bias, largely caused by his legal-cultural socialization. We need books that challenge the common–continental law divide. At least for readers from the Continent, the challenge starts as soon as they begin reading. One might just wish that the controversy raged more on the pages of the book than in the mind of the reader. In light of this excellent first glimpse into the nature of customary law, it is to be hoped that the editors may – despite manifold adversities – soon be able to realize the plan they originally had to publish a follow-up book, one that deals more specifically with customary *international* law.

Individual Contributions

Amanda Perreau-Saussine and James Bernard Murphy, *The Character of Customary Law: An Introduction*;

Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*;

Ross Harrison, *The Moral Role of Conventions*;

James Bernard Murphy, *Habit and Convention at the Foundation of Custom*;

Jean Porter, *Custom, Ordinance and Natural Right in Gratian’s ‘Decretum’*;

Brian Tierney, *Vitoria and Suarez on ius gentium, Natural Law, and Custom*;

Christoph Kletzer, *Custom and Positivity: An Examination of the Philosophic Ground of the Hegel–Savigny Controversy*;

David Ibbetson, *Custom in Medieval Law*;

Randall Lesaffer, *Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War*;

Alan Cromartie, *The Idea of Common Law as Custom*;

Amanda Perreau-Saussine, *Three Ways of Writing a Treatise on Public International Law: Textbooks and the Nature of Customary International Law*;

⁸ J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2010), at 181–240 (on the hierarchy of norms and the concept of sources), 59–86 (on customary international law in particular).

⁹ Excepting John Tasioulas’ chapter (at 307–335) which, as mentioned above, is perhaps better suited to an age where fidelity to positive law is not as important to legal scholars as it is today.

Michael Lobban, Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century;

Gerald J. Postema, Custom in International Law: A Normative Practice Account;

John Tasioulas, Customary International Law and the Quest For Global Justice

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Orna Ben-Naftali (ed.). **International Humanitarian Law and International Human Rights Law**. Oxford: Oxford University Press. 2011. Pp. 424. £60. ISBN: 9780191001604.

The volume under review is published in the series ‘The Collected Courses of the Academy of European Law’, which draws upon the lectures given at the European University Institute in Florence within the Academy of European Law Summer School. It includes eight essays, most of which are authored by the lecturers in the session on the human rights law of the 2008 Academy of European Law Summer School. Their common denominator is the exploration, to a greater or lesser degree, of the interaction between international humanitarian law (IHL) and international human rights law (IHRL) and its functioning in practice.

The collection opens with an essay by Yuval Shany entitled ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’. The author illustrates how after the 11 September 2001 attacks there was a shift from what he calls the ‘law and order’ paradigm, which considered terrorism simply as a criminal phenomenon, to what in his words is the ‘armed conflict’ paradigm, according to which terrorism is ‘a threat equivalent in its magnitude to an inter-state war’ (at 22). This shift had dramatic consequences for the respect for human rights in the fight against terrorism. Shany, however, points out that the situation is fluid: a mixed paradigm is emerging which takes human rights into due consideration. This paradigm was implicitly endorsed by the International Court of Justice in the *Wall* advisory opinion and, more recently, by the Israeli Supreme Court in various decisions, including that in the *Targeted Killings* case. In the author’s view, however, it remains unclear whether the mixed paradigm will be able to impact on state practice.

The second essay is by Marco Sassòli and focuses on the role of IHL and IHRL in the allegedly new types of armed conflicts. Sassòli considers asymmetric conflicts, conflicts in failed states, the ‘war on terror’, and peace operations conducted or authorized by the UN. He argues that nearly all these types of conflicts, if they are armed conflicts at all, are not of an international character, because the fighting forces do not belong to different states. In the author’s opinion, both IHL and IHRL contain rules applicable to many issues arising in such conflicts. What rule is to be applied in a certain case should be determined according to the *lex specialis derogat legi generali* principle. Sassòli points out that this principle ‘does not indicate an inherent quality in one branch of law or of one of its rules. Rather, it determines which rule prevails over another in a particular situation’ (at 71). To use his own words, ‘between two applicable rules, the one which has the larger “common contact surface area” with the situation applies’ (*ibid.*). A number of examples are given.

The author observes, however, that IHL and IHRL appear to offer similar solutions on most issues arising in the new types of conflicts and, more generally, in non-international conflicts, and focuses his attention on two issues on which the solutions offered by the two branches of law seem to differ. They are the deliberate killing and the detention of a ‘fighter’, meaning