

LEGAL RELATIONS AMONG LEGAL SYSTEMS:
GAMES, PAINS, AND SOME PENDING PROBLEMS

COVEY T. OLIVER

The writer has worked at the law and law-linked activities for forty-three years since finishing law school. Two-thirds of this working life has been in law teaching and scholarship; the remainder has been spent mainly in foreign affairs operations linked to law, such as economic warfare, international economic policy, post-war settlements, development assistance, and resource allocation issues. He has been a tenured instructor at three law schools, those of the Universities of Texas, California at Berkeley, and Pennsylvania. He has visited at a number of other American law schools and several foreign ones. He has lectured twice at the Hague Academy of International Law on issues pertaining to the law of international agreements. His civil service classification is International Economist, and he has served the Department of State in one capacity or another on at least six different occasions.

In a sense, my 1936 appointment to the Texas Law School faculty set a pattern for my entire career. The offer of a professorship and the opportunity to develop the law school's first regular course in federal taxation came as complete surprises to me. Ever since that initial appointment every job has been a surprise, rather than a targeted objective. Despite the seeming disorder that has resulted, in retrospect I see, like the man who discovered he had been talking prose all his life, that I have actually spent a great deal of my time studying the relationships among, and the relative authoritativeness and effectiveness of, different legal orders or systems.

Thus, because the tax curriculum in those days consisted of various wealth and family law courses, my eventual dissertation for an advanced law degree in federal taxation—and some of my later tax writing—dealt with the interface between the private law of land and marital property and the public law and policies of federal taxation.

Later, after seven years in foreign affairs operations, when the Berkeley law faculty recruited me (just as I was about to enter the Foreign Service) to teach international public law, I inevitably became involved with the relationships among international law,

international relations, and the national legal systems of the United States and other countries. Numerous and weighty questions arise in this context; so many, indeed, that this discourse will focus on them, after brief reference to several other experiences involving the interaction of legal orders.

My role as co-reporter of the American Law Institute's pioneering effort to restate the key legal principles and rules at play in United States foreign-affairs operations provided another opportunity to study relationships among legal systems.¹ The content and authoritativeness of these rules and principles had to be identified, whether their sources were in national law or in customary or treaty-made international law.

The *Restatement* experience quickly involved me in the foreign relations problems of one federal state, the United States of America. The complex relationship of the executive, legislative, and judicial branches, and its impact upon the formation and implementation of international agreements, are unique in the world. Elsewhere I have pointed out that the United States is one of only five or six democratic, truly federal, units in the international community of states. Of this small group, the United States is the only state that also mandates (at the constitutional level) the strict separation of powers, complicates this by checks and balances and gaps in the characterization of certain powers as "executive" or "legislative," and fails to specify a mode for the resolution of the resulting conflicts of authority. This, too, is a theme of continued concern on my part.

Along the way—at the University of Pennsylvania Law School—I enjoyed the opportunity of teaching private international law, or conflict of laws, in an American, federalistic, zone-of-the-interior version. Here, truly, there is a tangle of disorder among legal systems which involves the systems of the various states of the Union and also the relationship between the federal government and the states. This tangle demonstrates mainly that there is amazing divergence in American private law, that *stare decisis* tends to perpetuate this divergence even when uniform legislation is widely in effect, and that we have not yet found a reliable modality for resolving the relative authoritativeness of competing rules of decision that find their sources in different internal systems.

And there is also admiralty—that joyous romp of a course in which one talks with a seagoing gait and is attracted to a domestic

¹ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

version of comparative law. Admiralty involves the interplay of landlubber law and sea law, the latter too often deemed to have evolved from "the Rhodian Law and All That" of Professors Gilmore and Black, rather than from its true sources—judicial perceptions of brooding omnipresences and occasional, partial congressional pronouncements.

Finally, in international economic transactions one moves to a "multilaw" model that involves the laws of the country where the transaction originates (sending state), those of the state of destination (receiving state), and the rules and principles of international law. The last body of law reflects international regulatory efforts in fields such as movements of goods and services across frontiers (trade), direct foreign investment (through multinational enterprises or otherwise), and foreign exchange operations.

Thus, it has been my fate or my good fortune—I rather consider it the latter—to have been required to think about and teach about multidimensional versions of the common law judge's "seamless web" and the "diversities" of law, witty or unwitty. Multidimensional law, I suppose, like Chinese checkers, is more fun for some than two-dimensional games, and more intriguing for its own analytical complexity than any single system could be.

Is there any "opportunity cost," any catch? There is indeed, I fear. A player at multidimensional law simply cannot be master of all the systems involved. Hence, he or she is doomed either to suffer the pain or constraints of honest doubts as to competence, or to indulge in one of two hubristic follies: either (1) simply becoming insensitive to (ignoring psychologically) elements not mastered; or (2) assuming without justification a mastery not in fact possessed. Nonetheless, some degree of concentration on relationships among systems must be undertaken by some scholars, for otherwise legal systems and events are artificially separated and studied in isolation, at the cost of important insights. The need for such a broader view is especially apparent in the field of American conflict of laws, where only a few scholars have worked in transnational conflict of laws and international public law. *Restatement (Second) of Conflict of Laws*, for example, states the reach of legislative jurisdiction without reference to the limitations upon national state jurisdiction to "prescribe" the rule, a subject that is dealt with in the *Restatement (Second) of the Foreign Relations Law of the United States*. Similarly, some study books on international economic transactions pay slight or no attention to the problems of identifying the present customary international law applicable to direct foreign investments

in a receiving state by aliens—or, what is worse, they assume that nineteenth century formulations still represent a consensus.

International public law, in particular, has suffered from the ethnocentrism of scholars who write in their closets, with scarce attention to the actual phenomena of “how states actually go ‘round,’ ” as the late Karl Llewellyn would have put it. Of course, the existence of the writer or teacher who does not distinguish between his or her preferences or client’s interests as to what the law should be and what the law in fact is is not a phenomenon noticeable only in an international legal context. However, in the Anglo-American legal system the problem does not ordinarily stand out in the same way.

In municipal systems derived from the British model, the judge does not have to accept *doctrinne* from scholars and is tolerated (as to his or her own relatively undefined judicial innovativeness) beyond the point where the legal trails end, as the late Judge (and onetime Dean) Herbert F. Goodrich once put it. The international judge, on the other hand, is more tempted, particularly if he or she comes from a civil law system, by the authoritativeness of the scholar’s assertions. But international judges are, on the whole, staid rather than innovative or activist in nature, either because the civil law scholars whom the judges understand are, unlike some American scholars, rigorous in their differentiations between the law that is and the law that the scholar would prefer to see, or because the judges themselves are all too aware of the ephemeral quality of their decisionmaking authority-in-fact.

Elaborate wishfulness as to what the rules of international law are is fatal, because it divorces the normative from the authoritative and masks urgent problems of identification and formulation of effective legal rules and principles. Customary international law in particular is in a state of crisis at the present time.

This is caused by several overlapping developments. One is that customary law, by the very limitations of its genesis in the acquiescence of a very substantial preponderance of the legally equal states in the international community, cannot deal with detailed or technical subject matter. Moreover, customary international law, unlike “law-making treaties,” cannot bring into conforming parallelism the internal policies, rules, and administrative practices of states. Finally, and most importantly, the old consensus of “Christian Princes” is only selectively acceptable as *lex lata* in the Second World of the socialist states, the Third World of well-endowed developing countries, the Fourth World of non-well-endowed de-

veloping countries, and the pitiful Fifth World of the "make-believe" or "no chance" countries. Given the existence of these "new" worlds (in a somewhat grim sense), it is doubtful whether the developed countries' views on what customary law is state an acceptable consensus outside the First World, except with respect to such traditional rules as those that strongly support highly nationalistic political principles, such as "sovereignty," immunity from international scrutiny of internal conduct, and freedom from detriments once considered legitimate options, but now labelled "economic coercion," "imperialism," or "illicit interventionism."

Consider two illustrations:

1. The world is presently divided over economic issues of the highest magnitude. The capital-exporting countries continue to defend legal principles that are no longer acceptable to the capital-importing countries whose jejune demands entirely ignore the basic economic realities. At this writing, the present Administration clings, without review, to a 1972 Nixonian assertion of What The Law Is as to nationalizations of foreign investment that was forty years out of date in 1972!² The reiteration by either side of views of the law that are anathema to the other stops action, innovativeness, and resolution of these difficult issues. It will be interesting to observe what the projected new *Restatement of the Foreign Relations Law of the United States* will accept as proper modalities for ascertaining what customary law is in today's world. This question, indeed, is a challenge to all scholarship in the field.

2. The developing countries—indeed an overwhelming majority of the members of the United Nations—accepted a few years ago a so-called "convention" on economic rights and duties of states that is so unbalanced, and so inequitable as between developed and developing states (at widely variant levels and potentials for development), that it has again divided the planet over what customary law is. "Rich," developed countries must contribute to the development of "poor" countries, but the latter are declared immune from all legal restraints as to how they treat the economic interests of the nationals of the first group. The "poor" countries are also absolutely free to engage in state-created cartels and to charge all the traffic will bear as to exports, but developed countries

² Statement of Policy by the President of the United States Concerning the International Minimum Standard, 8 WEEKLY COMP. DOC. 64 (1972), quoted in N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 1070 (1973).

must provide developing countries with market opportunities protected from the economic principle of comparative advantage and the legal principle of most-favored-nation treatment. I do not assert the invalidity on policy grounds of any of these conflicting attitudes. I only point out that here again we see evidence of a fissuring of planetary policy that is both wide and deep. And so far there has been little "give" on either side.

I have hopes that it might be possible within a reasonably short time for the capital-exporting countries, particularly the United States, to explore with countries in Latin America and elsewhere, whose levels of development create absorptive capacity for private-sector business investment and a felt need for modernization of business methods, the possibility of reducing the impasse over new investment starts. Such progress is unlikely to occur, however, if the capital-exporting countries do not alter their legal and economic attitudes about direct foreign investment. The capital exporters (particularly, it seems to me, through their older, more established lawyers) follow uncritically an ancient common law analogy: if the tree is mine, so is its fruit, so long as the tree shall stand. This philosophy ignores the fact that the "trees" involved are perpetually controlled subsidiaries (based of course in the host countries) whose stock is never traded and is held 100% (or that figure less a few qualifying shares) by the foreign parent corporation. Thus, the right to the "fruit" (dividends returned to the sending country in the money of that country) is a perpetual drain on the always too-slight monetary reserves of the host country.

There is simply no private-sector long-term loan money available to developing countries; this is the principal reason why we have the World Bank and regional development banks. Putting to one side a few celebrated cases in which particular direct foreign investments have soured for other reasons, host countries' leaders—and in a more or less subliminal way their populaces—are troubled by the "mortmain" or "perpetuities" effect of direct foreign investment in share form. Some countries, notably the present five in the Andean Economic Community, as well as Mexico and Argentina, have attempted to respond to the mortmain effect by requiring new foreign business investment ventures to agree at entry to reduce to a minority share position within a stated number of years, usually fifteen, willy-nilly.

Considering start-up and related risks, foreign business capital shuns such requirements and tends to stay out. Sometimes this forces a capital-short, business know-how-deficient country whose

government can impose its rightist will, as in Chile, to abandon the chosen protective response, with a resulting accumulation of suppressed popular dissatisfaction that one day inevitably will break out.

A possible method of breaking the impasse might well be to alter somewhat the expectations of the business investors and the control mechanisms of the host countries. Would business capital flow if it were assured by host country law that it could keep its majority position until a complete recoupment of total investment (ten times, twenty times, thirty times?) had been achieved, whereupon its former equity would convert to a creditor interest? Would host countries of the eligible group I have described "buy" this, assuming assurances that direct foreign investment flows thereunder would start up again? The remarks of Dr. Carlos Lleras Restrepo, a highly experienced Latin American lawyer-economist-politician, and former President of Colombia, suggest an affirmative response. I have recounted the substance of that conversation elsewhere.

When he was President of Colombia, Dr. Carlos Lleras Restrepo several times commented that what is most needed from the private sector or developed countries is a supply of long-term, *loan capital*. The developing countries everywhere are faced with the fact that the private sector foreign investor today is almost [always] an *equity* (or ownership) investor. It has been observed in Latin America that when the United States developed, with European capital flows, the foreign investors were mainly creditors and that in time a creditor, inevitably, is got rid of. (He is paid off, defaulted out, or inflated away.) The foreign owner, on the other hand, has a perpetual claim on the productivity, the foreign exchange resources, and the economic utilizations (priorities) in the host country. Times change and circumstances vary. The Great Depression left North Americans rather favoring equity over creditor investment, as "better" or "more liberal." It is not seen that way in Latin America today.³

There is another challenge to which I am self-pledged during the working time that might be left to me. It concerns the problem of adjusting our generally estimable eighteenth century Constitution to modern international life insofar as international agree-

³ Oliver, *The Andean Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972), quoted in N. LEECH, C. OLIVER & J. SWEENEY, *supra* note 2, at 1160-61 (emphasis in original).

ments are concerned. When I addressed this and other issues of American foreign affairs in 1976 at the American Academy of Political and Social Science, as the nation celebrated its Bicentennial, I did not foresee that in 1978 and 1979 the "treaty problem" would have become as acute as it has. The cliffhanger in the Senate on the Panama Canal treaties, the heavy pile of legislation implementing the Canal treaties that the House of Representatives presently holds the President hostage to, and the difficulty of formulating an appropriate executive response to the high probability that SALT II will not be approved by two-thirds of the senators present and voting poignantly demonstrate the significance of the "treaty problem" to United States foreign policy. The fates of the four multilateral treaties on human rights, finally signed by a president and sent to the Senate, laden with reservations, to await the pleasure of two-thirds of the Senate, and the Convention on Genocide, which has languished in that body these many, many years provide proof of the cumbersome nature of the treaty-making process.

I was surprised to find much complacency about our unique position in foreign relations among the experts assembled by the American Academy of Political and Social Science. I could not escape the feeling that many of them believe that the world community simply has to accommodate our idiosyncratic ways of doing things internationally, much as, one historian says, Rome expected the rest of the world to defer to its whims. Today, of course, the threat of opening Pandora's box through a constitutional convention called to impose a debt-ceiling amendment creates a new resistance to formal change in our basic law, even as to the manner in which we conduct foreign relations.

However, I think it is possible to nurture an evolution within our existing constitutional framework that permits the President and simple majorities in both houses to bring into effect any full-fledged "treaty" that alternatively could go to the Senate under article II. The basic proof of the legitimacy of this alternative to the article II rule (two-thirds of the Senate) was established years ago by McDougal and Lans,⁴ and was "ratified" by the first *Restatement of the Foreign Relations Law of the United States*.⁵ The legislative-executive agreement alternative must be carefully an-

⁴ McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* pts. 1 & 2, 54 YALE L.J. 181, 534 (1945).

⁵ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 120 (1965).

alyzed; for example, one fruitful area of inquiry is the validity of the alternative with respect to international agreements that are not intended to have, or be capable of having, internal effect in the United States as law. Of course, if we dared, we would be better off repealing the two-thirds rule and taking away from the Senate a no-longer needed special prerogative. The two-thirds rule reflected a momentary political compromise in the large states-small states issue at Philadelphia that hot summer of 1787, and even there, in the final days, two-thirds approval was sustained by just one vote. As to its unitary role in the ratification of treaties, the Senate is no longer, thanks to the twelfth amendment, in any sense the collective of the states' heads of delegation to a sort of internal united nations.

A great lawyer, over a decade my senior, is fond of saying, "Only the gamefish swims upstream." Persons sustained by society in what Dean Charles McCormick used to refer to as "that most enviable branch of the legal profession," have and relish often this freedom. I am fortunate to have had it come my way, with just enough of another life, that of an officer in the hierarchies of government and international organizations, to make the contrast delicious, instructive, and, I hope, useful.