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Dutch Crossing
Journal of Low Countries Studies

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/ydtc20

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To cite this article: Dave De ruysscher (2020): Customs and Municipal Law: The Symbolic Authority of the Past (Low Countries, 16th–17th Century), Dutch Crossing, DOI: 10.1080/03096564.2020.1754673

To link to this article: https://doi.org/10.1080/03096564.2020.1754673

Published online: 20 Apr 2020.

DUTCH CROSSING
https://doi.org/10.1080/03096564.2020.1754673

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Customs and Municipal Law: The Symbolic Authority of the Past (Low Countries, 16th–17th Century)

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ABSTRACT

Over the past decades, legal historians have become more cautious when it comes to rules that in the Middle Ages and the early modern period were defined as '(old) customs'. Earlier optimistic appraisals as to the age of such rules have been challenged. This article argues that efforts of debunking should be combined with a more thorough analysis of the legal consciousness of past societies. It proposes to look at old municipal private law, not as a set of rules fixed by tradition, but rather as a malleable body of norms. The symbolic qualities of law were such that renewal and rephrasal could be combined with an ideology of conservation. It was perfectly possible for administrators to promote new rules as being a part of an 'age-old law' of the city or the land, without breaching the implicit conventions as to the qualities of law. However, as will be demonstrated further, there were limits to the agency of administrators in this regard. The codes as to the features of law marked boundaries that had to be taken seriously.

KEYWORDS

customary law; municipal administration; Early Modern period; legislation; historical analysis; legal change

Old and New Approaches Towards Customary Law

Legal Historicism and Customary Law

Until the 1960s it was usual among Dutch and Belgian legal historians to interpret historical labels of 'customary law' for their literal meaning. Terms such as '*consuetudo*', '*costuyme*' and '*gewoonte*' were viewed as referring to rules that had been passed on from generation to generation, and which had roots in a distant past. These ideas mostly related to the law of succession,[1] but can be detected also in publications on the history of other branches of law.[2] Because of these ideas, compilations of customs and court decisions that had been drafted in the sixteenth and seventeenth centuries were regarded upon as important historical sources, for it was thought that they contained the rules that had been in use in the Middle Ages.[3]

These assumptions of legal historians had slowly emerged in the nineteenth century. In the 1810s, the Berlin law professor Friedrich Carl von Savigny (Dec. 1861) stated that law evolves slowly over time, following mechanisms and rules that are implicit in the spirit (*Geist*) of the nation (*Volk*). As a result thereof, in Savigny's theories customs (*Gewohnheiten*) were important, for they were considered as emanations of that unconscious law.[4]

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Savigny was the founding father of legal history. He aimed at reconstructing the legal norms that had been used in the past, so as to explain the contents of the law of his day.[5] Savigny valued academic writings higher than customs, even though he thought of both as rephrasings of the *Volksgeist*.[6] His attention for scholarly writings followed on from the fact that in most of the German territories of the early nineteenth century, the so-called *ius commune* was still the main source of law. This was a canon of commentaries that had been produced by professors of law since the later Middle Ages. These texts made up the body of norms that were imposed in the daily practice of courts.[7]

In the later 1820s and early 1830s, Savigny's disciple Georg Friedrich Puchta wrote a two-volume legal treatise on custom.[8] This monograph was the most important tract on customary law in its day and it remained a work of reference throughout the 1800s. Puchta's accounts marked the mindset, not only of lawyers, but also of historians analysing the law of the past. In his book Puchta blended together Savigny's views with what had been written on custom (*consuetudo*) since the later Middle Ages (see further, under.2). According to Puchta, customs are rules that are based on the implied consent of a group as to their normativity. The factual element of customs is *usus* (habits, practices). However, Puchta went further than Savigny by stressing that customs were evidence of the 'customary law' (*Gewohnheitsrecht*), which was found within the *Volksgeist*. In the first volume of his book, dating of 1828, Puchta defined customs as pertaining to a body of customary rules that was tied in with the *Volksgeist*. Puchta considered the customary law the type of law that was most near to the *Volksgeist*.[9] However, in the second volume of his book he referred to the legal conviction of lawyers as a crucial element and pushed the popular basis of customary law into the realm of political fiction.[10]

Puchta was the first legal scholar to drive a wedge between official law and 'popular' law. Savigny had maintained that the *Volksgeist* could transpire into legislation, jurisprudence as well as customs.[11] In the first volume of his monograph Puchta by contrast brought custom close to the *Volksgeist* and he emphasized that the 'customary law' was the common conviction of the people. In the second volume, he changed his views and he stated that lawyers were the ones that knew what the people wanted.[12] Their convictions prevailed over old habits. Especially Puchta's first volume facilitated the idea that historical terms such as '*costuyme*' were hinting at a set of interconnected rules, rooted in popular consent. But it was foremost the second volume that gave rise to a movement of legal historians aiming to detect and preserve the 'old Germanic law' against the intrusions of lawyers and legislators.[13] The search for old customs was undertaken by such scholars as Karl Eichhorn and Jakob Grimm.[14]

Savigny's scientific ideas were closely related to historicism. This meant that he believed in the scientific qualities of historical research. Savigny reacted against the opinions of seventeenth-century authors such as Leibniz and Wolff, who had considered history as a realm outside the scope of science. Only science could produce universally valid statements and history was a domain of detail and idiosyncrasy.[15] Savigny by contrast identified history with jurisprudence, and defined it as a societal science. Legal history should be separated from philosophy, on the basis of a sound methodology of scrutiny of sources. Savigny argued in favour of tracking manuscript copies of legal tracts and commentaries

and pursue the comparison of their contents, in order to be as certain as possible on the original contents. This rigour would then yield results showing how law has evolved in response to social and political contexts.[16] A further link to historicism was Savigny's acknowledging of the possibility of legal change, but only for as much as the *Volk* wanted and needed such a change. This was connected to a romantic concept of an organic society, which rests on interdependent relationships and thus changes but slowly. Savigny often made the analogy between law and language. The intrinsic complexity of language has the effect that adaptations, which are necessarily approved of by the speakers of the language, are incremental and not abrupt.[17] In combination with the abovementioned views of Savigny, Puchta's notion that customs were part of a body of rules gave way to assumptions that the legal source texts should be taken for their literal contents. This was matched with the epistomology of Leopold von Ranke, who heralded the idea that the historian could gain access to the objective past if only the historical sources were read closely.[18]

Since the middle of the nineteenth century in German historical writings the mentioned views on the societal origins of law were complemented with a specific analysis of the institutional constellations of cities and other constituencies. In the second half of the 1800s, the legal definition of a city was hotly debated. According to Georg von Below, constituencies such as cities and villages were at first 'communities' (*Gemeinde*); they were started from gatherings which resulted in a council in which decisions were taken.[19] Since 1893, Henri Pirenne published several articles in which he argued that in the course of the eleventh century merchants had founded cities. They had brought trade and manufacture to the periphery of existing clusters of houses and had used their leverage to buy off seigniorial duties on their lands. Pirenne strongly emphasized that the *ius mercatorum*, the unwritten customs that were used among these traders, had been the basis of the municipal law that was applied in the newly established cities.[20] In a book of Max Weber that was published posthumously in 1921, medieval cities were essentially communities in which citizens were bound together by a joint oath of allegiance and which 'chose' the rules to which they abided. The urban community was a *Rechtsgenossenschaft*.[21]

The abovementioned ideas boiled down together in the efforts of historians to edit texts of local and regional law of the Middle Ages and early modern period. They thought this was necessary to preserve old law against legislation and '*Juristenrecht*' (lawyers' law). These ideas spread outside the German lands: in Belgium and the Netherlands, special committees were installed to edit the 'old law of the fatherland'.[22] The mentioned assumptions regarding custom were ubiquitous. It was very common for editors of compilations of rules, categorized as 'customs' or '*willekeuren*', to add explanatory notes referring to documents of different centuries.[23] Moreover, often only one or few manuscript copies were used, supposedly because the text was uniform in all versions.[24] The common assumption was that the rules found in the sources had been customary and had been transposed in an unaltered form from of old.

The Critique

Since the 1960s legal anthropologists have analysed litigation and legal decision-making involving unwritten norms. Most of the rules of this type are 'found' by councils of wise men (chiefs and their councillors) when adjudicating on disputes, and they are commonly

labelled as 'native law', 'law of the ancestors', 'customs', 'habits', or as belonging to a 'tradition'. Anthropologists' conclusions referred to the adaptability of such notions. Even though the mentioned descriptions hint at a long use of discernable, delineated and well-known rules, many of the norms that were defined in this way were novel. Their contents could not be traced back to a moment in time that preceded the decision establishing its contents. The normative substance of those new (yet 'traditional') solutions could alter rapidly over time, because of changing circumstances or due to the assimilation of externally imported rules. Developing contents of norms did not hinder their continued definition as being 'old' or 'of the ancestors'.[25] Legal sociologists and anthropologists commonly depict this changing yet traditional law as 'living customary law'.[26]

The mentioned methods and ideas have slowly trickled down into legal-historical research. A pioneer in this respect was the German legal historian Karl Kroeschell, who as early as the 1960s denounced the notion of objective law as existing before the later Middle Ages. In one of his publications, he demonstrated that the early medieval concept of 'the good, old law' referred rather to 'what was right', to the outcome of a trial that had been brought in moot courts, and not to positive, objective *ex ante* rules that were 'applied' or 'imposed' by judges. According to Kroeschell, the notion of law (*Recht*) pointed to proceedings that were considered 'right' rather than to rules.[27] In the 1990s and 2000s, medieval historians such as Raoul Van Caenegem and Robert Jacob mentioned examples referring to a deliberate change of '*consuetudines*' in twelfth- and thirteenth-century Flanders and France, by governing bodies or with their approval. They highlighted instances in which 'customs' were denounced as 'bad' and opened up a window for further discussion as to the differences between custom and legislation.[28] These appraisals were not met with much acclaim, and general overviews of legal history to the present day still largely rely on the nineteenth-century views of fixed traditional local law for the medieval and early modern period.

Other nineteenth-century conceptions lasted long as well. The features of autonomy and *coniuratio* in Weber's views on cities were further elaborated on in the writings of Wilhelm Ebel and Gerhard Dilcher. In the 1950s Ebel distinguished between several types of municipal law: he listed *Recht, Gebot* and *Willkür. Recht* referred to justice or natural law, *Gebot* to injunctions made by a lord. *Willkür* was the chosen law, decided by a community, such as for example found in the bylaws of cities.[29] Gerhard Dilcher emphasized that *Recht* was perceived as forcible. It could originate, and be perpetuated, in several proceedings and ritual acts. Law could be oral, but with reference to procedures and ceremonies only. It was only with the rise of cities that more written and thus objective norms became established. These norms were also *Willkür*, chosen by the municipal community.[30] By contrast, in the theories of Jürgen Weitzel the implicit *approbatio* by the community, represented by administrators, was the core feature of the law, *Recht*, of the High Middle Ages. As a result, the production of texts of municipal law by urban leaders, from the thirteenth century onwards, was not incompatible with renewal of the law.[31]

Moreover, since some time, historians and legal historians have pursued on empirical research into the use of labels. As a result, distinctions were made between local law, which was maintained by official courts, and more general normative practices that were considered as 'tradition'.[32] Or the official customary law could have a broader geographical scope than local customs that derogated from that 'common' law.[33] It is

acknowledged that the labels of 'customs' and 'customary law' were used for all mentioned conceptions of law. Moreover, historians and legal historians have categorized between customs of limited extent on the one hand, and 'common customs' on the other hand, the latter of which could be imposed *ex officio* by official courts and which could easily change. The former were closely related to privileges, the latter was the general rule from which those privileges derogated.[34] Over the past years, Emily Kadens has written important papers on custom in the later Middle Ages and the early modern period. She has in particular focused on the different features of 'anthropological custom' (also labelled behaviour-custom) as opposed to 'legal custom' (or rule-custom). She demonstrated that the former was inevitably vague and the latter always directed towards a solution for a problem.[35]

Furthermore, the history of custom has been interpreted as reflecting power struggles. For the French homologation movement, scholars such as Martin Grinberg emphasize the state formation mechanisms behind the mandatory writing of *coutumes*. Many seigniorial rights were glossed over in the *cahiers* of local law.[36] Raoul van Caenegem and Emily Kadens have amply demonstrated how the *Verschriftlichung* was involved with a change of discourse. The vagueness of custom was supplanted with the fixedness of written law. According to Kadens, this went together with the demise of a flexible culture of community-based remembering.[37]

However, in all the above mentioned accounts, there is still a large attribution to older theories. Assumptions are still common that law in the later Middle Ages and early modern period was exclusively concerned with fixed rules, which could be found either in legislation, scholarly writing or perpetuated custom. Kadens' scholarship as well mainly defines 'anthropological custom' as identifiable, at least as a departure point for formulating legal rules. The changes in subsequent versions of written customs have been explained as an involuntary result of a process of putting unwritten rules to writing,[38] as intentional distortions,[39] or as the consequence of an inevitably incomplete remembering of rules.[40] These views cannot be upheld, since also beliefs, even ideas when symbolically linked to tradition, could be considered customs. One poignant question, occasionally raised yet not answered,[41] is why thorough changes in the contents of municipal private law, for example due to the integration of rules found in academic writings since the twelfth century, did virtually not incite opposition from within the population? Uprisings in cities in the Low Countries since the end of the thirteenth century were not directed against the changes which the municipal leaders brought to the municipal private law; rather, abuse of power and public finances were the main motives.[42]

The Label of 'Custom' in Sixteenth- and Seventeenth-century Compilations of Municipal Rules

In the Low Countries, the French example of imposing the compilation of municipal law had started in the 1520s. The princely institutions embraced this approach in an attempt to bring more legal certainty to the different provinces. Written law was considered more certain than unwritten law. Also, they wanted to block out the creation of new customs, which often caused confusion and dispute. Moreover, once the municipal law would be compiled the princely institutions had a monopoly of interpreting the text; centralization of law was thus a clear incentive as well.[43] In the princely letters that were sent urging the

local administrators to put their law to writing, the identity between municipal law and customs was made evident.[44] In 1546 Emperor Charles V demanded the administrators of constituencies to compile those 'customs, as they have been in use until today'.[45] This was not merely an invitation to draw up collections of recent rules; the administrators were given the opportunity to present their legal tradition to the sovereign and have it acknowledged as princely law. If the princely councils accepted the contents of the *cahiers* of customs, they were homologated, which meant that their contents were copied into a princely ordinance.

The most common terms referring to customs in the sixteenth-century compilations that were sent in to the princely institutions are – besides '*costu(y)me*' – '*hercomme*' and '*usantie*'. *Usantie* refers to repeated practices, and resonates with the academic notion of *usus*. *Usus* was a requirement for custom. A *consuetudo* consisted of a rule, based on implied consent, and which was inferred from repeated practices. The understanding of *usus* as encompassing repeated actions had originated in the later Middle Ages, as will be demonstrated in paragraph 3. Often the terms were combined. Several compilations referred to 'customs, rights, and *usantien*'[46] or to the 'customs, *usantien* and *hercommen*'-[47] when defining the municipal law. Such formulas covered all aspects of customary law, in reference to the academic theories. *Usantie* stressed that a rule was applied,[48] whereas *hercommen* hinted at its longevity. *Hercomme* or *herbringe* literally meant 'coming from the past'.[49] In towns of the (later) Northern Netherlands, besides these notions, the terms of *handvest* and *privilegie* were more usual.[50] These concepts referred to the fact that the oldest municipal rules were often found in seigniorial charters. In the sixteenth-century, the term of *willekeur* was much more common in Holland, Drente and Groningen than elsewhere.[51] These terms had a corollary in the formulaic oath which was sworn by the prince when taking up the seigniorial rights in a province of the Low Countries. The newly installed duke or count solemnly declared to respect the 'rights, privileges, liberties, customs, and *hercommen*' of the province.[52]

Notwithstanding these depictions, the contents of the compilations of law that were sent were apt to change. Several cities submitted several versions of their municipal law. At Antwerp, compilations were sent in 1548, 1570 and 1608. The Brussels authorities handed in three collections, in 1547, 1570 and 1606. At the drafting of these compilations, new rules were added, and older ones were changed or supplemented.[53]

The contents of these compilations hint at how the urban administrators that compiled them looked at customs. At Antwerp, late-medieval depictions of the municipal law had been 'the *vierschaarrecht*' (that is, the law of the municipal court of aldermen) or 'the law of the citizens of Antwerp'.[54] When in the third quarter of the fifteenth century, academic ideas within the urban administration increased, the requirements for customary law that were posited in legal scholarly writings became acknowledged (even though they were adapted as well, see under .4). Customs were attested by way of a *turbe* proceeding. When a question of law was raised, ten or more legal professionals (former aldermen, practitioners and civil servants), who were often academically trained jurists, were interviewed on the contents of rules of Antwerp municipal law.[55] The questionnaires and answers of the mentioned *turbe*-inquiries were put to text into so-called *turbeboecken* (ledgers of *turben*), which after a certain period of time facilitated the production of evidence on formerly attested Antwerp norms.[56] In these *turben* it was regularly emphasized that a custom had been practised for several years; the witnesses were asked to confirm that they had seen a

rule being imposed in the court. This requirement of longevity was an important feature according to the legal doctrine on custom.[57]

It is striking that some of the rules mentioned at *turben*, which were corroborated by the witnesses as being 'old', were in fact novel. At an Antwerp *turbe* investigation in 1520 a practice of 'abandonment', which permitted an imprisoned debtor to regain his freedom if he yielded all his properties to his creditors, was mixed with precepts of Roman law, relating to the procedure of *cessio bonorum*. Notwithstanding this novel adoption of rules, which had not been in use before, all aspects of the rules confirmed by the witnesses were described as 'old *costuymen*'.[58] Another example relates to the rights of married women to sign contracts. In the later fifteenth century, at Antwerp it was still generally condemned that women engaged in contracts without permission of their husband. Since approximately 1526 women had a 'right of retreat': they could lawfully accept an agreement, without cooperation from their spouse, but if afterwards the agreement was considered disadvantageous the woman had the right to have the contract annulled.[59] In 1532, during a *turbe* inquiry, it was stated that this rule – even though it was of recent times – was a 'well-known custom that had been in use without defect over 2, 3, 4, 6 10, 20, 30 years'.[60]

The changes in municipal law, as found in subsequent versions of collections of rules, were often the result of incremental interpretation, but they could be far-reaching as well. A compilation of Antwerp dating from 1541–45 started with an article explaining which rules were part of the Antwerp law. It was stated that 'the law of the city of Antwerp is introduced by customs, usages and old *herbrengen*, which in the city were applied for as long as memory could go'.[61] A further analysis of the contents of the collections of Antwerp *costuymen* demonstrates that this did not exclude substantial legal change in subsequent redactions. This is clear in the legal position of the *femme sole* ('*coopwyf*'), for example. A married woman could be considered as legally autonomous if she had – with the consent of her husband – a business of her own. In that case, she was not required to seek the permission of her husband for signing contracts. In 1509, this principle had been evoked during a *turbe* inquiry[62] but it was probably older. The underlying aim of the original rule had been to provide wives with the capacity to act in the interests of their business, and do so swiftly. But by 1509 there had been a shift towards the patrimonial effects of the acts of the '*coopwyf*'. In 1509, it was expressed that debts made by a *femme sole* could be enforced against both the properties of the wife and the matrimonial community property. The authorization of the husband to start a separate business was thus interpreted such that the matrimonial community property, which was managed by the husband, was turned into collateral for the debts of the wife's business.

But this approach resulted in confusion. It was not clear whether the husband was an associate in his wife's business, or whether the creditors of the business of the wife merely had a recourse against the effects of the matrimonial community. If the former interpretation applied, then the wife could be held liable for debts that had been made by her spouse, also with the assets of her business.[63] This was not only an extension of the rights of creditors; it was also a considerable diminishment of the rights of wives. Before the 1540s, when this interpretation was formulated, it had been the rule that a widow was liable for half of the debts made by her husband, provided that the debts had been 'communal', meaning that they had been made for the interests of the couple or the household. The opting for a separate business thus also improved the position of the husband vis-à-vis his personal creditors. This interpretation of the rule was abolished in

the compilation of municipal law of 1548, which again clearly separated personal from communal debts.[64]

Custom as *Mores* and Formulated Municipal Law: Openings in Contemporary Theory

The doctrinal texts of the later Middle Ages and early modern period that were written on customs have mainly been interpreted from the perspective of the nineteenth-century theories. Puchta considered the *customary law* as being founded on convictions, deeply rooted within the *Volksgeist*, but at the same time he reduced the scope of *customs* to repeated practice. This was a change from the earlier accounts on what could make up a custom (*consuetudo*). Late-medieval legal scholars of civil and canon law emphasized that customs proceeded '*ex usu seu moribus plurium personarum*' (i. e. either from the behaviour or beliefs of many persons).[65] Moreover, in particular canon lawyers considered *consuetudines* and *mores* as being identical.[66]

The mentioned conceptualization, of customs being derived from *mores*, had firm precedents in the Roman law. *Mores* (convictions) were viewed as a core element of customs, and it was separated from *consuetudo* as well. The Roman jurist Julianus considered *mores* as the remote cause of *consuetudines*, the latter of which were more easily identifiable than the former (D. 1,3,32,1). However, Julianus as well as other Roman jurists distinguished between the mentioned concepts: they regularly referred to both *mores* and *consuetudines* (for example, D. 1,16,7*pr*.). When considered separately, *mores* were usually viewed as being older and more general than *consuetudines*. The *patria potestas* for example, which referred to the central position of the *paterfamilias* as head of the Roman *familia*, was described as pertaining to the *mores*,[67] and it was not labelled as *consuetudo* because it was considered a century-old institution. The roots of appraisals in medieval legal writings that filtered the notion of *mores* out of the concept of *consuetudo* was found in the Justinian Code (534 AD) which had a preference for '*usus*' instead of '*mos*'(C. 8,52(53),2).

Over the course of the seventeenth and eighteenth centuries, in civilian literature the constituent element of *usus* became gradually more important than *mos*. In a tract dating of 1611, Antonio Piaggio evaluated that *mores* and *usus* could be constitutive parts of customs, in combination with *tacitus consensus populi*, but he still attributed more importance to *mores* than to *usus*.[68] In 1682, Johann Schmidt wrote an interesting doctoral dissertation on *consuetudo*, but did no longer consider *mos* or *mores* for their legal characteristics.[69]

By contrast, in canon law the notion persisted longer. The definitions of Julianus found their way to the *Etymologiae* of Isidore of Seville of the early seventh century AD ('*consuetudo est ius quoddam moribus institutum*') and this phrase was copied into the *Decretum* of Gratianus (*c*. 1140), which was the leading text of canon law until 1917.[70] In civil law writings, which stuck more closely to the legal texts of Justinian the idea that customs were based on *mores*, whereas among canon lawyers it was more common to take customs and *mores* as comparable notions. This approach, which had some backing in texts of Roman law (Inst. 1,2,9), had been important in the doctrine of church fathers such as Augustine and Tertullian. They considered the *mores* of the people as being very

close to the *lex aeterna divina*. In their categorizations, *mores* was then a set of beliefs or traditional culture rather than a collection of practices.[71]

What the Roman law, and the medieval canon law that was largely based upon it, suggested was that *mores* could turn into customs without repeated behaviour. A tradition in law could be a matter of collective ideas rather than of identifiable actions. A crux in this regard was the '*tacitus consensus populi*', i. e. the tacit 'consent' of the community. This was a paramount condition for any *consuetudo*. The requirement has since the nineteenth century been re-interpreted as *opinio necessitatis* or *opinio iuris* (that is, the opinion that a practice is normative) but in the pre-modern times the requirement was very different. The *consensus populi* referred to an interiorized sharing of views, as to ideas and/or practices. By contrast, the nineteenth-century *opinio necessitatis* referred to subjective normative appraisal. The notion of *consensus* in the period of approximately 1200–1650 was not the 'consent' of contract law of today, but can be considered as hinting at 'legal consciousness'. It was derived from *con-sentire*, which was 'to experience a common sensation'.[72]

This sensation referred to a pre-existing order of things, in which any member of the population and the population at large participated. Consent in its present-day meaning hints at the crossing of wills, constituting an agreement, without reference to a system of values constraining that consent. By contrast, the notion of *consensus* that was used with respect to *consuetudines* and *mores* in Roman law and in doctrine that was based on Roman law until the middle of the seventeenth century, pointed to a predisposed framework of legitimacy that inevitably was accepted and acknowledged by the community.[73] As a result of this characteristic of *consensus populi, mores* were firmly integrated in the concept of *consuetudines*. They could be repeated practices or ideas, and even convictions that were quite recent. The adjective of *tacitus* served to explain why *consuetudines* did not need express acts of approval by the community in which they were held to exist. It was not required that a practice or habit was evidenced in order to establish a custom; a view or opinion was sufficient, if it was 'felt throughout the community'. A *consuetudo* was sometimes regarded as a 'silent ordinance' (*statutum tacitum*).[74]

Therefore, it was generally accepted that the legislating body of the community or the sovereign determined, even promulgated, what that silent law was.[75] This was not contradicting the appraisal of legal writers that the *tacitus consensus* was considered the '*causa efficiens*' of *consuetudo*.[76] With this concept, which referred to Aristotelian theory, authors meant that the will of the population crafted the custom in its final form. Most writers considered this an idea of legitimacy rather than of legality; it was not contrary to the legality of custom that it was declared or fixed by legislators, because custom was legitimated through the population's acknowledgement.[77] This appears strange to the modern reader, for he would consider this as undemocratic. However, up until the end of the eighteenth century, the councils of aldermen and other rulers that issued legislation (*statuta*) for cities and small jurisdictions were considered to be the *sanior pars* (the better part) of the population.[78] It is this to which Hugo de Groot referred when talking about international law that was introduced '*sive moribus et pacto tacito*'.[79] With *moribus* he meant those views of states that were shared within a population and that were formulated by its leaders, even though they had not been made explicit in a treaty or even an individual act. An interpretation of *mores* as 'acts of members of the

population' would not be compatible with de Groot's assessment that they were a source of international law.

The rationality of customs was equally important. It was commonly stressed that customs had to be reasonable (*rationabilis*). This requisite is usually explained as allowing for an extra test when customs are adduced and proved, before they are acknowledged as law. However, the requirement was also often described in terms of *aequitas* or *ratio scripta*, which could be sufficient to make up a custom. These notions pointed to well-established ideas that were derived from classical texts, and which were very close to 'natural law' as it had been defined since the 1500s. For de Groot, *ius naturale, ius voluntarium* and *consensus gentium* were very much intertwined. The nations acknowledged fundamental rules as binding because they were reasonable, and they consented in those and other constraints for they recognized what was right and what was not.[80]

Considering all of the above, it is clear that historians have often looked at customs, and comparable categories, through the lens of nineteenth-century doctrine. Puchta emphasized that customary law was ontological, following Savigny, but on the other hand he stressed that customs were repeated actions only (*Handlung, Übung*), and not tradition (*Sitte*). According to Puchta, judges were not supposed to know them, even though they could infer them from facts.[81] This meant that customs were no longer viewed as part of 'tradition', but rather as particular rules that were exceptions to the law that was imposed by courts and jurists. Puchta separated 'custom' from convictions (*mores*) and reduced them to facts.

The inclusion of *mores* into the broader category of *consuetudo* had one advantage, which was lost in Puchta's theories. It allowed for bridging *ex ante* and *ex post* normativity. It is widely felt today that a rule cannot be projected onto the past. This idea builds on the requirement of publicity of binding norms. When a norm is created in response to a new problem, then that problem itself cannot be regulated by that particular rule, because no one can be held liable for breaching a rule that does not exist. Therefore, the need for a rule cannot be assimilated with the rule itself. If a new problem arises, the normative answer to that problem cannot be customary.[82] Since many legal problems are new, the approach by Puchta meant that the scope of customary law was restricted to a large extent. Puchta's theories thus had the effect of shrinking the practical importance of customs. When considering customs as a label that could also be used for novel solutions, in reference to a tradition that was upheld by administrators expressing that tradition, the abovementioned problem did not exist. Puchta's insistence on evidenced, particular customs had as result that judges or administrators could no longer craft a 'living law' from tradition, but instead should consider customs as rules themselves, and not transgress the boundaries of their normative contents.

The Limits of Custom's Fluidity

In 1578, the Antwerp aldermen decided to issue a new law compilation, after they had sent in earlier collections to the princely institutions in 1548 and 1570.[83] The new text, which was printed in the last months of 1582, became the standard Antwerp law. It was widely cited and praised for its contents, including those relating to commercial contracts. Because a Calvinist-orientated Antwerp government had issued the 1582 text, in May 1586 the new and now Catholic Antwerp board of aldermen prohibited the use of

this version, and ordered another committee of jurists to draw up a new compilation of Antwerp law.[84] In 1608, a text of municipal law of gigantic proportions was finished. The 1608 law book contained 3643 articles, distributed over seven parts and eighty-one paragraphs. Provisions on commercial law comprised nearly one third of the total, *i. e.* 1124 articles in eighteen chapters, which contrasted with the 111 articles regarding corresponding matters in the 1582 law book. Shortly after the submittal of the 1608 compilation for homologation to the Council of Brabant, the Antwerp aldermen urged for provisional princely approval and publication of the part on commercial law, which was granted in February 1609.[85]

Although in March 1609 the Antwerp aldermen publicly imposed the commercial chapters to be used in the municipal court,[86] the new compilation never gained much popularity. For nearly all commercial and also other topics, the 1582 compilation was the most used after 1586 and after 1609. The reason for this was mainly that the new solutions contained within the 1608 law book were often fundamentally in contradiction to older court practice and unwieldy for mercantile contracts. The fact that *Memorieboeken* had been drawn up, which explained where certain rules came from,[87] was already an indication that the compiling committee had not stuck closely to the earlier texts of Antwerp law. The new legislative tactics followed from a stricter policy that identified the waning commercial attraction of Antwerp with problems and deceitful behaviour in the market. The 1608 compilers, for example, insisted on compulsory clauses to be inserted into insurance contracts and even required litigating purchasers of insurance to draw up a declaration of good intent. Fraud was thus presumed![88] The 1608 compilation was also strict in terms of imposing sanctions. Fraud in insurance was prosecuted as theft,[89] which was a capital offence, and notaries and brokers who drew up insurance contracts containing forbidden clauses were fined.[90] According to the *Memorieboeken* all these measures aimed at eliminating treacherous insurance practices. The authors of the *Memorieboeken* stressed that – in their opinion – marine insurance in Antwerp had fallen prey to disarray and confusion, and that the new rules would tackle these problems in order to restore certainty and to stimulate growth in the insurance market.[91] Such rules were not accepted among merchants.

Shortly after the text of the compilation had become known, advocates at the Antwerp municipal court launched protests. In 1610, advocate Jacques van Uffel argued in favour of repealing the law collection and to draft a new one that stuck closer to the 1582 version. He argued that the 1608 compilation contained a large number of 'invented and imaginary rules' and 'fantasized laws'.[92] At around the same time the Antwerp administrators received an anonymous letter denouncing the compilers of the 1608 law book as 'forgerers' and its contents as the product of 'fantasy' and 'academic musings'.[93] From these letters, it is evident that some members of the legal community at Antwerp felt that the Antwerp rulers had crossed a line. Even though it was commonly accepted that customs were not always age-old, framing entirely new rules that had no backing in the legal tradition of the city as 'customary' was considered as going too far.

Even though the authors were not explicit about this, one can suppose that their protests were largely based on the feeling that rules in commercial matters had changed tremendously. The idea that commerce was built on freedom of contract, and that the legislator had to refrain from excessively correcting the contents of mercantile agreements, was a trope in the Antwerp legal scenes since the middle of the sixteenth century.

In 1555, an Italian merchant Giovan Battista Ferrufini had proposed to centralize the brokering and the registration of marine insurance contracts. He suggested using a standard insurance policy form, in response to the lack of clear customs in the area of marine insurance. In 1557 and 1558 165 merchants rose against Ferrufini's projects. A main argument brought forward by them pointed to the freedom of contract. In the end, the plans were left and the earlier rules regarding marine insurance were for a large part left intact.[94] Maybe the comparable arguments that were raised against the 1608 compilation stuck. In 1633, after several attempts to get homologation of the 1608 compilation, the aldermen no longer insisted on formal princely approval.[95]

The case of Antwerp bears resemblance to similar views that were raised in Ghent in 1510 by legal practitioner Marten van den Bundere. He argued against the judges of the princely Council of Flanders that they distorted the customs of the city of Ghent, on the basis of their interpretation from 'books'. He objected that they introduced 'novelties' out of 'murmurations' and that these 'novelties' 'opposed the people to those who ruled them'.[96] This account offers a glimpse into how the fabric of municipal law was perceived of as tying citizens, residents and their administrators together.

In the sixteenth century in other European countries, similar ideas were uttered. In fact, the coming of the printing press had resulted in a rise of the number of available legal books. In the courtrooms all over Western Europe, advocates started citing the passages of writings of often obscure authors. This was one of the reasons underlying the 'nationalist' legal movement in sixteenth-century France. Charles Dumoulin argued against the use of 'exotic' writings and wanted to restrict the doctrine that was used in the French courts to well-received, well-known texts. The fierce opposition by other legal authors, such as François Hotman, against the *ius commune* was in part inspired by the sense that the body of learning had become polluted with writings of low quality.[97] A remnant of this view can be found in the *Tribonianus belgicus* by Antoon Anselmo (1662). The author, an Antwerp advocate, lamented that advocates were quoting foreign authors of low standing and that one had to return to the roots and core of the 'Belgian' law.[98]

It is important to note that in the mentioned examples not legal change as such was denounced, but rather a specific type of it. Legal practitioners warned against inflating the *ius commune* to the level of municipal law, without caution. However, they did not oppose academic rules as such. There was no conviction that the qualities of law had been harmed because of the growing influence of academic rules or even the homologation of customs. Rather, the stretching of the contents of the academic law that was compatible with municipal law was the issue.

In Flanders, the *Rezeption* of *ius commune* had started in the twelfth century. Examples of strife over this process are largely absent. Raoul van Caenegem cites a case, dating of 1430, in which for the first time a rule of Roman law was invoked before the aldermen of the municipality of Sint-Pietersdorp, in Ghent. The aldermen considered themselves incapable of deciding the case, because of their lack of knowledge of the 'written laws', of which 'they had no custom'. In response, they referred the case to a higher court, which was the municipal bench of aldermen of the city of Ghent.[99] This example is very telling: the judges did not refuse to hear arguments based on the academic law, but instead sent the case over to judges that had the expertise to assess them. Admittedly, the court trial was between two clerics, and they may have been acquainted with the scholarly law themselves. Therefore, this case might be less apt for

assessing the (lack of) friction caused by the *Rezeption*. Nonetheless, it seems that the segments of the population that were mostly involved with the law of contract and succession, which were the nobles and patricians, ever since the thirteenth century had voluntarily inserted rules of Roman and canon law writings into their agreements.[100]

A further argument that not *Rezeption* as such was the problem is that the sixteenth-century compilations of municipal law envisaged that they could be supplemented by the 'common written law'. This was a reference to the *ius commune*, but with the additional test that scholarly rules could be used only to the extent that they were compatible with the municipal law,[101] as had been the case before the sixteenth century. In 1578 the commissioners of the compiling committee that was to write a new collection of Antwerp *costuymen* was instructed to complement and interpret the *costuymen* on the basis of the 'common opinion of doctors that here are maintained as custom'.[102] Also, the proceeding of *turbe-inquiries*, which was adopted from French practice, was quickly adjusted so as to make it match with the earlier conceptions on legal tradition. At Antwerp, as soon as this technique was used in the 1480s, it was said that the statements of the witnesses should not be unanimous but that a majority sufficed to state a valid custom.[103] The original *enquête par turbe* had involved testimonials by wise men, but at Antwerp the witnesses were usually legal practitioners and occasionally merchants. This was also the case at Amsterdam in the later sixteenth and early seventeenth century.

A further shift was that the witnesses were the administrators of the municipality themselves. In Antwerp, in the sixteenth century the aldermen of the city issued 'certificates' stating what the customary 'law of the city' was.[104] In the 1500s, this seems to have been practised also in the bailliwick of Rijnland, which was the larger region around Leiden and Amsterdam.[105] But, here as well, the symbolic authority of formulated customary law was not without its limits. In his edition of the Rijnland *costumen*, Simon van Leeuwen referred to two Rijnland *turben* of 1591 and 1654, both of which stated that the procedure of *naasting* (*retrait lignager*) could be initiated within one year after a traditionally announced public sale. The *naasting* allowed relatives to claw back on immovable property that had been sold without their agreement. According to the mentioned *turben*, the *naasting* was not allowed if the public sale had been announced with pamflets, and not in the traditional way with three proclamations during Sunday mass.[106] This custom had been confirmed by the Court of Holland and the High Council, but van Leeuwen denounced it as facilitating fraud. It was easy to circumvent the *naasting* by putting up pamflets that were quickly removed. Van Leeuwen therefore labelled the custom as 'corrupt' and 'an *indragt*' (i. e. a travesty).[107] His comments point to perceived logic and fraud prevention as imposing limits on the malleability of customs.

Conclusion

In the sixteenth- and seventeenth-century Low Countries, customs were a valuable, yet diffuse legal category. This vagueness surrounding the notion was very useful, since it allowed administrators of cities to adjust and update the municipal law of their constituency. This offers an explanation for legal change and for the largely uncontested integration of academic rules into municipal law since the twelfth century. Neither the *Rezeption* of academic rules nor the *Verschriftlichung* of municipal law were denounced as going against the tradition. The abovementioned

examples show that in a context of written law subsequent reformulations of rules remained possible.

But this was not only a consequence of vagueness of the notion of custom; there was an older tradition of considering customs as malleable rules that upon adjustments remained valid for as much as they were considered part of the legal tradition. The approaches of legal historians who have taken customs as being fixed, age-old rules, are more influenced by nineteenth-century views than in line with pre-modern conceptions. The late medieval and early modern epistemology concerning customary law was such that the formulation of legal rules as customs was legitimate if the rules could be subsumed under the tradition of municipal law. This allowed for some flexibility, but it was not possible to introduce rules into the customary law that were completely alien to it. Of course, it is very difficult to detect where the dividing line between acceptable renewal and distortion of the legal tradition lay. And, surely, this line was most probably not fixed. But it seems that in the sixteenth- and seventeenth-century Low Countries, the distinction between novel, 'good' customs and novel, 'bad' customs did exist. The above-mentioned results invite for further analysis of the processes of formulation of law, in a broader context of the symbolic uses of power. The administrators of the cities and constituencies had agency to change municipal law and this autonomy must have been based on their symbolic capital. The use of ceremonies and public display of authority can therefore be connected to the study of the legislative process. A closer look into the arguments brought forward against municipal and princely rulers, in petitions, might add further material to completing the picture of the symbolic authority of the past in the legal domain of the pre-modern period.

Notes

1. Very explicit in this regard is Sijbrandus Johannes Fockema Andreae, "Het middeleeuwsche recht als hulpmiddel bij het onderzoek naar de verspreiding der rassen en stammen in West-Europa." *Mededeelingen der Koninklijke Akademie van Wetenschappen, afdeling Letterkunde*, series B, 54 (1922), 14–159. See for a general appraisal, Dirk Heirbaut, "A History of the Law of Succession, in Particular in the Southern Netherlands." In *Imperative Inheritance Law in a Late-Modern Society: five perspectives*, edited by C. Castelein, R. Foqué, and A. Verbeke (Antwerp, 2009), 6–82.
2. See many examples in: Sijbrandus Johannes Fockema Andreae, *Het oud-Nederlandsch burgerlijk recht*, 2 vols. (Haarlem, 1906).
3. See on this assumption, with regard to the theories of the Dutch legal historian Eduard Meijers regarding the "Ligurian" law of succession: Stephan Dusil, *Eduard Maurits Meijers en het Ligurische erfrecht in Europa. Geschiedenis(sen) van het privaatrecht* (Antwerp, 2018), 1–18.
4. Frederick C. Beiser, *The German Historicist Tradition* (Oxford, 2011), 248; and Christoph Kletzer, "Custom and Positivity: an Examination of the Philosophic Ground of the Hegel-Savigny Controversy." In *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James B. Murphy (Cambridge, 2007), 13–137.
5. Joachim Rückert, *Friedrich Carl von Savigny: Leben und Wirken (177–1861)* (Cologne, 2017).
6. Frederick C. Beiser, *The German Historicist Tradition* (Oxford, 2011), 249.
7. Franz Wieacker, *A History of Private Law in Europe* (Oxford, 1995), 36–366.
8. Georg Friedrich Puchta, *Das Gewohnheitsrecht* (Erlangen, 182–37), 2 vols.

9. Puchta, *Das Gewohnheitsrecht*, vol. 1, 14–145.
10. On this shift, see Christoph-Eric Mecke, *Begriff und System des Rechts bei Georg Friedrich Puchta* (Göttingen, 2009), 27–313; and James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton, 1990), 12–124.
11. Beiser, *The German Historicist Tradition*, 24–249.
12. Puchta, *Das Gewohnheitsrecht*, vol. 2, 20.
13. In 1844, Georg von Beseler had further opposed the "law of the people" (*Volksrecht*) to "lawyer's law" (*Juristenrecht*) and advocated for the former. See Georg Beseler, *Volksrecht und Juristenrecht* (Leipzig, 1843).
14. For an interesting overview of their views, see Kaius Tuori, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (New York, 2015).
15. Ian Hunter, "The Law of Nature and Nations." In *The Routledge Companion to Eighteenth-Century Philosophy*, edited by Aaron Garett (London, 2014), 577.
16. Beiser, *The German Historicist Tradition*, 22–233.
17. Ibid., 24–250.
18. Johnson Kent Wright, "History and Historicism." In *The Cambridge History of Science, VII: The Social Sciences*, edited by Theodore M. Porter and Dorothy Ross (Cambridge, 2003), 12–124.
19. Georg von Below, *Die Entstehung der deutschen Stadtgemeinde* (Düsseldorf, 1889).
20. The article "Les origines des constitutions urbaines au Moyen Âge" was published between 1893 and 1898 in *Revue historique*. Two monographs elaborated on the ideas that were already well developed in these articles: *Les anciennes démocraties des Pays-Bas* (1910) and *Les villes au Moyen Âge* (1926). These texts were assembled in *Les villes et les institutions urbaines*, 2 vols. (Brussels, 1939).
21. For a close analysis of Weber's conceptions in *Die Stadt* see Otto Gerhard Oexle, "Max Weber und die okzidentale Stadt." In *Stadt – Gemeinde – Genossenschaft. Festschrift für Gerhard Dilcher zum 70. Geburtstag*, edited by Albrecht Cordes, Joachim Rückert and Reiner Schulze (Berlin, 2003), 27–388.
22. In Belgium, the *Commission royale pour la publication des anciennes lois et ordonnances* was erected in 1846. In the Netherlands, the *Stichting tot de Uitgaaf der Bronnen van het Oud-Vaderlands Recht* (*OVR*, the "Foundation for the Edition of Sources of the Old-Fatherland Law") was established in 1879.
23. One out of many examples: an unclear term in the compilation of *costuymen* of Deurne, dating 1577, was filled in by editor Guillaume de Longé on the basis of the Antwerp compilation of municipal law of 1608. See Guillaume de Longé (ed.), *Coutumes du Kiel, de Deurne et de Lierre* (Brussels, 1875), 376, 400.
24. Guillaume de Longé in the 1870s usually stuck to few manuscripts; the 1570 Brussels *costuymen* were edited in 1869 by Antoine André de Cuyper on the basis of one, private manuscript. See Antoine A. de Cuyper (ed.), *Coutumes de la ville de Bruxelles* (Brussels, 1869), 1.
25. Sally Falk Moore, *Social Facts and Fabrications. "Customary" Law in Kilimandjaro 188–1980* (Cambridge, 1981); and Martin Chanock, *Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia* (Cambridge, 1985).
26. This concept goes back to the notion of *Rechtsleben* by Eugen Ehrlich. In publications regarding legal pluralism, the "living customary law" is usually juxtaposed with "official customary law". The latter is the codified variety, for which it is typically said that it is outdated and even that it did not reflect the "living customary law" when it was being registered. See, for example, Tom W. Bennett, "'Official' vs 'Living' Customary Law: Dilemmas of Description and Recognition." In *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act*, edited by Aninka Claassens and Ben Cousins (Cape Town, 2008), 13–152.
27. Karl Kroeschell, "Der Rechtsbegriff der Rechtsgeschichte – Das Beispiel des Mittelalters." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Germanistische Abteilung* 111 (1994), 31–329; Karl Kroeschell, "Recht und Rechtsbegriff im 12. Jahrhundert." In *Probleme des 12.*

Jahrhunderts (Sigmaringen, 1968), 30–335; Karl Kroeschell, "Rechtsfindung. Die mittelalterlichen Grundlagen einer modernen Vorstellung." In *Festschrift H. Heimpel*, vol. 3 (Göttingen, 1971), 49–517; and Karl Kroeschell, "Germanisches Recht als Forschungsproblem." In *Studien zum frühen und mittelalterlichen Recht*, edited by Karl Kroeschell (Berlin, 1995), 6–88. For an overview and critique of Kroeschell's views, see Martin Pilch, *Der Rahmen der Rechtsgewohnheiten. Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte* (Cologne, 2009), 27–290.

28. Robert Jacob, "Les coutumiers du XIIIe siècle ont-ils connu la coutume?" In *La coutume au village dans l'Europe médiévale et moderne*, edited by Mireille Mousnier and Jacques Poumarède (Toulouse, 2001), 11–119; Robert Jacob, "Beaumanoir vs. Révigny: The Two Faces of Customary Law in Philip the Bold's France." In *Essays on the Poetic and Legal Writings of Philippe de Remy and His Son Philippe de Beaumanoir of Thirteenth-Century France*, edited by Sarah-Grace Heller and Michelle Reichert (Lewiston (NY), 2001), 237, 259; Raoul C. van Caenegem, "Aantekeningen bij het middeleeuwse gewoonterecht." *The Legal History Review (Tijdschrift voor Rechtsgeschiedenis)* 64, no. 1 (1996), 10–104; and Raoul C. van Caenegem, "Boekenrecht en gewoonterecht: het Romeinse recht in de Zuidelijke Nederlanden op het einde der Middeleeuwen." *Bijdragen en Mededelingen van het Historisch Genootschap* 80 (1966), 1–37.
29. Wilhelm Ebel, *Geschichte der Gesetzgebung in Deutschland* (Göttingen, 1967), 1–26; and Wilhelm Ebel, *Die Willkür. Eine Studie zu den Denkformen des älteren deutschen Rechtes* (Göttingen, 1953).
30. Gerhard Dilcher, "Die Zwangsgewalt und der Rechtsbegriff vorstaatlicher Ordnungen im Mittelalter." In *Normen zwischen Oralität und Schriftkultur*, edited by Gerhard Dilcher (Cologne, 2008), 12–170; and Gerhard Dilcher, "Noch einmal: Rechtsgewohnheit, Oralität, Normativität, Konflikt und Zwang." *Rechtsgeschichte* 17 (2010), 6–73.
31. Jürgen Weitzel, *Dinggenossenschaft und Recht* (Berlin, 1986); and Jürgen Weitzel, "Gewohnheiten im Lübeck, Sachsen und Magdeburg," 35–356.
32. In general: John Gilissen, *La Coutume* (Turnhout, 1982), 2–24. For late-medieval and early modern England, see: Lloyd Bonfield, "What Did English Villagers Mean by 'Customary Law?'" In *Medieval Society and the Manor Court*, edited by Zvi Razi and Razi Smith (Oxford, 1996), 10–109; Albert Kiralfy, "Custom in Medieval English Law." *The Journal of Legal History* 9 (1988), 2–39; and Andy Wood, *The Memory of the People: Customs and Popular Senses in the Past in Early Modern England* (Cambridge, 2013), 39. For late-medieval Scotland: Rab Houston, "Custom in context. Medieval and early modern Scotland and England." *Past & Present* 211 (2011): 3–76.
33. David Ibbetson, "Custom in Medieval Law." In *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy (Cambridge, 2007), 15–155, 16–165.
34. This distinction is mostly made in regard of late-medieval and early modern England and Scotland. See Houston, "Custom in context," 3–40; Ibbetson, "Custom in Medieval Law," 16–162. However, some civil lawyers recognize the distinction in late-medieval continental law as well, see for example: Emanuele Conte, "Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction." *Rechtsgeschichte* 24 (2016): 23–241.
35. Emily Kadens, "The Myth of the Customary Law Merchant." *Texas Legal Review* 90 (2012): 115–1161; Emily Kadens, "Convergence and the Colonization of Custom in Pre-Modern Europe." In *Comparative Legal History*, edited by Olivier Moreteau and Kjell Modeer, 16–185; and Emily Kadens, "Custom's Two Bodies." In *Centre and Periphery. Studies on Power in the Medieval World in Honour of William Chester Jordan*, edited by Katherine L. Jansen, Guy Geltner and Anne E. Lester (Leiden, 2018), 23–248.
36. Martine Grinberg, "La rédaction des coutumes et les droits seigneuriaux, nommer, classer, exclure." *Annales, économies, sociétés, civilizations* 1997, 101–1038; and Jacques Poumarède, "Droit romain et rédaction des coutumes dans les ressort du Parlement de Bordeaux." In *Études d'histoire du droit et des idées politiques*, edited by Jacques Krynen (Toulouse, 1999), 34–345.

37. Kadens, "Convergence and the Colonization," 185.
38. Philippe Godding, "Nouveaux itinéraires en droit dans l'espace belge du 12e au 18e siècle." In *Nouveaux itinéraires en droit. Hommage à François Rigaux* (Brussels, 1993), 244.
39. Jos Monballyu, "Het costumiere recht in de kasselrij Kortrijk tijdens de 15de en de 16de eeuw." *Handelingen van de Koninklijke Geschied- en Oudheidkundige Kring van Kortrijk. Nieuwe reeks* 45 (1978), 161.
40. Michael T. Clanchy, "Remembering the Past and the Good Old Law." *History* 55 (1970), 172.
41. van Caenegem, "Boekenrecht en gewoonterecht," 24.
42. The literature on urban revolts in late-medieval Flanders is abundant. See for an overview of protesters' motivations, Jan Dumolyn and Jelle Haemers, "Patterns of Urban Rebellion in Medieval Flanders." *Journal of Medieval History* 31, no. 4 (2005): 36–393. Several revolts (for example, at Cassel in 1427 and in Ghent in 1540) were caused by state formation processes, when the prince raised "customary" taxes. See for example Jan Dumolyn and Kristof Papin, "La révolte paysanne à Cassel (142–1431): lutte d'une communauté rurale contre la centralisation bourguignonne." In *Haro sur le seigneur! Les luttes anti-seugneuriales dans l'Europe médiévale et moderne*, edited by Ghislain Brunel et Serge Brunet (Toulouse, 2008), 8–85.
43. For France: Donald R. Kelley, "'Second Nature': The Idea of Custom in European Law, Society, and Culture." In *The Transmission of Culture in Early Modern Europe*, edited by Anthony Grafton and Ann Blair (Philadelphia, 1990), 14–143. For the Low Countries: John Gilissen, "La rédaction des coutumes en Belgique au XVIe et XVIIe siècles." In *La rédaction des coutumes dans le passé et le présent*, edited by John Gilissen (Brussels, 1962), 98–102.
44. Gilissen, "La rédaction des coutumes," 98–102.
45. John Gilissen, "Les phases de la codification et de l'homologation des coutumes dans les XVII provinces des Pays-Bas." *The Legal History Review (Tijdschrift voor Rechtsgeschiedenis)* 18 (1950): 42.
46. For example, Constant Casier (ed.), *Coutumes de Santhoven* (Brussels, 1873), 4.
47. For example, Constant Casier (ed.), *Coutumes de la Ville d'Aerschot, de Neder-Assent et de Cagevinne* (Brussels, 1894), 124 (*costuymen* of Caggevinne, 1570).
48. "Usance," WNT (gtb.inl.nl).
49. "Herbrengen," WNT (gtb.inl.nl).
50. "Handvest (II)," WNT (gtb.inl.nl).
51. "Willekeur," WNT (gtb.inl.nl).
52. Antoon Anselmo (ed.), *Placcaerten ende ordonnanciën van de hertogen van Brabant.*, vol. 1 (Antwerp, 1648), 194 (5 July 1549).
53. Gilissen, "La rédaction des coutumes," 103; Ph. Godding, "La rédaction de la coutume de Bruxelles." *Annales de la Société d'Archéologie de Bruxelles* 51 (1966): 19–196; and J. Monballyu, "Het costumiere recht in de kasselrij Kortrijk tijdens de 15de en de 16de eeuw." *Handelingen van de Koninklijke Geschied- en Oudheidkundige Kring van Kortrijk. Nieuwe reeks* 45 (1978): 161.
54. "Clementynboeck, 1288–1414." *Antwerpsch Archievenblad*, first series, vol. 25, 217 (*c.* 1390).
55. D. De ruysscher, "From Usages of Merchants to Default Rules: Practices of Trade, Ius Commune and Urban Law in Early Modern Antwerp." *The Journal of Legal History* 33, no. 1 (2012): 1–14. On the *turbe*-procedure, see John Gilissen, "La preuve de la coutume dans l'ancien droit belge." In *Hommage au professeur Paul Bonenfant (1899–1965). Études d'histoire médiévale dédiées à sa mémoire par les anciens élèves de son séminaire à l'Université Libre de Bruxelles*, edited by Georges Despy (Brussels, 1965), 568–70; and Kadens, "Convergence and the Colonization," 18–185.
56. Antwerp City Archives (hereafter ACA), Vierschaar (hereafter V), no. 68.
57. Roy Garré, *Consuetudo. Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten ius commune in Italien (16.–18. Jahrhundert)* (Frankfurt am Main, 2005), 128–40.
58. ACA, V, 68, fol. 34r. (1 June 1520). For an analysis of these rules, see D. De ruysscher, "Reconciling old and new: imprisonment for debts and *cessio bonorum*, in Antwerp and

Mechelen (c. 150–c. 1530)." In *European Traditions: Integration or Disintegration?* edited by Jan Willem Oosterhuis and Emmanuel Van Dongen (Oisterwijk, 2012), 4–44.

59. Dave De ruysscher, "De ontwikkeling van het Antwerpse privaatrecht in de aanloop naar de costuymen van 1548. Uitgave van het *Gulden Boeck* (ca. 151–ca. 1537), (projecten van) ordonnanties (149–ca. 1546), een rechtsboek (ca. 154–ca. 1545) en proeven van hoofdstukken van de *costuymen* van 1548." *Handelingen van de Koninklijke Commissie voor de Uitgave der Oude Wetten en Verordeningen van België* 54 (2013), 8–89.
60. ACA, V, 68, fol. 93r. (s. d., *c.* 1532).
61. De ruysscher, "De ontwikkeling," 241.
62. ACA, V, 68, fol. 17v. (15 October 1509).
63. ACA, V, 68, fol. 113r. (9 June 1542).
64. Guillaume de Longé (ed.) *Coutumes de la ville d'Anvers*, vol. 1 (Brussels, 1872), 316 (ch. 10, s. 32–34). For another example of incremental interpretation of the widower's rights in the 1547 and 1570 Brussels *costuymen*, see Godding, "La rédaction," 19–196.
65. For the quote, see Kadens, "Custom's Two Bodies," 248.
66. One example is Rufinus (mid twelfth century) quoted in Kelley, "Second Nature," 162, endnote 13 ("*Mores autem isti partim sunt redacti in scriptis et vocantur ius constitutum; partim absque scripto utentium placito reservantur, et dicitur simpliciter consuetudo*").
67. D. 1,6,8*pr.*
68. Antonio Piaggio, *De iure consuetudinis tractatus* (Rome, 1611), 12 (q. 1, nos 2–28, concerning *mores*), 67 (q. 4, no. 24, regarding *mores*), 107 (q. 5, nos 4–45, on *mores*), 209 (q. 6, no. 241, on *mores*), 620 (q. 13, nos 6–72 (addressing *usus*) and 62–622 (q. 13, no. 73, concerning *mores*).
69. Johannes Andreae Schmidt, *De consuetudine* (Jena, 1682), cap. 1, § 3.
70. "*moribus institutum*" is often translated as "instituted by practices", but "beliefs" or "convictions" is a better translation. See for example, Jean Porter, "Custom, Ordinance and Natural Right in Gratian's Decretum." In *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy (Cambridge, 2007), 93.
71. Jean Gaudemet, "La coutume en droit canonique." In *La coutume*, edited by John Gilissen (Recueils de la Société Jean Bodin 52) (Brussels, 1991), 4–61; Udo Wolter, "Die "*consuetudo*" im kanonischen Recht bis zum Ende des 13. Jahrhunderts." In *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter*, edited by Gerhard Dilcher, E. A. (Berlin, 1992), 9–100.
72. See for example *Decretum Gratiani* C. 29 q. 1 § 1 "*Consensus est duorum vel plurium sensus in idem. Cum autem errat non sentit, non ergo consentit, id est simul cum aliis sentit*".
73. Francis Oakley, *The Mortgage of the Past: Reshaping the Ancient Political Inheritance* (Yale, 2012), 13–159; and Francis Oakley, *The Watershed of Modern Politics. Law, Virtue, Kingship, and Consent (130–1650)* (Yale, 2015), 17–239.
74. Eg. Antonio Piaggio, *De iure consuetudinis tractatus* (Rome, 1611), 20 (q. 2, no. 27).
75. Garré, *Consuetudo*, 15–155; Oakley, *The Watershed of Modern Politics*, 19–194; Piaggio, *De iure consuetudinis*, 10–106 (q. 5, no 52); van Caenegem, "Aantekeningen," 103, footnote 26 (referring to Petrus de Ravannis' (Dec. *c.* 1528) statement that governments can create customs).
76. For example, Piaggio, *De iure consuetudinis tractatus*, 64 (q. 4, nos 1–13). See also Kelley, "Second Nature," 136.
77. Oakley, *The Watershed of Modern Politics*, 19–194.
78. Garré, *Consuetudo*, 12–140.
79. Hugo de Groot, *De iure belli ac pacis*, R. J. D. De Kanter-Hettinga (ed.) (Leiden, 1939), 5 (book 3, *pr.*).
80. Tetsuya Toyoda, *Theory and Politics of the Law of Nations* (Leiden, 2011), 2–30.
81. Puchta, *Des Gewohnheitsrecht*, vol. 2, 2–32.
82. On these issues, see Alan Watson, "An Approach to Customary Law," *University of Illinois Law Review* 1984, 56–576.
83. ACA, Privilegiekamer (hereafter PK), no. 552, fol. 204r (18 July 1578).
84. ACA, PK, no. 558, fol. 112v (30 May 1586).

85. ACA, V no. 64.
86. ACA, V, no. 55.
87. For an analysis of these *Memorieboeken*, see Bram van Hofstraeten, *Juridisch Humanisme en Costumiere Acculturatie. Inhouds- en vormbepalende factoren van de Antwerpse Consuetudines Compilatae (1608) en het Gelderse Land- en Stadrecht (1620)* (Maastricht, 2008).
88. *Antwerp 1608 Law*, vol. 2, p. 310 (part 4, ch. 11, s. 266).
89. Ibid., p. 208 (book 4, ch. 11, s. 24) and p. 240 (book 4, ch. 11, s. 97).
90. Ibid., p. 224 (book 4, ch. 11, s. 58).
91. Antwerp City Archives (hereinafter ACA), Vierschaar (hereinafter V), 28bis.
92. ACA, V, no. 64 (petition of 9 August 1610).
93. ACA, V, no. 64 (anonymous letter).
94. Dave De ruysscher and Jeroen Puttevils, "The Art of Compromise. Legislative Deliberation on Marine Insurance Institutions in Antwerp (c. 155–c. 1570)." *BMGN-Low Countries Historical Review* 130, no. 3 (2015): 2–49.
95. A last attempt was made in the early 1630s, but in December 1633 the efforts stopped. See ACA, PK, no. 579, fol. 22v (14 July 1633), fol. 23r (23 July 1633), and fol. 25r (9 August 1633).
96. van Caenegem, "Boekenrecht en gewoonterecht," 2–26.
97. Vincenzo Piano Mortari, *Diritto romano e diritto nazionale in Francia nel secolo XVI* (Milan, 1962), 11–114.
98. Antoon Anselmo, *Tribonianus Belgicus, Epistola Dedicatoria*.
99. van Caenegem, "Boekenrecht en gewoonterecht," 1–17.
100. This is also evident from the ubiquitous use of clauses refuting the application of Roman, learned or written laws, which can be found in charters since the second quarter of the thirteenth century. See Dirk Heirbaut, "Afstand van Romeinsrechtelijke excepties in Vlaanderen." In *Ius romanum – ius commune – ius hodiernum: Studies in Honour of Eltjo J. H. Schrage*, edited by Harry Dondorp (Amsterdam, 2010), 17–185.
101. John Gilissen, "À propos de la réception du droit romain dans les provinces méridionales des Pays de Par-deça aux XVIe et XVIIe siècles." *Revue du Nord* 40 (1958): 26–269; John Gilissen, "Le problème des lacunes du droit dans l'évolution du droit médiéval et moderne." In *Le problème des lacunes en droit*, edited by C. Perelman (Brussel, 1968), 22–226; Ph. Godding, "L'interprétation de la 'loi' dans le droit savant medieval et dans le droit des Pays-Bas méridionaux." In *L'interprétation en droit. Approche pluridisciplinaire*, edited by M. Van de Kerchove (Brussels, 1978), 474.
102. ACA, V, no. 21, fol. 2r–v.
103. The requirement of unanimity existed in France since the early fourteenth century. In 147–76, Willem van der Tannerijen, secretary of the city of Antwerp, was the first in the Low Countries to voice that not all witnesses should have the same opinion. See Gilissen, "La preuve de la coutume," 581.
104. De ruysscher, "From usages," 12.
105. Simon van Leeuwen (ed.), *Costumen van Rijnland* (Leiden, 1667), 22–221 (dating 1530).
106. van Leeuwen (ed.), *Costumen van Rijnland*, 19–194.
107. Ibid., 194.

Acknowledgments

This article was written as part of the ERC-funded project CLLS (Starting Grant, 714759). The author would like to thank Marta Lupi, Marco In't Veld, Maurits den Hollander and Ilya Kotlyar for their remarks.

Disclosure statement

No potential conflict of interest was reported by the author.

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