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BOOK REVIEW

Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester University Press, 2019, 216 pp, ISBN 9781526127914, £22.50
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In both its historical approach and its critique of doctrinal orthodoxy, Anthony Carty's *The Decay of International Law?* was ahead of the curve upon its initial publication in 1986. In the following years, however, the book's reputation became folded into critical legal studies/new approaches to international law (CLS/NAIL) – perhaps due to Carty's repeated engagements with its leading authors.[1] Not only does *Decay* predate that school's landmark texts by some years, having been written largely during the 1970s,[2] it also draws stridently different conclusions. Upon the book's republication, now missing the question mark of the original title but with a new introduction from the author, its argument bares renewed attention, particularly as a corrective to its lazy mis-categorization with CLS/NAIL.

Decay's thesis is simple. International law is in a state of decay due to the insufficiency of its central actor, the sovereign state. This insufficiency is described in two ways. On the one hand, the state is an exclusionary concept. By taking for granted the authority of existing states, international law removes entirely from its purview questions of politics, economics, history, nationalism, and self-determination, leaving the discipline with 'only a very fragmented and partial view of world society'.[3] At the same time, positivism has served as a doctrinal gloss over this insufficiency. Despite the development of elaborate methods for asserting the bindingness of international law, the coherence of state practice and *opinion*, *juris*, and so on, positivism's claims about the systemic nature of international law remain 'little more than an assertion that the completeness of any legal system is a logical necessity'.[4] For Carty, without a sovereign able to enforce these agreements, international law cannot be considered a positive legal order – it is at best a series of 'rules which regulated more or less incompletely a number of relations among States which were independent *in fact*, i.e. leaving completely open the question whether there was an

[1]From CLS/NAIL's side see D. Kennedy, '*The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*. By Anthony Carty. Manchester and Dover, N.H.: Manchester University Press, 1986. Pp. x, 138. Index. $40.', (1987) 81 *American Journal of International Law* 451. From Carty's side see A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law', (1991) 2 *European Journal of International Law* 66; A. Carty, '"Liberalism's Dangerous Supplements": Medieval Ghosts of International Law', (1991) 13 *Michigan Journal of International Law* 161; A. Carty, 'Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein', (2012) 13 *Melbourne Journal of International Law* 859.

[2]A. Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (2019), xi-xii.

[3]Ibid., at xi.

[4]Ibid., at 39.

international legal system of which these states were part'.[5] *Decay* thus spends most of its pages demonstrating the incoherence of positivist international law in relation to some of its principle concepts – custom (Ch. 3), territory (Ch. 4), treaties (Ch. 5), and non-intervention and the use of force (Ch. 6) – in the hope that 'when the legal concepts are understood in their original sense, it might be possible for modern legal theory to develop and adapt them to new situations'.[6]

At various points in the book, this history of positivism is given an explicitly critical, even Marxist edge. The abstraction of the law of territory from self-determination, for example, 'has to be seen within the ambit of the role of law in the rise of capitalism', with the consequence that 'the analogy of private law methods of acquiring territory has ... [excluded] the question of political legitimacy, the control of some people over others, from any consideration in the law of territory'.[7] Similarly, Carty identifies 'an international economic elite, for whom the primary goal is to subject nationalist self-interest to a framework of predictable constraints' and notes that '[f]or this elite [positivism's] hypothesis of an international legal order may be quite functional'.[8] It is at these points where *Decay* is at its strongest. By positioning positivism as arising within and consolidating particular economic, political, and cultural (and one could add racial) hierarchies, *Decay* gives real bite to the injustice of positivist legal doctrine, remarkably prescient as to recent critical work on the history of positivism and the disciplining of the state form.[9]

Having found positivism and its statist 'frame of meaning' wanting, the book's final chapter considers how international law could be decoupled from the state and restructured around the principle of self-determination. Carty explores two case studies, the Falklands Islands and Israel-Palestine, to show how self-determination remains a significant blindspot for international legal doctrine. But, beyond a suggestion that international law take up the task of 'reconstruct[ing] conflict situations in accordance with basic principles of possible understanding'[10] – the influence here being Habermas's 'ideal discussion-situation' – Carty doesn't actually posit a 'new' method or doctrine for international lawyers to pursue. Instead, his attack appears to be on *all* disciplinary distinctions. At the book's close, he writes that:

> the very multiplicity of effective actors in international society makes it all the more necessary for doctrine to accept *a subjective, personal and relative role for itself*, where the authority it enjoys *rests upon the quality of its argument* rather than upon a pseudo-objective professionalism.[11]

In calling for a more 'complete' international law, then, Carty ends up advocating for the absorption and destruction of *all* boundaries between law, history, politics, economics, philosophy, and international relations.

This argument is made clearer in the republication's new introduction, where Carty draws a line from the last chapter of *Decay* to his later book *Philosophy of International Law*.[12] Enlisting a range of thinkers to his cause, including Agnes Lejbowicz, Alex Hägerström, and Paul Ricœur, Carty argues for 'a going back beyond Hobbes', to 'replace the brute facts of the State, as figments

[5]Ibid., at 46.
[6]Ibid., at xi.
[7]Ibid., at 93.
[8]Ibid., at 166.
[9]In particular M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013). See also A. Orford, 'Food Security, Free Trade, and the Battle for the State', (2015) 11 *Journal of International Law and International Relations* 1; L. Eslava and S. Pahuja, 'The State and International Law: A Reading from the Global South', (2020) 11 *Humanity* 118; Legal Form's ongoing series on state theory, available at legalform.blog/archive/.
[10]Carty, *supra* note 2, at 168.
[11]Ibid., at 188 (emphasis added).
[12]A. Carty, *Philosophy of International Law* (2007).

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of the imagination … with a return to a natural state of fraternity'.[13] International law is thus explicitly refigured as a moral project:

> The final goal of personal self-respect and interpersonal respect is … possible and achievable, only because the admonition of classical moral philosophy is and remains to recollect and rediscover the moral self. The word Law can be used, if wished, to describe the achievements of such moral selves in public and international relations … International law is then the study of the just and proportionate relations among peoples.[14]

Ricœur is also enlisted to disentangle *Decay* from CLS/NAIL, opposing *Decay*'s historical approach to the structuralism of CLS/NAIL through their respective influences: Paul Ricœur on Carty's side and Claude Lévi-Strauss on CLS/NAIL's. Citing Ricœur's 'Structure and Hermeneutics', Carty writes that structuralism rests on 'a model of linguistic laws that supposedly designate an unconscious, ahistorical, non-reflective level of mind'. This, Carty argues, overemphasizes the extent to which language disciplines and totalizes our discourse: it 'leaves us without a thinking subject. Because there is no subject in time there is no history'.[15] Carty's history, then, reintroduces the possibility for the subject to reinvent the limits of its (legal) imagination.

It should now be clear how great a misunderstanding has occurred in treating *Decay* as a CLS/NAIL text. In its challenge to the very fundamentals of the 'legal imagination' of international law, it takes us far beyond claims of indeterminacy to argue that the very form and language of international law is unjust – an emanation of the 'monstrous concept of the State'.[16] Yet one wonders how this argument is intended to work. I do not mean this in the sense of rebutting *any* form of idealistic or reconstructive thought. Rather, it is that Carty's historical contextualization drops off at precisely the moment his reconstitutive project is introduced. If one accepts that international law gained its (positivist) disciplinary coherence in conjunction with the solidification of the industrial state, it is unclear whether and for what reasons the two can now be disentangled. Bar some discussion of the 'info-terrorism' of today's 'postmodern (i.e. post-State) globalised society' in the new introduction,[17] Carty gives no clear evidence as to why modern conditions necessitate or even open the possibility for international law's stateless reconstitution.

In fact, we are possibly in a worse position today to cast off the limits of the legal imagination. With so many of us invested in its current framework, academics cannot unilaterally rewrite international law in the way Vattel, or Kelsen, or Lauterpacht once did. On an educational level, too, the space to delve into its theoretical underpinnings is reserved for (maybe) a module or two at postgraduate level. For those students who seek the top jobs, a knowledge of theory may even be a hinderance – you cannot win the Jessup by citing Paul Ricœur, after all.[18] So how exactly elaborate doctrinal frames are meant to intervene in all this day-to-day practice is unclear. Governments and large corporations will continue to hire those students who excel at the basics while, to lift a phrase from Terry Eagleton, academic critique becomes 'a handful of individuals reviewing each other's books'.[19] On this point CLS/NAIL seem to have had the advantage, remaining, to varying

[13]Carty, *supra* note 2, at 18.
[14]Ibid., at 20.
[15]Ibid., at 23.
[16]Ibid., at 16.
[17]Ibid., at 19.
[18]Although cf. D. M. Scott and U. Soirila, 'The Politics of the Moot Court', forthcoming in the *European Journal of International Law*, which critically assesses the knowledge practices transmitted and reinforced by moot courts.
[19]T. Eagleton, *The Function of Criticism* (2005), 107. Cf. A. Rasulov, 'A Marxism for International Law: A New Agenda', (2018) 29 *European Journal of International Law* 631.

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degrees, embedded in the actual professional practice of international law without precluding opportunities for its structural change.[20]

None of this is to detract from *Decay*'s remarkable argument (nor to say that CLS/NAIL's approach is unimpeachable either). On an analytical level, its attack on the political import of positivist legal doctrine is devastating, asking readers to take seriously how their received disciplinary imagination limits what international law can be. At the same time, its reconstitutive edge is both refreshing and thought-provoking. Out of the shadow of CLS/NAIL, *Decay* deserves to be re-read.

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[20]Cf. M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20 *European Journal of International Law* 7.

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