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Book Reviews

BOOK REVIEWS

THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT. Sir Hersch Lauterpacht. New York, Frederick A. Praeger. 1958. Pp. xii, 408. $12.50.

International law is a product of modern thinking. It has slight antecedents in the Roman *ius gentium* which, valid between Rome and its satellites, was more intra- than inter-national. Neither in Roman times nor for centuries after were international relations based on respect for national independence or human welfare. Physical force was the only conceivable instrument of foreign policy, and the law of nations was the law of survival. It seems natural that the first stirrings of an international legal conscience were concerned with the conduct of war. Writing during the Thirty Years War, and doubtlessly roused by its horrors, HUGO GROTIUS in *De Jure Belli ac Pacis* (Paris, 1625) made a first attempt to humanize warfare. His "law of nature" recognized the rights of state integrity and broke with the code of *vae victis*. A complete repudiation of war would have been alien to the mood of the period, but, distinguishing between "just" and "unjust" wars, GROTIUS took the initial step. He started a line of thinking which finally led to the view that inter-national law equals inter-national peace.

On the tortuous road toward this goal, remarkable milestones were the creation of the Permanent Court of Inter-national Justice in 1919, and its successor, the International Court of Justice in 1946. SIR HERSCH LAUTERPACHT treats both courts as a unity, calling them by the collective title "Inter-national Court". His book is a revised and enlarged edition of a study, published in 1934, on the Permanent Court. Owing to the author's personal affiliation with the Inter-national Court—he became a member in 1954—his approach is strictly non-critical. He does not attempt a full length coverage of the Court's activities, but he surveys a substantial number of cases. He concentrates on the Court's *duplex* role as agent and creator of law. The Court functions because inter-national law gives it a mandate; the law itself thrives on the pronouncements of the Court. Such interaction, typical for common-law thinking, stems from the common-law roots of inter-national law. Just as the common law of England reflects the customs and usages of the English people, GROTIUS' Law of Nature encompasses the mores and habits of civilized nations. If court interpretation could strengthen the king's edicts, arbitration could do the same for treaties. The common-law character of inter-national law is further underscored by the absence of a sovereign law giver. Until the United Nations of the world are replaced by a singular World Nation, world law is not the expression of one, but a compromise between several sovereign wills.

SIR HERSCH LAUTERPACHT points out that sovereignty entitles a state to judge its own actions; inter-national law cancels the maxim *Nemo judex in re sua*. Again, this gives rise to an intriguing reciprocity. Inter-national law aims to protect national independence. Yet inter-national law cannot survive unless the nations are willing to surrender part of their independence and to merge it into a trans-national sovereignty. Their limited readiness to do so, compounds the problems of the Inter-national Court. Its judges must be aware that, in concept and range, inter-national law differs from state law. National justice upholds the peace of the realm, and at the same time the authority of its government. Inter-national does not, as yet, serve any central authority; the accent is on persuasion more than on force. In state law, "consent of the governed" may be an abstract thought, in inter-national law it is a formidable reality.

As a result, the Inter-national Court uses its powers with judicial restraint. This often proves a blessing in disguise. The author cites numerous instances where "advisory opinions" seemed preferable to straight adjudication, and, in the end, more

effective. One may, however, agree with him that judicial boldness would increase in proportion to increasing world law consciousness. The book discloses a variety of unknown disputes, which the Court settled before they became headlines. Clearly, the Court's performance cannot be measured by publicity; unobtrusiveness, tact, pliability are prime requirements of its work.

Despite its slow moving style and an intricate footnote arrangement, the book has great merits. It draws, from the vantage point of an expert observer, informative sketches of inter-national arbitration. More important, it shows how far inter-national law absorbed, how far it rejected the principles of general jurisprudence. It brings into clear focus not only the issues submitted to the Court, but the intellectual problems faced by its judges. For these learned and brave men, it will evoke a great deal of unsolicited but deserved admiration. It will be rewarding to everyone who is interested in inter-national law and its relationship to general legal thought.

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THE SUPREME COURT AND STATE POLICE POWER, A STUDY IN FEDERALISM. By Ruth Locke Roettinger. Washington, D. C.: Public Affairs Press, 1957. Pp. 252. $4.50.

"THE states were never more loved than they are today." So begins this book reviewing the decisions of the United States Supreme Court in eleven principal categories which the author deems significant in tracing the Court's position on the role of the states in our federal system.

The introductory chapter of the book, written at a time of high prosperity, clearly reveals that there are many champions of states' rights who would like to bring "government back home from Washington." Unfortunately this review is being written perhaps only a few months after this Introduction was, but at a time when this country is in the midst of a recession, however characterized, and the clamor of the people, both states' righters and others, is descending upon Washington to make known their position: They want something done about the recession, and they want the federal government to do it!

As any student of American history knows, our federal government is one of "delegated" powers, a government to which certain enumerated powers, as set forth in a document entitled the Constitution, were granted by those groups which already possessed that power namely the states. The question arises, however, as to the status of those powers not granted to the central authority. According to the Tenth Amendment to the Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The crucial questions as to whether the federal or the state government may legislate as to certain subject matter arise where there appears to be a conflict between local legislation and a Constitutional provision. Such questions also arise where Congress has been granted a power and either has not exercised it, or has exercised it, but not completely.

Since the instrument of judicial review, here used in the loose sense, has been utilized by the Court to carve out the limits within which the states can exercise their reserved powers, Dr. Roettinger turns to judicial decision by the highest court of the land to find the picture of state "police power" as it exists today.

Not only for convenience, but in order to prove her point, Dr. Roettinger looks into the exercise of the police power before 1930, a period of about 125 years, and then microscopically examines the decisions rendered by each of the differently composed Courts, in the 27 years following 1930. Particularly distressing to the author in this latter period are the "racial segregation" and "control of subversion" cases by the Supreme Court. Yet, the fact is that Congress has not seen fit to overrule the effects of these decisions, evidently displaying their approval of them. In any event, the conclusion she reaches as to the entire historic trend of Court decisions regarding federal-state relations appears to be the same:

". . . The concept of police power has been used by the Court as an instrument to determine the reach of state legislative power according to the exigencies of the times and the changing disposition of the Court (p. 22).

". . .

". . . These decisions [the school segregation and state sedition cases] seem to leave the present Court's conception of police power in uncertainty and might well portend a swing of the judicial pendulum away from Taney's balance under a federal system and toward the consolidation of a national state (p. 209).

The reconciliation of the powers which were delegated to the Government of the United States and those which were retained by the States is indeed difficult. However, conflicts were to be resolved by the Supreme Court of the United States, a court created by the powers delegated by the States as set forth in Article III of the Constitution. At an early date the doctrine of judicial review in all Constitutional matters by the Supreme Court was established by John Marshall in *Marbury* v. *Madison,* 1 Cranch 137 (1803), and it has remained the law ever since.

In reading this book, it is evident that the Justices of the Supreme Court recognized the problem at hand. The statement by Frankfurter, J. in *Kirschbaum* v. *Walling,* 316 U. S. 517 (1942), is most applicable:

"Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the Central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. . . . The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration . . ." (at pp. 103-104).

Justice Douglas, with Justice Black, dissenting in the case of *New York* v. *United States,* 326 U. S. 572 (1946), likewise recognized the problem when the majority of the Court decided the federal government could tax a state mineral water enterprise. They pointed out the following:

". . . What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in South Carolina v. United States, any activity in which a State engages within the limits of its police power is a legitimate governmental activity. . . . The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. . . . The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy. . . . The Constitution is a compact between sovereigns. . . . If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status . . . (at p. 134)."

Those particularly interested in constitutional law, should read this book in order to gain the full views of the so-called "states' rights." Those who are interested in the development of the law in the area of state police powers should read this book as a well-done thumbnail review of the law in this field. Finally, those who are interested in the Supreme Court simply as lawyers would do well to read this book as a stimulating experience. All, when they have done so, will marvel at the intelligence and wisdom displayed by the Supreme Court over the years in dealing with this difficult problem of federal-state relations.

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