

# SCHOLARLY OPINIONS

## THE CULT OF CUSTOM IN THE LATE 20TH CENTURY\*

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Legislation involves the deliberate and explicit establishment of community policy through prescribed procedures, usually in specialized institutions. It is common to advanced legal and political systems which are generally distinguished from lesser developed systems by an appreciation and cultivation of division and specialization of labor. Custom, in contrast, concerns the *implicit* creation of norms through the behavior of a few politically relevant actors who are frequently unaware that law is being, or has been, made. Custom is supposedly indistinguishable from the aggregate flow of community behavior and thus has traditionally been associated with primitive societies lacking institutional articulation. While those who wish to use law as a means of affirmatively shaping future social arrangements have viewed custom as an anachronism and an atavism, a coalition of historians, those conservatives who just like old things and some scholars who appreciate so-called "free market arrangements" have extolled custom for what they believe are its inherent efficiency and democracy.

Custom rapidly regained currency in the international context after the United States repudiated the Law of the Sea Treaty,<sup>1</sup> the most ambitious international legislative project since the drafting of the United Nations Charter. Although the action was traumatic for the international legislative process, the President of the United States has announced that the renouncement will have little effect on lawmaking for the uses of the oceans: Most of the substance of the treaty, in fact, *mirabile dictum*, that is everything except the parts we dislike, is customary law anyway, meaning that it is a part

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1. Law of the Sea: Convention on the Territorial Sea and Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639.

of international law irrespective of the President's action.

As this demonstrates, the prescription of new norms, like most other international decision functions, has been performed inadequately. The international community has proved unable to legislate for its own security, for example failing to stop the juggernaut of developing, stocking and diffusing of thermonuclear, chemical and biological weapons. Attempts to legislate for the oceans, the environment, and the organization of the international market have met with scarcely more success.<sup>2</sup> And for all our power and wealth, we, as a nation, feel that we are misunderstood and unfairly treated in international legislative arenas. Until now, the unpalatable alternatives appeared to be either to try to reform the world, to learn to live with it or to withdraw from it. The Soviets, who have certain interests symmetrical to ours, have used the term "custom" for years to mean that they must explicitly consent to the norms being prescribed: This is a claim that extends the veto power across the board. The United States resisted this position but now we have done them one better. We can stay in the world without the need for a veto and still have our way: We can use custom to get the international law we want without having to undergo the "give" part of the "give-and-take" of the legislative process.

However, we must ask ourselves whether custom can really address the needs of global civilization in the late 20th century. If purposive legislation is so important an instrument for clarifying and implementing policy in an industrial and science-based civilization such as ours, how can we dispense with it in the much more complicated and varied global civilization? Mr. Reagan and his spokesmen told us that everything in the draft Convention—except for the seabed resources regime—was custom anyway. That is rather puzzling in that our delegates were arguing over much of it in international legislative chambers only weeks earlier. Moreover, few American leaders would agree that what majorities do in international conferences, much less what particular governments say there, is *ipso facto* custom or *eo ipso* evidence of it.

There are, in short, more than a few intellectual problems with this revivalist jurisprudence. It is hard to escape the suspicion that

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2. See, e.g., Law of the Sea: Convention on the High Seas, Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82; Law of the Sea: Convention on the Continental Shelf, June 10, 1964, 15 U.S.T. 471, T.I.A.S. 5578; Law of the Sea: Convention on Fishing and Conservation of the Living Resources of the High Seas, Mar. 20, 1966, 17 U.S.T. 138, T.I.A.S. 5969, 559 U.N.T.S. 285.

this great leap backward to custom is a device to conceal an entirely different political and legal maneuver. Obviously, custom will always survive in large measures for there will always be a great deal of macro- and micro-law secreted in the interstices of social life, like the hidden bulk of the proverbial iceberg. The question is about the tip of the iceberg: Can we really dispense with the international equivalent of legislation?

I think the answer is obvious. No one, I submit, seriously believes that custom is replacing deliberate international legislation. I believe that the word "custom" is being used not to dispense with international legislation and not in the Soviet sense to embody a veto right over all law formation. Rather, the new use of the word "custom" camouflages a constitutive shift in two aspects of the *politics* of international lawmaking. What is being signalled is opposition to the *quantity* and the *style* of formal international legislation as it has developed in the last twenty years. The setting of necessary legislation is being shifted from the most inclusive and open international arenas, such as the General Assembly and universal conferences, to more limited alliance, regional and, within them, value sectoral conferences from which most of the new majority in the United Nations will be excluded. The "all states" trend of the last forty years, seeking to bring *everyone* into an inclusive conference arena, is being reversed in favor of a network of restrictive-access legislative arenas. Because this shift from the floors of the world legislatures to back rooms elsewhere is inconsistent with venerated international legal myth, it is more convenient, if less accurate, to describe it as the resurgence of custom.

Four reasons for this concealed power shift deserve special attention: One, the inescapable relation between authority and power in law and politics and the growth of grave discrepancies between the two in formal international organizations; two, the excessive use of the machinery of international legislation; three, the low degree of consensus among those who actually have effective power, making it easier to confirm what has been done but harder to agree on what should be done; and four, the difficulties which certain popular democracies have discovered they will always face in the most inclusive contemporary international legislative arenas. There are some cogent reasons for these shifts and their facilitating camouflage, and some of the shifts, will, I believe, serve the common interest in the years ahead. But one of the costs of this obfuscation—the squid function as Professor McDougal has called it—is that it impedes

critical appraisal of action and its consequences in terms of basic policy and retards the invention of new arrangements that might better fulfill international goals.

### I. THE RELATION BETWEEN AUTHORITY AND POWER

The factitious distinction between law and politics is nowhere more preposterous than in discussions of law-making. The making of law, whether at the international or national level, and whether through explicit deliberation or implicit behavior, is quintessentially a political process. Those who have political power use it to achieve their objectives. Rationally, they enhance their power by a variety of techniques including the establishment of community policy as "law" which they enforce through institutions of the state apparatus. The extent to which particular laws advance the common interest of the community, or discriminate in favor of a particular group, is likely to be a function of the distribution of power in the community. Where power is widely shared, and many actors are able to protect their interests in the arenas of decision, law is more likely to reflect the interests of all who are politically relevant. Where power is narrowly shared, it is no surprise that the content of the law protects the power base and other interests of the oligarchy.

Where there is a congruence between the institutions of formal law-making and those of effective power, we encounter legislation. A formal authority lacking effective power produces "semantic law," a caricature of legislation; socially meaningful law is established extra-legislatively by those with sufficient effective power. The explicitly rational and open deliberative aspects of legislation are then lost and the entire promise of legislation is depreciated. Where the possibilities of reaching agreement have been exhausted, the ultimate outcome will be determined by the exercise of power as a function of its equilibrium. Law is made by "custom," a vague term which tells us little more than that certain laws did not derive from a legislative process. The quality or content of the resulting law is a separate matter. From a disengaged observational standpoint, legal scholars and political philosophers may comment on the relative value, ethical content or degree of means-end utility of particular laws. But, unless they are transempirical natural lawyers who have no grasp of reality, there is no question as to what the law is.

A divergence of formal authority and effective power seriously

infects international legislative efforts. A numerically large bloc of essentially non-aligned states, whose actual political power is not as great as its number, pursues a set of policies designed to secure or enhance its members' own precarious political independence and, related to that, to accelerate, if not initiate, their social and economic development. The *formal structures* of international law established after the Second World War have accommodated the numerical growth of this non-aligned or Third World force, giving its members the *illusion* of general political power. However, the Soviet Union never accepted the claims of legislative competence of international organizations of which these countries are members. For almost two decades, the United States did because of an amalgam of democratic ideology and pragmatic calculation that the majority was ours. But in terms of effective power, the superpowers and their associates always held sway. International law's arithmetic may be one state—one vote, but international political arithmetic, as Leonard Legault has put it, still holds that ninety nine minus one oftentimes equals zero, and that one plus one oftentimes equals one hundred.

Getting your numbers wrong in world politics is as perilous as getting your physics wrong on a superhighway. Many political leaders began to believe that formal international arenas *were* world politics, rather than only a small part of world politics. Since the Third World is animated by goals not always compatible with those of the two superpowers, the formal institutions most responsive to this new majority have tended to reflect its preferences. Inevitably, the outcomes of these institutions are characterized by the numerical minority of effectively powerful states as "irresponsible" and are ignored. The result is that the institutions in question cease to be meaningful arenas of legislation and the idea of legislation itself is disparaged.

On paper, the resolutions of UNCTAD and the General Assembly during the 1960's and 1970's reformed world politics and economics.<sup>3</sup> In fact, they did very little. Belatedly, the political leadership of the Third World acknowledged the problem. These leaders collaborated in exploring ways to temper the illusory tyranny of big

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3. United Nations Conference on Trade and Development [UNCTAD] was established December 30, 1964, as a permanent organ of the General Assembly of the United Nations to promote international trade and economic development. *DIRECTORY OF UNITED NATIONS INFORMATION SYSTEMS* Ref. JX 1977.8 .D6 D57 1980 (2d ed. 1980), Vol. 1., at 137 (available at California Western School of Law Library).

numbers because they stood to gain more from formal and structured, rather than from informal and non-structured, international lawmaking. "Consensus" emerged as a way of reconfiguring processes of formal and effective power. It has come to signify a general agreement to ignore the formalities of voting where there are automatic majorities which are inconsistent with the actual power necessary for making effective legislation. Decisions are shaped through consultations, taking into account the interests of those who have effective power but who may, in a particular structured arena, be a numerical minority. Only then is the agreement "endorsed" by a formal vote.

## II. THE USE OF PROCEDURES

Consensus was a creative response to the problem of the discrepancy between numbers and power. But it has responded only partially to the problem encountered by the United States and its closest allies. The sheer weight of numbers in organized arenas is felt in the very decisions to hold a conference, in the establishment of its agendas, timetables, staffing policies, procedural matters, and so on. With or without the United States, the numerical majority can create a treaty, secure enough ratifications to put it into force and perhaps establish a mechanism for its implementation. It is hardly surprising that the United States should sense that the new technique of consensus is at best a partial palliative and draw back from inclusive legislative arenas.

This problem might have been tempered by a "cooling off period," a moratorium of activity. Unfortunately, exactly the opposite has occurred: It has been aggravated by the crushing quantity of international legislative activity, much of which has produced no results other than to validate in the minds of the actors the importance of what they are doing. We encounter here a corollary to Parkinson's Law: Once an institution is established, its work load increases to the limits of its institutional capacity. Create, staff and budget an office for international conferences at the U.N. and it will proceed to plan and organize conference after conference after conference even if the conferences do not contribute appreciably to the functions of the U.N. and indeed even if the conferences disserve those functions. Not to act, not to fulfill one's plan, as our Soviet colleagues put it, is to make oneself expendable and to justify the termination of one's office and one's job in the next fiscal year. So the process whirls on, ever more frenetic and ever more

expansive. Parkinson's Law is accompanied by the bureaucratic territorial imperative: The label "common heritage" is attached with abandon to matters that might have been dealt with as effeciently in less inclusive arenas. They are "common heritaged" in order to give them international importance.

Parkinson's Law particularly applies to the United Nations and its various organs. The machinery in place is involved in too much and produces too much of indiscriminate quality and dubious political need, making it difficult for small delegations to protect their interests. They vote and change their votes without serious consideration. Even larger delegations become overwhelmed by the quantity. Trivial items, which threaten no one, win large majorities and push aside more urgent matters. No wonder that many delegations with genuine foreign policy objectives begin to doubt the viability of the legislative process and begin to look elsewhere for effective and controllable lawmaking.

### III. THE FAILURE OF CONSENSUS

The new international conference "consensus" deals with the numerical problem. But, the consensus procedure requires a substantive consensus between the actors concerned. The most striking feature of contemporary international politics is the lack of such a substantive consensus. Compounding this shortcoming is the irrelevance of formal international legislative arenas for the formation of a consensus. As between the superpowers, the consensus of Yalta seems like ancient history: The basic struggle between two contending systems of world order is more open than ever. The agreement on basic zones which had been established in 1945, and briefly renewed in 1972, is disintegrating in Afghanistan, South Asia, Africa and Central America. And those agreements that do survive, the so-called "rules of the game," are deeply resented by other states, many of which discover that they are merely pawns in the game, and in some cases merely spaces on the great chess board.

The state system, the basic metaphysic of world politics for the past century, is itself under intense stress, not simply from the Soviet Union, but rather extending from Tripoli to Teheran. Restraints on the use of force have decayed to the point where a state that wishes to conform to article 2(4) of the Charter could well be disserving the international interests and rights of the human beings concerned. In the Third World, a second and sometimes third generation of genuinely nationalist political leaders who are less in-

fluenced by whatever exposure they may have had to the West have come to power; they are pushed even further away from Western principles by the rise of fundamentalist and anti-rational thought among their own rank-and-file. Even in NATO, the basic consensus which for decades gave rise to and animated the alliance is under great stress, largely because of rank-and-file pressures in the Western European democracies.

The current lack of consensus between the First and Third World is dramatically evident in international legislative arenas. It is the result of a tragic collision of historical forces. The political and economic aspirations of the Third World are, quite understandably, unyieldingly real and preeminently important to those charged with political responsibility there. Those interests have given rise, among elites sharing many of the same historical experiences, to a new political-ethical calculus called the "New Economic Order." Since these same states are also a numerical majority in the formal legislative institutions, those forums are the natural vehicle for the achievement of NEO goals. But those goals are largely incompatible with the political objectives and economic capacities of the superpowers and the OECD states. Adjustments and arrangements can never completely bridge this gap, especially when the economically more powerful states that are asked to make concessions find themselves in difficult straits. Possibilities of accommodation are further narrowed when democratic processes allow those groups within the countries likely to be disadvantaged by the concessions to block them. This brings us to the fourth factor militating against inclusive international lawmaking: domestic politics.

#### IV. DEMOCRACIES' PROBLEMS WITH INCLUSIVE ARENAS

The United States is an indispensable, but far from optimally efficient, actor in international politics. The same internal structural features which make it a vibrant domestic democracy tend to disable it from effectively operating in the formal international legislative process. Because it is a constitutional democracy in which the executive and legislative branches are distinct each with certain overlapping and checking functions and in which there is no central party discipline, the United States cannot participate effectively in the new conference diplomacy.

The essence of conference diplomacy is the capacity to make deals and arrange complex packages which reflect, on balance, the interests of all of the parties. Inevitably, this means sacrificing some

of the cards in your hand: But cards in a democracy are the interests of particular domestic constituent groups. For United States negotiators to play the conference game, they frequently must decide which domestic interests that may have been part of their general instructions can be sacrificed in favor of securing other more important domestic interests. While this can be accomplished fairly easily within the delegation, the moment of truth comes when a draft must be approved in the domestic political process.

This is not a serious problem in parliamentary systems like those found in the United Kingdom or India, for there the majority party in parliament *is* the government and vice-versa. Since political parties there are still relatively centralized and disciplined entities and important to the individual parliamentarian seeking election, what the government does in its negotiation can be expected to win the agreement of the parliamentary majority. Not to agree is to betray a lack of confidence in the government and to require elections which, in turn, could jeopardize the tenure of the parliamentarians themselves. In the United States, none of these conditions appear; those interests which had been "sacrificed" in order to secure a package can block in one fashion or another the acceptance of the agreement.

The Law of the Sea Treaty is a pertinent and still painful example. Our delegation did not do a bad negotiating job in terms of package-theory. But we had to yield on something. The concessions made with regard to deep-sea mining may possibly have been in the national interest but they were ultimately unacceptable to that sector of the American industry which had invested in it. Its lobby was able to muster sufficient influence in the domestic arena to assure the scuttling of the draft. The Law of the Sea Treaty was ultimately repudiated by the United States not—in my view—because Ronald Reagan sat in his study and, after much reflection, concluded it was incompatible with his philosophy. I agree with Professor Gamble that it would have floundered in the legislative branch of the United States had it not been headed off at the executive pass.

Thus, for domestic political reasons alone, the United States will find smaller, more focussed and more restrictive arenas more congenial since they provide for agendas which the United States can influence, if not dominate. But even here, the requirements of conference diplomacy, replicated in a microcosm, will crash against the domestic interests inherent in pressure group politics. As for those

matters which the Executive believes are indispensable for the national interest, one can expect a different approach. A new type of executive agreement may emerge in which Congress indicates disapproval, but which the Executive respects "as if" there were an agreement on the condition that the other negotiating state lives up to the terms of the unratified treaty. Salt II is a striking example of this developing phenomenon. The exigencies of participation in the international legislative process will substantially rewrite article II of the Constitution, a regime whose basic policies have survived remarkably well for two centuries.

#### V. WHY CUSTOM ALONE IS INSUFFICIENT

It is the interaction of domestic and international factors that have sowed suspicion and doubt about the inherent efficacy of inclusive international legislation and revived the slogan of custom. While the concerns of United States decision makers about the costs of international legislation to our national interests are valid, the notion that custom can solve the problem is incorrect.

In the first place, the new slogan of custom assumes that in the broader arena of real world power, numbers will not count at all. This, however, is as myopic a view as the Third World view that the U.N. is the world power process and because the U.N.'s internal rules say that numbers count, the numerical majority in the General Assembly of which the Third World makes up a large portion, is real power. The fact is that, though the voting rules of the General Assembly magnify the power of the Third World, its members are part of the world power process and must be taken account of in future deliberations. Many of the programs pursued by the United States will require the collaboration of Third World countries. In or out of the General Assembly or an *ad hoc* international conference, the Third World must be contended with. It is autistic fantasy to assume that the Third World can be conjured away merely by substituting the word "custom" for "legislation." Realistically, even without the United States, the numerical majority does have power. No United States government can afford to believe that, just because it stands aloof, legal arrangements cannot be made. The saga of the Law of the Sea Treaty is not over!

In addition to procedural fantasies in the custom slogan, there are also related substantive fantasies. It should be clear to anyone with the faintest understanding of international life that customary processes of lawmaking cannot deal with the enormous problems

facing the world such as the debt crisis, the complex arrangements involved in a space station, the staggering detailed problems involved in meshing economically interdependent but functionally different national economies, the arranging of transnational defense against and suppression of terrorism and so on. However much one extols custom, deliberate multilateral legislation must continue. But, concealed under the rubric of custom, there will be important changes.

## VI. FUTURE CHANGES

I believe that in the next several decades, the earlier tendency to sweep more and more matters into the most inclusive international arenas for legislation will be reversed. States with a genuine interest in the outcome of a particular legislative program will seek to move it to the most restrictive rather than to the most inclusive forum. The model will be specific subject treaties such as the Antarctic Treaty and not the Law of the Sea Treaty, or the Space Station rather than the Outer Space Treaty.<sup>4</sup> Within the United Nations, parliamentary maneuvering will essentially be directed at keeping major items from the agenda. This will stimulate the development of a "jurisprudence" of legislative jurisprudence, an anticipation of which we have recently had in the unsuccessful U.S. effort to argue admissibility in the Nicaragua Mining Case. More exclusive arenas for explicit law-making will develop on regional and sectoral lines. Many of these will be conducted with greater secrecy rather than with the relative openness which has characterized international conference lawmaking in the past decades. These practices will minimize the numerical power of the Third World, coordinately increasing the relative power of the industrial-based states which has been diminished most by the rapid increase of membership in the United Nations in the last twenty years.

But political and economic interdependence will set limits on the extent to which matters may be privatized by shifting them to restrictive-access arenas. One need look no further than the abortive Reciprocating State Agreement. Where issues are genuinely inter-

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4. Antarctic Treaty, June 23, 1961, 12 U.S.T. 794, T.I.A.S. 4780; Convention on the High Seas, *supra* note 2; Agreement for a Cooperative Program for Space Laboratory, Aug. 14, 1973, 24 U.S.T. 2049, T.I.A.S. 7722; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, United States-United Kingdom-Union of Soviet Socialist Republics, 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205.

national and require the agreement of a large number of states for their effectuation, international conferences will continue to be held. But, they will be prefaced by very careful preparation of a fall-back draft by small groups of stronger states meeting in private caucuses. These drafts will largely guide the outcomes of the conferences.

Conferences themselves will be a rare occurrence. There will be fewer full-dress conferences in the next twenty years than there have been in the past twenty. Formal inclusive institutions which were created in the heyday of inclusive international legislation will tend to wither on the vine. The International Law Commission may be taken as only one of several melancholy examples. The increase of its membership to reflect the growing and increasingly diverse membership of the United Nations has been exceeded by the rate of absenteeism. Most of the subjects being treated at the meetings have been dealt with in desultory fashion for more than a decade, or sometimes more than two, and there is little sense of direction or expectation that they will ever yield final drafts. In reading the debates and talking to members, one detects no sense that any final drafts which may ultimately be agreed on will stimulate an international conference, much less a convention.

Of course, new norms will continue to be established and existing norms amended or terminated in complex patterns of interaction. This will be referred to increasingly as customary international law, and sometimes extolled as natural democracy, but one should have no illusions as to what it really means. The critical factor in the establishment of custom is the relative power balances, corrected by the context of the issue, of the parties concerned and the intensity of the interest they have in securing certain outcomes. Even a power process is restrained by concerns of reciprocity and log-rolling, with stronger actors making certain concessions in order to secure a variety of other concessions from weaker but functionally important actors; however, the power of states which have made unilateral determinations as to what serves their interests will be paramount.

The quality of the content of the law emerging from this type of restrictive-access legislative process may sometimes reflect what a scholar would consider the common interest for there is no necessary correlation between the degree of democracy of procedures and the utility and ethical content of the law produced. And restrictive-access legislation will be very important because, overlooking

for the moment the question of democratic procedures, in contexts in which technology, environment or political goals are in flux, the ability of the community or its elite to anticipate events, to consider them in terms of preferred policy and to prescribe behavior likely to yield the highest return for aggregate goals is the difference between controlling or being controlled by destiny. Some restrictive-access legislation will be functional, for not every matter is a common heritage which is best treated in inclusive arenas.

Whatever the substantive content, procedurally this is a sad state of affairs. It is far from the dazzling dreams of the founders of the United Nations forty years ago and is consistent with the alarming decay in many of the international institutional arrangements laboriously created after World War II. The blame can be apportioned among new states which were exhilarated by the illusion of power and did not temper their aspirations with realism; among the old imperial powers which were intransigent about relinquishing a share in power and among many lawyers in more powerful states who permitted themselves the opiate of theories of voodoo jurisprudence, completely severed from the unyielding reality of power in all politics. Custom will not displace legislation. The world community will legislate for itself in the last decades of the twentieth century, perhaps not badly, but not democratically. However, building or rebuilding an international legislative system which is responsive to the policies of power sharing and responsibility will, I fear, be a long and hard task.