Introduction: The dimensions of customary law

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The extent to which law rather than custom governed a particular society at a specific moment in the past is of vital concern to the variety of disciplines that find intellectual communion in the pages of Continuity and Change.* Although the words 'law' and 'custom' may be defined in diverse terms, we understand 'law' to consist of formally articulated positive rules or norms, and 'custom' to signify patterns of conduct that operate regardless of such legal norms. Those scholars who investigate the structures and institutions of past societies, be they historical anthropologists, historical demographers, social historians, historical sociologists, or academic lawyers, are largely dependent upon documents produced directly by the legal system or by order thereof. Thus historical researchers cannot afford to be oblivious to or unconcerned with the nature of the legal order that produced their data; and, in order to understand our evidence, we must be cognizant (to the greatest degree possible) of the workings of the legal system that produced it.

The notion that societies are governed by either law or custom, and not some combination thereof, should have long been discarded by interdisciplinary scholars. As Malinowsky pointed out almost 75 years ago, much conduct in advanced law-bound western societies (even, as he opined, Oxford colleges!) is governed by intuitive and unconscious adherence to unarticulated norms that earlier anthropologists branded as 'customary' (B. Malinowsky, Custom and the savage mind (New York,

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1928)). Yet, as Jane Burbank illustrates in her contribution on nineteenth- and early-twentieth-century peasant courts in Russia, the law/custom dichotomy has retained a certain contemporary vibrance. Separating the legal order of pre-revolutionary Russia into two discrete segments, one governed by law and the other directed by custom, had considerable ideological appeal in the Soviet Union until the present decade. Political forces and ideologies to the contrary aside, it seems that the two differing channels of norms that guide human conduct, law and custom, frequently reside so comfortably together within a legal order that it is often difficult even in our own society to understand whether particular conduct should be regarded as governed by law or custom. If this is the case, it is certainly legitimate to wonder, then, how we can hope to understand the interplay between law and custom in past societies.

Unhappily, the articles that comprise this special issue cannot provide a comprehensive analytical framework to dissect a legal order, historical or modern, into its legal and customary elements. Such a design would be unduly pretentious given the level of previous inquiry into the subject. Rather, our agenda here is more modest: to illuminate rather than explain. Our goal in this special issue is to stimulate dialogue in the hope that scholars can move closer towards a comprehensive framework for understanding the operation of custom in a wide range of legal orders. Our authors illustrate in some detail how custom modifies law in both complex legal orders (like the law of Rome and of those medieval western legal orders that followed the Roman law and in modern Japan) and in relatively unsophisticated legal orders (like medieval Bavaria or pre-revolutionary Russia). But our contributors go further, to consider how custom is created within both advanced and uncomplicated legal orders, and to ponder the means by which custom is implemented both by courts and by extralegal means.

Custom can serve a variety of functions within a legal order. The appeal of custom in part appears to be its use to allow a legal order to modify, temper, or even to repeal positive norms (that is to say, law) by more simplified means, without undertaking more formal explicit change thereof. This aspect of custom appears perhaps most clearly here in Carl Hammer's study of morganatic marriages in early medieval Bavaria. The various Germanic codes of the era provided rather harsh disabilities for both parties to a marriage between free and servile individuals, and their issue. While the particularities in the individual codes may have varied, the children of morganatic marriages were regarded as servile, and in most instances could not inherit even the family property of the free parent. Indeed the free spouse, particularly if the servile spouse was a male, might even forfeit her family property to her servile spouse's master.
Normative law did not change even when marriages between free and servile persons were regarded as legal and binding by the Church. Rather custom seems to have intervened, mitigating the penalties wrought by law. The ability to effect complex transfers of property interests that were protected by the Church permitted the issue of some morganatic marriages qualified use and enjoyment of family property. Thus the conflict between the Codes and the social reality of morganatic unions was resolved outside of the formal legal order through individual strategies fashioned by a process of negotiation. While morganatic unions remained subject to the same formal sanctions and were overtly discouraged, the issue of such unions, although still regarded as servile at law, had their interests protected. The actions which parents undertook to avoid the consequences of legal norms should seem familiar to historians of other societies, particularly those of England, where transfers of property by feoffments to uses and then inter vivos settlement to avoid the effect of the canons of inheritance (and, in particular, primogeniture) and the fiscal incidents of succession (feudal dues such as wardship and relief) have long been undertaken.

The use of custom as a means of modifying and developing law also appears in Peter Stein’s article. In modern codified legal orders in western Europe, custom remains a powerful, if obscure, force as a source of law. So it was also in Rome. Yet, as Stein notes, early Roman lawyers were not always in agreement on the precise place of custom in their juridical universe. Was custom merely to be implied in agreements (because the contracting parties were assumed to know it and to acquiesce to its terms) or was it binding because it was a source of law? Even the Corpus iuris was unambiguous about the status of custom: was custom subject to law, or was custom an equal partner in the legal order?

Likewise, medieval civil lawyers relying upon Justinian’s compilations had to struggle to explain the status of custom and to articulate the relationship between law and custom. They attempted to do so through the application of logic. If custom could abrogate written law, then presumably it had to be its equal. Such a theory of jurisprudence was particularly attractive to English jurists who felt compelled to defend the common law as a system of jurisprudence against continental critics. Yet the common law in Bracton’s England had a more elevated status than custom achieved at Roman law. The common law as found and then articulated by the judges was the exclusive law (with the exception of statute) of the royal courts. In England, there was no competing text.

Another aspect of our inquiry into the relationship between law and custom concerns those institutions referred to as the customary courts. Scholars who have worked on the records of jurisdictions considered to be
‘customary’ attempt (usually in vain) to produce a digest of substantive principles employed therein. Scholarly interest has been focused upon distilling law from the record. Yet, as Jane Burbank demonstrates, the rules produced by the Russian *volost’* courts should be far less interesting to the historian than is the process of dispute formation and resolution which she can discern from the record. To Burbank, it is not merely the substantive rule that is custom; rather custom is the process of conflict and dispute resolution that is employed in the court. The case of nineteenth-century Russia is an extraordinarily interesting one for those scholars interested in understanding the creation of custom, because the courts constructed by the high legal order in the great Reforms of the 1860s were to be administered by ex-serfs who would appear (at least according to their historians) to have had no existing legal culture.

Yet the *volost’* was not a forum without norms, process, and decision. Its guidelines, like the ones that informed the Melanesian legal order, may not be readily explicable in modern legal terms. For the Russian peasants appear to have used the courts for their own purposes, and not according to the framework which the authorities originally contemplated. Indeed the types of cases which peasants brought to the *volost’* differed from the ones that central authority had initially contemplated; the breakdown of causes by subject matter indicates the sorts of injuries the peasantry regarded as worth the bother of formal redress. Thus the record tells the historian more about how custom operated than what were its substantive principles.

Finally, we may consider the extent to which custom permeates contemporary legal orders, and whether its continued presence can shed light on how the a modern legal system functions. In his contribution, Alan Macfarlane seeks to explain how the western-style economic success of modern Japan was obtained by a westernized legal order without having to endure western-style levels of crime and litigiousness. In large measure, Japan borrowed both its private law and its constitutional law over the course of the last century. Yet the Japanese today seem to use the same law in a different way than do westerners; or perhaps we may say they wish to avoid it. Litigation in modern Japan is discouraged; penalties for crime are calculated towards rehabilitation rather than towards punishment or societal retribution. Even though the law may provide for individual responsibility for conduct, there is a marked tendency in Japan for burdens to be regarded as communitarian, corporate, or familial. As in nineteenth-century Russia, it would appear, according to Macfarlane, that process rather than normative rule is what informs the legal order in modern Japan.

Is, then, modern Japan largely governed by custom? And does this
component of the legal order explain differential crime and litigation rates between Japan and the west? Perhaps such a question is too grandiose to pose. Yet according to our rather broad conception of custom, as norms that exist despite formal rules of law that might provide otherwise, the answer may be a tentative 'yes': 'tentative' because it is difficult to control for other variables that might account for differential crime or litigation rates in a complex society like modern Japan; 'yes' because our inquiry into the dimensions of customary law leads us to view custom as a force present in a variety of legal orders with the ability to shape the process which is the law.

Our contributors have illustrated by way of example the various forms that custom can assume in legal orders that are culturally and temporally scattered. In all four societies examined here, custom can (and indeed must) be defined in different terms. Custom appears more like a form of positive law in Rome and medieval Europe, like practice in early medieval Bavaria, like an alternative legal order in pre-revolutionary Russia, and like cultural values in Japan. In large measure, though, custom in its permutations has been found outside of the formal sources of law. Yet custom may well be omnipresent in legal orders, though it is not always easy to discern and to fix its place in the universe of legal sources. But our contributors have demonstrated that the hunt can yield important insights into a variety of legal orders.