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Book Review: The Concept of Custom in International Law (1971)

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BOOK REVIEWS

The Concept of Custom in International Law. By Anthony A. D'Amato. Ithaca & London: Cornell University Press, 1971. Pp. xvi, 286. $9.50.

In the Preface to this significant contribution to the growing library on international law, Anthony D'Amato makes apt reference to the "approaching theoretical explosion in the discipline" that "will rival that of Grotius, Pufendorf, and their contemporaries in the sixteenth and seventeenth centuries."[1] Although it is no small claim to make, it is fair to say that Professor D'Amato, in clearing a path for greater use of international law in the resolution of conflict between nations, has introduced a literary blasting cap which will have a noticeable effect on the size, shape and eventual value of the explosion. Furthermore, he has done this in a manner designed to obtain the respect not only of the theoreticians of the subject matter, but also of the hard-headed realists of state foreign offices. In the months and years to come it is hoped that these latter individuals will turn frequently to this rather small treatise to examine D'Amato's insights and to review the persuasive arguments he makes in unfolding his conception of customary international law.

Despite its brevity the book is not one which can be read rapidly. The scholarly research of the author is apparent as he explores the theories of others and makes frequent references to opinions of the World Court, resolutions of the General Assembly and, most significantly, the acts of nation-state members of the world community. Yet, his prose is also tough and hard-hitting. D'Amato's concern for the establishment of law as the guiding spirit in conflict resolution leaves him in awe of no one. Respected publicists and practitioners of international law, both past and present, are challenged frontally; their writings are subjected to clinical dissection at his hands. Hudson, Anzilotti, Kelsen, McDougal, Baxter, Lauterpacht, Briggs and Jenks are just a few of the prominent scholars who feel the sting of D'Amato's persuasive presentation. Needless to say, replies from those publicists who are still active will not be long in coming and will make lively reading in forthcoming issues of the periodicals devoted to international law. However, it is submitted that most of them will readily acknowledge D'Amato's unique contribution and will agree that it presents not only a valuable historical record of the development of law from custom, but also a helpful model for future application in relieving tension between nations.

Custom is one of those words that is not so much defined as described. D'Amato rightly calls it a concept, and he tells us that Part One of his book "attempts . . . to locate the concept of custom in the larger meaning of the term 'international law.' "[2] In his words:

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[1] D'Amato, *Preface to* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW at xii (1971).

[2] *Id.* at xii-xiii.

> If international law refers to a process and language by which many conflicting international claims are defined and argued, "custom" then becomes a method of legal argumentation. I shall argue that custom is a secondary rule for discovering the content of primary or substantive rules of international law.[3]

At another place[4] the author states that custom is the most important of the secondary rules of international law. In comparing custom with treaty, D'Amato suggests that custom is more important, "for it is generally regarded as having universal application, whether or not any given state participated in its formation or later 'consented' to it."[5] Treaties, of course, indicate subjects upon which nations can and do agree, and treaty obligations are generally respected. Custom, on the other hand, is resorted to by nations to support their conduct in the absence of any articulated agreement on the subject. Accordingly, Professor D'Amato tells us, if the world community would adopt a uniform methodology for acknowledging that a particular custom has ripened into a rule of international law, decision-makers would be greatly aided in resolving disputes among member states rationally.

While attributing primacy to custom over treaties, D'Amato nevertheless emphasizes in the heart of his work, Chapter 5: Treaties and Custom, the contribution each makes to the other in advancing the cause of international law. Earlier in his book D'Amato makes it clear[6] that states do not dispute the fact that international law includes many well established rules of custom, but the crunch comes when one side refuses to recognize as a rule of customary law a new custom which the other side argues has replaced an older one, or when it is alleged that a new custom has arisen in a previously unregulated situation. He states that in both cases:

> [A]n innovating state runs a legal risk, for it cannot be certain either that it is acting with respect to a previously unregulated area or, in the event that its policy represents a departure from previously established customary behavior, that other states may not exact a high price in diplomatic bargaining for the legal violations. To safeguard themselves from such risks, states that are about to introduce new patterns of international behavior have a great incentive to secure in advance the agreement of foreign governments who will be affected by the contemplated actions. For this and other reasons, states have historically resorted to treaties (in the sense of all explicit agreements, pacts, bargains, whether written or oral) with other states in matters of mutual concern.[7]

As to the impact of treaties on custom, D'Amato continues:

> Not only do they [treaties] carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties. For a treaty arguably is a clear record of a binding international commitment that

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[3] *Id.* at xiii.

[4] A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 270 (1971).

[5] *Id.* at 4.

[6] *Id.* at 74.

[7] *Id.* at 103 (footnotes omitted).

> constitutes the "practice of states" and hence is as much a record of customary behavior as any other state act or restraint. International tribunals have clearly recognized this effect of treaties upon customary law, and historically treaties have a decisive impact upon the content of international law.[8]

D'Amato's claim is not that treaties bind nonparties per se, rather it is "that generalizable provisions in treaties give rise to rules of customary law binding upon all states."[9] To illustrate this proposition he refers to the 1967 Convention on Outer Space. After making it clear that a party to the Convention is bound by its provisions that outer space is not subject to national appropriation, he goes on to say: "That same party is also bound by a customary rule of international law to the same effect that has arguably been generated by this treaty."[10] The significance of this statement becomes apparent should one of the parties withdraw from the treaty, for under D'Amato's analysis the party would still be bound by the customary rule of law. This customary rule of law would also bind nonparties to the treaty.

Difficulty, of course, arises with the word "generalizable." Reasonable men and reasonable decision-makers in foreign offices are naturally going to differ as to the generalizability of any particular provision, especially if it has found its way into the treaty only after long and laborious preliminary debate. Cognizant of this difficulty, D'Amato devotes considerable attention, in his discussion of treaties and custom, to developing this point. In defense of his thesis he draws support from opinions of the World Court in the *Nottebohm, Lotus, Asylum* and *Continental Shelf* cases, as well as from the judgment of the International Military Tribunal at Nuremberg, the Hague Convention of 1907 and the Geneva Convention on Prisoners of War of 1929.[11] Considerable evidence of state practice is also amassed to demonstrate that many provisions found in treaties are nevertheless generalizable enough to be binding even in the absence of those treaties.[12] The opinions of writers also support his thesis, says D'Amato. Hall and Oppenheim are called upon for support of the proposition that "treaties can be either declaratory or in derogation of the underlying customary law, but in both cases the underlying law remains unchanged."[13] The respected Soviet publicist G.I. Tunkin is quoted as saying that " 'norms of international law may be created by treaties.' "[14] D'Amato also calls on Judge Fitzmaurice of the World Court for support, noting that, when reporting for the International Law Commission's Report on Treaties, Judge Fitzmaurice "made a list of law-making treaties that have acquired the status of customary rules of law."[15]

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[8] *Id.* at 104.
[9] *Id.* at 107.
[10] *Id.*
[11] *See id.* at 109-28.
[12] *See id.* at 128-38.
[13] *Id.* at 139 (footnotes omitted).
[14] *Id.* at 140.
[15] *Id.* at 141.

D'Amato is not unmindful that his avowal of this relationship between treaties and custom is not universally accepted. He concedes that "[a] state desiring change is well advised to enter into a treaty, thus eliminating in advance the risk of adverse diplomatic reactions of affected states."[16] He also considers that it is more "persuasive to cite a multilateral convention than a bilateral treaty in the attempt to marshal one's proof of customary law."[17] Nevertheless, he does not shrink from suggesting that even bilateral treaties may generate custom and that the practices acceded to by only two nations can be valuable precedents for use by third parties in supporting their claims that international law includes the "custom" agreed upon by the parties to a bilateral treaty.[18]

In formulating any new theory it is rather easy for an author to become somewhat polemic in his discourse. D'Amato has not avoided this difficulty, and yet his careful scholarship and his genuine respect for the contributions of his predecessors and colleagues encourages, in this reviewer, the conclusion that his persuasive articulation will be well received. D'Amato hits hard, however. For example, it is generally agreed that the contributions of Myres McDougal to international law are both prodigious and influential. Yet, McDougal's theories on reasonableness and the development of customary law are literally picked to bits by D'Amato in Chapter 7: Reinforcing Factors (i.e. those elements of the jurisprudential literature which "reinforce the psychological authoritativeness of custom"[19]). This brief extract gives a flavor of this attack:

> Apart from the description of claim-conflict behavior, McDougal advances a number of interpretive arguments on behalf of "reasonableness." First, customary rules tend to be "formulated at the highest level of abstraction" and hence are "ambiguous in highest degree." The implication is that policymakers have a wide ambit of choice within these broad rules, and therefore do what is "reasonable." But the conclusion does not necessarily follow, as we can see from McDougal's own writings. For example, the very broad or even ambiguous international rule of *aer clausus* has led, at a great economic loss, to the proliferation of national airlines operating over international air routes. "Among all the stultifying ingredients of egocentric aerial nationalism," McDougal observes, "this has probably been the most irrational." Clearly, then, he does not view *aer clausus* as yielding reasonable policy decisions in the same manner as he views *mare liberum* though both are clearly norms of custom. With respect to freedom of the seas, as a second example, McDougal finds the inclusion of the "genuine link" theory in Article 5 of the Geneva Convention on the High Seas as "drastic," "misconceived," "uneconomic," "positively dangerous," and "unnecessary." Yet because the convention resulted from the consensus and mutual toleration of many national views as perceived by lawyers and national representatives, one might suspect that what is "reasonable" to McDougal may not be so to the international claimants whose views he is purporting to describe.[20]

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[16] *Id.* at 162.
[17] *Id.* at 164.
[18] *See id.* at 165-66.
[19] *Id.* at 187.
[20] *Id.* at 217-18 (footnotes omitted).

In concluding his comments on McDougal's theories, however, D'Amato introduces a little reasonableness of his own when he states:

> Despite these objections to McDougal's arguments for "reasonableness" as the central ordering factor in customary law, in an important sense reasonableness does reinforce custom's authority. For nearly all acts that states undertake seem reasonable to the actors. If these same acts are later cited as precedents for rules of customary law, then such citation is enhanced by the feeling of reasonableness that invested the constitutive acts. Like the notions of consent and estoppel, the objective reasonabless of some acts and the subjective reasonableness (from the actors' standpoint) of *all* acts combine and transfer their aura to all the constitutive data of custom, thus increasing the sense of legality of the system of rules that states accept as part of "customary international law."[21]

Other major publicists of international law who find themselves in D'Amato's line of fire are Hudson,[22] Lauterpacht[23] and Baxter.[24] It need only be noted that D'Amato has shifted the burden of persuasion to these individuals (or their spokesmen) if they plan to question the underpinnings of his theories.

D'Amato's own brief conclusion in Chapter 10 restates the proposition he put forth earlier that his concept of custom is basically a recourse to argumentative procedures designed to persuade the decision-maker as to what is in fact the operative rule of international law. He concedes that there are no easy cases, for where the custom is clear it does not give rise to controversy. As D'Amato states, "[C]ompeting claims of states clash in the penumbral areas of law."[25] What he has done in this treatise is to bring some light into this shady area. If his contribution encourages the spokesmen of claimant states to persuade decision-makers that prior acts, forbearances, commitments or agreements among states support the conduct in question as a custom which is therefore a rule of international law, then Professor D'Amato can be justly honored by the world community.

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[21] *Id.* at 229.
[22] *See id.* at 7-20.
[23] *See id.* at 131-32, 209-15.
[24] *See id.* at 114-16, 152-59.
[25] *Id.* at 269.
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