BOOK REVIEW

Amanda Perreau-Saussine and James Bernard Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*. Cambridge: Cambridge University Press. 2007. ix + 338 pp.

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In the past century scholarly study of the many past and present varieties of customary law has grown considerably. There is now a stock of information, and many descriptive and analytical theories, about a range of customary laws, including those of the peoples who form the majority populations of African and Asian countries, of indigenous minorities in North and South America, Australasia and India, of immigrant minorities in countries of the North, of groups engaged in long-term commercial activities locally and internationally, of other economic groups such as members of professions and groups of co-workers, of residents in particular localities, and of groups such as political parties and religious communities, as well as of the customary elements of state laws, religious laws, transnational laws and international law. The literature contains discussion of theoretical questions such as which of these varieties may be classified as laws, how if at all they may be legitimately changed, and what is their relationship to various types of morality.

The title of this book promises to make a contribution to this theory. But at its start a puzzle emerges. The introductory summary (i, repeated on the back outer cover) claims: "Nowhere are customary rules of law more prominent than in international law". It is difficult to find a ground on which it can be claimed that customary law is exceptionally prominent in international law or that international law comprises a large part of the field of customary law. The book is not quite as narrow as this preliminary statement suggests. The editors state in their introduction that the studies in the book also focus on the common law, and further, that "customary practices underpin *every* legal system" (their emphasis), especially in the form of rules of interpretation (9-10). But even here, by the words "every legal system" they seem to mean no more than every *state* or international legal system. The

subject matter does not include the vast range of non-state manifestations of customary law.

A book on the theory of customary law might be expected to base its arguments on specific instances of customary laws which demonstrably exist or have existed. Social scientific research has provided accounts of many. Although there are references to lessons which might be learnt "from philosophy, from psychology, from behavioral economics, and from other disciplines and sub-disciplines that can help us to make sense of the process by which customary law is created and interpreted…" (18, in the chapter by Frederick Shauer), the book ignores the sub-discipline of legal anthropology. Nowhere in this book is there a reference to the writings on customary laws by Collier, the Comaroffs, Evans-Pritchard, Gluckman, Greenhouse, Hoebel, Holleman, Macaulay, Malinowski, Meek, Merry, Moore, Nader, Pospisil, Rattray, Rosen, Schapera, Starr, Strathern, van Vollenhoven or the von Benda-Beckmanns - to mention only the first 20 or so which happen to come to mind. There is one reference to Bohannan (18), but not to his *Justice and Judgement Among the Tiv* (Bohannan 1957). There is one reference to Fallers (at 18, Fallers 1969). It is claimed that there have been few theoretical investigations of customary law (e.g. at i), but no contributor appears to have noticed the significant contributions to the theory of customary law of Ehrlich, John Griffiths, Merry or Vanderlinden, as well as virtually all of the other writers just listed.

Perhaps the contributors would reply that they are engaged in theoretical or conceptual analysis, not in the formulation of social-scientific hypotheses. The answer to that is that no theory about law, however pure and remote from contingent facts, can be formulated without taking as true some propositions, however minimal, about laws as social facts. Essays about the characteristics of customary law must be based on reliable information about at least one customary law, and essays on the nature of customary law in general must convey knowledge of at least the main varieties, and arguably should take account of all varieties of the phenomenon. This book is based on far too slender a foundation of explicit knowledge for it to contribute significantly to understanding of the topic of its title.

Nevertheless the papers provide interesting discussion of certain aspects of the two types of customary law mentioned, and insights into some literature in legal philosophy. They fall into three categories: analyses of the relevance of fundamental theoretical questions to customary law; studies of the status of customary law in common law systems; and studies of the place of customary law

in international law. Here I concentrate on the first, making brief comments on the others.

The discussions of theory relate certain issues of customary law to classical philosophy and modern legal theory. Thus James Bernard Murphy's chapter, entitled 'Habit and convention at the foundation of custom', is concerned primarily with the use made of the concepts of customary law, habit and convention in leading literature of philosophical jurisprudence. He shows that from Plato to Kelsen jurisprudence

> rests upon three fundamental concepts of order and three allied concepts of law: the order intrinsic to human nature grounds the natural law, the order found in informal social practices grounds the customary law, and deliberately stipulated order grounds enacted law (53).

He examines the implications of this for theory, with an especially illuminating discussion of concepts of nature (*phusei*), habit (*ethei*) and teaching (*didakē*) in the philosophy of Aristotle (55-56). This leads to a consideration of the disputed relationship between law in general and custom. He suggests a distinction between discussions of habit and of convention:

> … most jurists list custom as one among several independent sources of law, but the jurists of the historical school often assert that all law is custom.… If we are focused on conventions, then custom is but one source of our legal conventions; but if we are focused on habits of tacit knowledge and skill, then all law rests upon custom, in the sense that the interpretation and application of law rest upon deep reservoirs of tacit know-how" (66-67).

From here he argues that "the growth of law [of all types] means the growth of custom" (67, having cited Ellickson 1991). This enables him to engage in reflection on more modern writers, including James Carter, Hayek, Raz and Finnis. He counters the Austinian, and still quite prevalent view that "particular customs are not lawful until a court enforces them" by the succinct conclusion that "rather, a court enforces them because, as a class of customs meeting established legal criteria, they are regarded as already lawful" (77). He concludes with a reflection on the significance of custom for legal theory and legal philosophy (78). While it may be mistaken to claim that there has been a neglect of theory in studies

of customary law, Murphy appears correct to criticize the literature of general jurisprudence for its neglect of customary law.

Ross Harrison examines the relationship between convention (by which he means what the English lawyer would call local custom) and morality. In his subtle argument he contends that, while morality is more than mere convention, it is necessarily related to convention, and that the recognition of conduct as conventional does not remove its moral force. Jean Porter provides a perspicacious study of the place of custom, legislation and natural right in Gratian's *Decretum* of the 12th century. Brian Tierney demonstrates the importance attached by Suarez, writing in the late 16th and early 17th centuries, to customary law in the formation of international and other law. He also discusses the work of Vitoria, but this, while interesting on questions of human rights and general morality in law, is not shown to contain much of importance on customary law.

Christoph Kletzer provides an informative study of "the philosophic ground of the Hegel-Savigny controversy". Especially interesting is the account of Savigny's "decisively anti-philosophical stance" (130). That scholar's doctrine of legal sources defined all law as positive law, which was already in existence before problems about legal relations could arise. Law was not voluntarily created by a formal legal authority, but, for the would-be legal philosopher, was simply given (131). It lived in the consciousness of the *Volk* (132), having been created by the "inner, silently-working forces" of that consciousness (134, quoting Savigny 1967: 13). Consistently with this, Kletzer summarises Savigny's view as: "Custom itself is not law and the positive law owes nothing to custom" (134). What Savigny referred to as "so-called customary law" (134, quoting Savigny 1967: 14) might provide indirect knowledge of a community's positive law for the outsider, but for members of the community "their cognition [of positive law] is an *immediate* one, based only on direct intuition" (134, quoting Savigny 1840: 38).

These chapters, by keeping their discussions of customary law at a general level, say much of interest about legal philosophy in general, but less about customary law. Frederick Schauer, in a chapter on "Pitfalls in the interpretation of customary law", engages in more questionable argument. His paper is carefully limited to questions about the process of interpreting acts and decisions for the purpose of determining the content of customary laws. Moreover, it does not attempt to answer these questions, but rather to clarify them. However, the discussion is also limited to a few sets of instances, namely, "the role of customary law in common law adjudication [and this means only in adjudication in the common law of

England]... and the role of customary international law as a part of international law more generally" (14). He argues that customary law, which he limits to customary systems which are recognised in "formal law", that is, in state or international law, must be seen as being developed from "pre-legal" normative practices, not from other types of regularities of conduct (18). Recognition of this would indeed clarify the analysis of state court decisions in multicultural societies, by distinguishing clearly between cases in which the courts consider whether to apply norms of non-state customary law and those in which they consider whether to take facts of a minority culture into account when applying general state law. However, Schauer's illustration of this issue is difficult to follow. He refers to the English case *Mercer v. Denne* [1905] 2 Ch 538, in which, as he says, "it was held ... that the fishermen of Walmer were entitled by a local custom to dry their nets on a particular stretch of sand", an act which would otherwise have been a trespass (quoting Cross 1977: 162). He then states that "there is no indication that the customary practice was done under claim of right, and no indication that the practice itself became normative", and "[a] fisherman new to the Walmer area would not have been subject to criticism, we suppose, for not participating in the custom...." (19). But all three judgments in the Court of Appeal referred to the practice as being, according to custom, the exercise of a right, thus placing it in a normative category. The imagined case of a fisherman who did not take advantage of the custom and was not criticised for this is irrelevant. The normative aspect of the custom was not the imposition of a duty on fishermen, but rather the conferment of a privilege on them. A more satisfactory analysis of this custom would place it in the context of a body of interrelated normative customs: there was a general customary obligation to observe property rights conferred by state law, but in this case a specific customary right had arisen which constituted an exception to this. Again one suspects that an engagement with more numerous instances of practised customary laws would have avoided puzzlement over this case.

Schauer then analyses certain questions posed by various philosophers in order to illuminate the decisions which may be made in cases which consider customary laws. Virtually all are discussed in terms of decisions by English common law courts, and so are discussions of the circumstances in which these courts will recognize customary laws. Thus the discussion of 'Llewellyn's question' (28-31) considers whether for every instance in which there are grounds for holding the relevant customary law to comprise one particular norm, there are also tenable grounds for holding it to be a norm of different content. This discussion refers to Llewellyn's rule-skeptical early work (Llewellyn 1930) and to his later analysis of

the judicial process (Llewellyn 1960). It also suggests the important observation that norms involved in litigated, hard cases are not the entirety, nor even a large portion of the norms of a legal system. It notes that the existence of conflicting norms on a particular issue is an empirical question. But it fails to mention Llewellyn's own empirical study in collaboration with Hoebel of the customary law of the Cheyenne Indians (Llewellyn and Hoebel 1941), which could have been used to formulate a plentiful number of illustrations of the question.

Three chapters are within the second category of this book, studies of aspects of the relationship of customary law to common law doctrine. David Ibbetson, on "Custom in medieval law" considers the uses of the idea of custom in England, comparing these with the practices in western mainland Europe. His conclusion, after a study of medieval literature on the common law, and court records, is that "within the medieval legal tradition custom can be seen as a form of safety valve enabling courts to derogate from the common law when there was sufficient pressure [from those subject to the law] to do so" (174). Alan Cromartie's chapter on "The idea of common law as custom" is largely a collection of reports on and ideas about custom in English legal literature from 1066 to Blackstone. Various views as to the nature of "custom" emerge from this, and in particular the distinction between popular custom (custom practised generally by the people) and custom as made or declared by judges. An interesting comparison might be made between that distinction and the distinction drawn today in various terminological forms between living law and officially recognised, or lawyers' customary law. Michael Lobban, in the first part of his chapter on "Custom, common law reasoning and the law of nations in the nineteenth century", considers the views of English lawyers on the nature of general customs, local customs and the custom of merchants (257-264). In the second part of his chapter he applies these findings to the attitudes of judges to international law.

The other four chapters are concerned with customary international law. Randall Lesaffer contributes a chapter on "Siege warfare in the early modern age: a study on the customary laws of war". This is a study of texts written approximately in the century before and the century after the Treaty of Westphalia, 1648, revealing the writers' understanding of these customary laws which could on occasion dramatically limit the unrestrained use of violence in war. Amanda Perreau-Saussine, in "Three ways of writing a treatise on public international law: textbooks and the nature of customary international law", takes a number of modern text-writers on international law, and examines the extent to which they assert a natural law or rely on customary practice to establish principles of

international law. Gerald J. Postema, in a chapter on "Custom in international law: a normative practice account" devotes most of the discussion to a consideration of the customs followed by individuals in a society. This is not a report of empirical research, but seems to be soundly based on a tacit knowledge and understanding of empirical facts. Only in the last section does the paper argue for the applicability of such customs in international law. John Tasioulas, in the final chapter, on "Customary international law and the quest for global justice" is concerned with the prospects for the reform of international law in order to secure greater justice, that is, to bring it more fully into accord with moral norms. He contends that this may be achieved through arguments based on customary international law, as conceived by him. It is helpful to the general student of customary law, as also to the student of international law.

This collection presents insights into the arguments and conclusions of certain leading philosophers, provides information about the attitudes in the past of common lawyers to custom, and contributes to the understanding of customary international law. But it does not advance understanding of the nature of customary law.

References

BOHANNAN, Paul
1957 *Justice and Judgement Among the Tiv*, London: Oxford University Press for the International African Institute.
CROSS, Rupert
1977 *Precedent in English Law*, 3rd ed. Oxford: Clarendon Press.
ELLIKSON, Robert
1991 *Order Without Law: How Neighbors Settle Disputes*. Cambridge MA: Harvard UP.
FALLER, LLOYD A.
1969 *Law Without Precedent: legal ideas in action in the courts of colonial Busoga.* Chicago: Chicago University Press.
LLEWELLYN, Karl N.
1930 *The Bramble Bush: Some Lectures on Law and its Study*. New York: Columbia University School of Law.
1960 *The Common Law Tradition: Deciding Appeals*. Boston: Little Brown.
LLEWELLYN, Karl N., and E. Adamson HOEBEL

1941 *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press.

SAVIGNY, Friedrich Carl von

1840 *System des heutigen Römischen Rechts [System of Modern Roman Law]*. Berlin: Veit.

1967 *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft [On the Vocation of our Age for Legislation and Jurisprudence]* (first published 1812, Berlin). Hildesheim: Georg Olms.