Book Reviews

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Franck, Thomas M. *Fairness in International Law and Institutions*. New York: Oxford University Press, 1995. Pp. xxxvi, 484. Index. $55.

This book is a combination of a philosophical analysis of international law and a review of the main subjects of the law of nations in the light of that analysis. The author is of the opinion that international law has reached an advanced stage of maturity and specialization. Hence, there is no longer a need to defend its very existence. Instead, one should ask whether it is effective, enforceable, understood and fair (p. 6). He then discusses the notion of fairness (pp. 7–46). 'Legitimacy and distributive justice are two aspects of the concept of fairness' (pp. 8–9). Legitimacy is procedural fairness. It expresses the preference for order and stability and the belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied. Distributive justice, on the other hand, is substantive fairness. It expresses the need for a justifiable distribution of costs and benefits, and usually favours change. Distributive justice is rooted in the subjective, relative moral values of the community. Legitimacy and justice may coincide, but they may also clash. The objective of fairness is to achieve a balance between the need for order (legitimacy) and the need for change (justice). The importance of fairness lies not only in its moral value, but also in the utilitarian aspect that it pulls towards voluntary compliance.

[The international community is ripe for a discussion of fairness since there exists 'moderate scarcity' and a 'community' – two preconditions of fairness discourse. In a situation of extreme scarcity, fairness would not be sought. Neither would it be relevant in the absence of a community, namely, 'a social system of continuing interaction and transaction ... a conscious system of reciprocity' (p. 10).]

The author continues by analysing further the legitimacy component of fairness (pp. 25–46). Legitimacy is affected by properties of the rule, by the process by which it was made, and by its implementation. [The legitimacy of most of the rules of international law derives from their being based on the consent of states. However, once this consent has been given, the consenting state is bound to act in accordance with that to which it has agreed (*pacta sunt servanda*) – an obligation which cannot be derived from state consent, but from another source of legitimate authority. Moreover, once a new state joins the community of states, it is bound by the basic rules of that community, regardless of consent.]

The legitimacy of substantive rules of law depends on four indicators: determinacy, symbolic validation, coherence and adherence. Textual determinacy is the ability of a text to convey a clear message. A clear rule has more chance of being complied with and of being perceived as fair. Paradoxically, when the legislator introduces a reference to a 'fairness' standard or to equity, this may reduce the determinacy of the rule.

Symbolic validation communicates authority by means of cues. These signal the importance of the relevant rule in the overall system of social order and the fact that it was adopted in accordance with right process. Examples include the symbols of pedigree and rituals in diplomatic practice.

'A rule is coherent when its application treats like cases alike, and when the rule relates in a principled fashion to other rules of the same system' (p. 38). That is, generality and consistency of the rule increase its legitimacy. This does not mean that uniformity has always to be achieved. But 'when distinctions are made, they must themselves be explicable by reference to generally applied concepts of differentiation' (p. 39).

Adherence is the nexus between a rule of conduct and secondary rules governing

the creation of rules. In national communities, the legitimacy of the law derives from its having been made in accordance with the procedure established by the Constitution. International rules derive their legitimacy not only from the consent of states, but also from compliance with certain preemptory norms – 'a sort of customary constitution of the international community' (p. 43). The state is also bound by certain rules due to its mere status as a state, namely, customary rules that developed before its establishment.

After this theoretical analysis of the notion of fairness and its components – legitimacy and distributive justice – the author examines equity as fairness in international law (pp. 47–80). He first studies equity as an instance of 'law's justice' (pp. 48–54). In order to protect the legitimacy of this sort of equity, the courts have developed general principles of equity, e.g. unjust enrichment, estoppel and acquiescence. He continues by analysing the distinction between equity and *ex aequo et bono*, and explains the reticence of the ICJ to decide cases *ex aequo et bono*. Finally, Professor Franck discusses equity as a mode of introducing justice into allocation of scarce resources, e.g. the riches of the continental shelf. He discerns three approaches in this sphere. The more traditional approach is that of 'corrective equity', and the other two, only recently applied, are 'broadly conceived equity' and 'common heritage equity'. He finds 'broadly conceived equity' in some rules of the UN Convention on the Law of the Sea of 1982, as well as in the proposed rules on the Non-Navigational Uses of Watercourses. Lastly, under the 'common heritage equity', certain resources are the patrimony of all humanity, as exemplified by the regime of the deep sea bed of the moon and of Antarctica. The author concludes by stressing the need for considerations of equity both on account of the pace of technological and scientific innovation and because of the great and widening chasm between rich and poor.

The above theoretical developments are followed by an analysis of some of the most difficult subjects of international law through the prism of fairness: fairness to persons: the democratic entitlement (pp. 83–139); fairness to 'peoples' and their right to self-determination (pp. 140–169); administrative impartiality as fairness; the UN Secretary-General's good offices and other third party functions (pp. 173–217); the bona fides of power: Security Council and threats to the peace (pp. 218–244); just and unjust war (pp. 245–283); collective security: sharing responsibility and burdens (pp. 284–315); judicial fairness: the International Court of Justice (pp. 316–347) – this chapter does not deal with the substance of the decisions of the Court but with structural impartiality and procedural fairness; environmental matters (pp. 351–412); fairness in trade and investment (pp. 413–473).

These chapters are not merely a search for fairness, but include also a highly original analysis of the subject matter and sometimes a reflection on possible future developments. For instance, Franck suggests a new solution to the problem of the contradiction between people's right to self-determination, which may involve secession, and the state's right to territorial integrity. The author bases his solution on the way in which the crises related to dismemberment of Yugoslavia were addressed by the international community.

In the final part (pp. 477–484), the author expresses his dissatisfaction with the principle of the equality of states – 'unfair equality' – and with the fact that discourse on fairness is led only by governments. He would prefer to see a forum where the participants are elected by the population, so that values and interests other than a 'national interest' can be represented. As a modest proposal of reform, he suggests that the UN General Assembly be transformed into a two-chamber forum, one of which would be constituted as at present and the other would be directly elected by universal suffrage.

Although the book deals primarily with international law, the underlying theory is valid for all legal systems. It is unique in its combination of theory and practice. Unlike many other theoreticians, Franck is very clear in his distinction between *lex lata* and *de lege ferenda*. His

theoretical statements are invariably accompanied by clarifying examples.

This reviewer cannot resist the temptation to prove her thoroughness by mentioning a few minor points on which she disagrees with the author. Prof. Franck uses the term exterritoriality in the context of immunities (p. 36), but this term was based on a fiction and has practically been discarded. The 1951 Fisheries case (p. 53) dealt with the territorial sea and not with the continental shelf. The author seems to assume that the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities offers autonomy to minority groups (p. 162), but the text only ensures those groups the preservation of their identity without granting them autonomy. These minor remarks are not intended to detract from the great value of the book.

To conclude, Professor Thomas Franck has written a masterpiece, a modern classic of international law.

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Kontou, Nancy. *The Termination and Revision of Treaties in the Light of New Customary International Law*. New York: Oxford University Press, 1994. Pp. xvii, 166. Index. $55.

The problem addressed by this book is the situation created by the coming into effect of a rule of customary law that runs contrary to an existing treaty provision. It takes a rather strong position in favour of the idea that a state bound by a treaty which is contra to newer custom has the right to insist on its cancellation or renegotiation. This seems to follow from a rather straightforward, binary view of custom, namely that there either is or is not a new custom. Americans are inclined to be sceptical of assertions about custom, noting that they can be highly partisan, self-seeking and disingenuous. In a world without judicial institutions possessing broad jurisdiction, definitive resolution of questions about custom is rare. One fears that an assertion of a new custom may be one more in a set of reasons for avoiding a nation's treaty obligations.

In fact, the supersession of treaties by custom is not a common event since in the context of modern international law the advent of new treaty rules codifying, modifying or cancelling prior customary law is by far the more usual. A large fraction of the examples considered in this book come from a single event – the supersession of various agreements by newer customary international law of the sea. The special quality of this new custom lies in the fact that it is primarily the product of widespread agreement among states upon the provisions of the Law of the Sea Treaty signed in 1982, together with its failure to achieve enough ratifications to cause it to come into effect before 1994. It is a somewhat uneasy state of affairs when a treaty that has failed *qua* treaty has such a major effect, coming through the back door as custom. For one thing, this shift from treaty to customary law alters the internal balance of power among branches of the government in the United States and perhaps in other countries as well. A treaty under the US Constitution requires the agreement of two thirds of the Senate, and even a presidential/executive agreement needs a vote of both houses of Congress. Yet a President can alone determine that a new customary rule has formed and that the United States should adhere to it. This is what happened in 1993 when President Reagan proclaimed a 200 miles exclusive economic zone. The judiciary also has some power to declare customary law as part of the law of the land. As between states, the existence of this new custom has been hotly controverted. The United States has with considerable success taken the position that the parts of the Law of the Sea Treaty that it likes have become custom, whereas the parts that it does not like, chiefly those relating to the Deep Sea Bed Mining Authority, have not. It has thus been able to avoid directly confronting the question whether it should accept the whole package. That has also weakened the position of states that thought they could insist on the deep sea bed provisions