

agreements with norms of the constitution, in particular with the question of whether the constitutionality of such agreements should be subject to judicial review, and with the transfer of sovereign rights to international organizations. On the latter question, a comparative study leads Dr. Wildhaber to the conclusion that accession to international organizations "with a narrowly limited field of operation" should be deemed to fall under the traditional scope of treaty-making, while the accession to so-called "supranational" entities would seem to call for a revision of the constitution (397). This conclusion is not, however, borne out by practice. Thus the member states of the European "supranational" organizations, ECSC, EEC, EURATOM, have not always amended their constitutions before joining these entities. Therefore,

[c]laims alleging unconstitutionality of these treaties can, if realistically appraised, no longer be taken seriously . . . (397).

The work reviewed here would be invaluable simply for the wealth of information and of material collected by its author. It is, however, much more than a compilation. Dr. Wildhaber presents a lucid, consistent, perceptive, and well-balanced comparative analysis of basic issues of both constitutional and international law. He shows not only an enviable degree of legal scholarship, but also a solid common sense. There can be no doubt that Dr. Wildhaber's book will rapidly become a standard reference work for both constitutional and international lawyers.

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*International Customary Law and Codification.* By H. W. A. Thirlway. Leiden: A. W. Sijthoff, 1972. pp. xii, 158. Index.

This is basically an account of an intellectual wrestling match between a classically formal view of treaties and custom on the one side, and a disquieting glimpse of the necessity of accounting for change and evolution in international law on the other. The author's training in international law clearly inclines him, indeed leads him to insist upon, the formal Anglo-American position that (a) treaties are contracts between states, (b) there is a fixed number of "sources" of international law, and that new "sources" can only be outgrowths of the old, and (c) rules of customary law are absolute—and custom is a sort of entity, not a process. However, the author is constantly haunted by the demon specter of change and flux in the nature of international law. His very topic, codification, presents the first formidable challenge from the left. Why codify anything if the rules are already clear? Because they may not be satisfactory. But if not satisfactory, are you really codifying, or engaging in "progressive development"? Well, then, maybe the rules were not really clear. But how do you know they are not clear? Is a "clear" codification convention evidence of prior unclarity of customary law? Can it be said to "crystallize" such law?

The author wrestles mightily with these questions, and his book is an interesting account of his difficulties in reaching satisfactory answers. Two

examples may be given, both stemming from his basic concern with the interrelation of custom and codification conventions. First, in dealing with the theory that generalizable provisions in treaties give rise to rules of general customary law, he writes:

Professor D'Amato's approach is "claim-oriented" and he views customary law as a process rather than as a set of rules. It appears therefore—but the present writer is ready to admit that he is not wholly confident of having fully grasped Professor D'Amato's thought—that all that is meant by the argument quoted is that from the moment of its creation, a treaty begins to exercise a certain pressure upon States non-parties to the treaty, tending to induce them to adapt their conduct to the view of the law contained in or implied by the treaty; and this pressure may in favourable circumstances attain such a point that a tribunal can, *ex post facto*, refer to that view as amounting to a rule of law. For Professor D'Amato, the treaty is part of customary law as soon as it begins to exert pressure; for us, for reasons already explained, it seems more useful to speak of the treaty as legally relevant forthwith, but as only entering customary law, or generating a rule of customary law, when the "rule" is no longer merely persuasive but absolute. (84)

Sticking rigidly to his definitions, Mr. Thirlway will not abide by the notion of "custom" in anything short of an "absolute" rule. Thus, later in his study, he expresses considerable reluctance in finding any "law" relating to outer space, the moon, artificial satellites, and so forth, stemming from multilateral conventions; provisions in those conventions have not become customary law for nonparties, in his opinion. But what, one might inquire, would be the effect if, in Mr. Thirlway's terminology, the provisions in those treaties were "merely persuasive"? Isn't "persuasion" enough until some more powerful counterpersuasion comes along? If so, what kind of law is involved that is neither treaty law nor customary law, but merely "persuasive" law? If such law is not truly "law," then of course it is not even persuasive. But if it *is* law, then is it not almost exactly the same as customary law? Customary law, as it operates in the reality of international intercourse, is simply law of varying degrees of persuasiveness. There is no "absolute" custom; if there were, how could it be changed? Mr. Thirlway recognizes the Antagonist of Flux and Change, but he continually backs off, hoping to salvage an absolutistic "book" view of international law.

The fundamental problem of the Anglo-American view of treaties and custom in international law is that it is viewed through municipal law glasses. Mr. Thirlway and the writers he cites want absolute certainty in their view of international law, the sort of certainty inherent in municipal law when a duly enacted statute has the unchallenged force of law and will be enforced by the police. But this certainty, this positivistic consequence of the unvarying application of superior force to duly enacted law, is and has always been absent from international life. Thus international law is *different*. A treaty is not quite the same thing as a contract. Custom is not the same thing as common law. Laws arise, are applied, and are changed, by states which are both their creators and their sub-

jects. In this lies the fascination, as well as the elusiveness, of international law.

A second brief example is Mr. Thirlway's problems with consensus. If a multilateral treaty expresses the consensus of states, then either its rules are good "law" (and one might as well call it "customary") or else a scholar, such as Mr. Thirlway, can stand in opposition to all the nations of the world and proclaim that what they believe to be the law is not really the law. But this is apparently his position:

[T]he present writer is not entirely confident that he has drawn the correct conclusions from Professor D'Amato's analysis; but it would seem to be right to read him as implying that what consensus has done, consensus can undo and re-do, and that the class of rules indicating how rules of direct application may be altered or added to can itself be altered or added to. . . . [T]he writer finds [this view] unconvincing, partly for the very reason that [it] leaves wide open the possibility of law creation through sources which are neither already recognized, nor themselves created through the operation of recognized sources. (42)

The author's conceptual grappings are never fully resolved, but even so his later chapters are significant and eminently worth reading. His analysis of codified law in relation to dissentient states, and especially his treatment of subsequent practice as affecting existing codification conventions, are lucidly presented. Mr. Thirlway does not make any theoretical addition to Professor Baxter's definitive statement of the classical position,<sup>1</sup> but he advances the analysis by presenting situations and questions that test and apply Professor Baxter's theories.

The ultimate problem with this book, however, is that it presents no thesis. Rather, it is an account of the author's thinking on a subject. It was written, apparently, not because the author had something to say, but because the Institut de Droit International set a subject on "the continuing role of custom in the present period of codification of international law" for its John Westlake Prize. Mr. Thirlway cannot be faulted for having won that particular prize.

ANTHONY D'AMATO

*Law and Policy in China's Foreign Relations, A Study of Attitudes and Practice.* By James Chieh Hsiung. New York and London: Columbia University Press, 1972. pp. x, 435. Index. \$12.50.

Serious scholarly studies of Communist China's record in the field of international law since 1949 are still in short supply. Professor Hsiung's treatise goes a long way toward filling the void.

Since the problem of encompassing all aspects of the CPR's encounter with international law to date within the ambit of a single volume meets with insuperable obstacles, the author has wisely elected to concentrate on the salient themes of that experience. He thus addresses himself to the following issues: general attitudes toward international law; the inter-

<sup>1</sup> R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y. B. INT. LAW 275 (1965-66); R. R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 31 (1970-I).