

BOOK REVIEW

THE STRUCTURE OF IMPARTIALITY. BY THOMAS M. FRANCK. New York: The Macmillan Company, 1968. Pp. 344, \$8.95.

Thomas B. Moorhead †

“Experience has shown that one can find persons sufficiently unbiased to determine more often truly than untruly whether a thing has or has not happened, and usually to apply justly and correctly an existing law to admitted or ascertained facts.”¹

“Finally he came to his third reason why an agreement may not be possible. It turns on the problem of the administrator of the agreement. Here, he was vehement and unqualified. He would never accept a single neutral administrator. Why? Because, he said, while there are neutral countries, there are no neutral men. He would not accept a Communist administrator and I cannot accept a non-Communist administrator. I will never entrust the security of the Soviet Union to any foreigner. We cannot have another Hammarskjold, no matter where he comes from among the neutral countries.

I found this enlightening. It was plain to me that here is a new dogma, that there are no neutral men. After all the Soviet Union had accepted Trygve Lie and Hammarskjold. The Soviet Government has now come to the conclusion that there can be no such thing as an impartial civil servant in this deeply divided world, and that the kind of political celibacy which the British theory of the civil service calls for is in international affairs a fiction. This new dogma has long consequences. It means that there can be international cooperation only if, in the administration as well as in the policy-making, the Soviet Union has a veto.”²

“Impartiality,” Chief Justice Hughes wrote, “is not a technical conception. It is a state of mind.”³ Professor Thomas M. Franck

† Vice President for Industrial Relations, Hooker Chemical Corporation. B.A. 1956, Yale University. LL.B. 1959, University of Pennsylvania. LL.M. 1964, New York University. Mr. Moorhead has studied at The Hague Academy of International Law and is a member of the New York Bar.

¹ WOLF & THE FABIAN SOCIETY, *INTERNATIONAL GOVERNMENT*, 70-71 (1916).

² Interview of Chairman Khrushchev by Walter Lippmann, N.Y. Herald Tribune, Apr. 17, 1961, at 2, cols. 5-6.

³ *United States v. Wood*, 299 U.S. 123, 145 (1936).

has undertaken the monumental task of exploring an international state of mind which is the core issue in settling many international disputes: the concept of impartiality. The central question is the one posed by Chairman Khrushchev in his interview with Walter Lippmann: can there ever be a truly impartial decision-maker in the international sphere?

An understanding of the nature of impartiality—and especially of what it is not⁴—might lead to acceptance of international third-party decision-making or adjudication. So far, virtually no progress has been made towards such acceptance. For as Professor Franck points out, in the past half century the choice of military weapons available to members of the international community for settlement of disputes has grown immensely while legal methods of adjustment have scarcely added a single new device to the armory of peaceful settlement. No breakthrough in the direction of peaceful third-party lawmaking can be expected in the international community until the problem of the impartiality of decision-makers is satisfactorily resolved. No administrative or judicial decision-making system, except in a dictatorship, can be widely accepted or routinely resorted to until the essential credential of impartiality has been established. In Professor Frank's opinion, the failure of the international community to develop a system of third-party lawmaking comparable to that of the national community may well prove to be the fatal error of our civilization.

The impartiality about which Professor Franck writes is not the mechanical impartiality of two men settling a dispute by flipping a coin. All decisions made by human judges embrace the subjectivity of human perception. The impartiality of a decision-maker is the detachment achieved by not identifying with one of the disputing parties. However, this does not mean that he will not have biases. Impartiality is not "preneutrality."⁵

Society has a preference for decisions which are consistent with that which has gone before. To meet this expectation the internationally impartial person need not be divinely infallible, but he must not be responsive to every whim of public feeling. Impartiality is the subjective characteristic by which the international decision-maker achieves a reputation for consistency. How to develop this reputation and nurture trust in the decision-maker is the theme of Professor Franck's discussion of impartiality.

Since law does not claim to develop absolute truths, as do religion and science, the individual or state confronted with the application of international law is inclined to be dubious about assurances of fairness

⁴ Professor Franck points out that impartiality is not objectively definable except in terms of what it is not.

⁵ "Preneutrality" has been described as complete neutrality of thought in the decision-maker. See C. DEVISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 306-07 (1957).

or rationality in the international decision-maker. Thus, there is need for a standard against which a decision can be measured. This means that if a judge is to be considered impartial, there must be a body of law sufficiently developed to provide standards that, while not absolute in the scientific or theological sense, are at least formulated, generalized hypotheses. These standards will be the test of impartiality. While there is a substantial body of such law in treaties and agreed-upon custom, Professor Franck persuasively argues that there is an additional, overlooked area—the customary conduct of states. He states that even communist countries concede on occasion the existence of international laws binding because of general community acceptance even though unendorsed by the state in question. In Professor Franck's words it is inevitable

that rights of one are circumscribed by the rights of others, and that all human and national conduct, because it affects other members of the community, must constantly be shaped and limited by considerations of mutual accommodation.⁶

The impartial decision-maker may be subjected to two forms of bias-inducing pressure: external and internal. The external pressures, such as bribes or threats to personal security, are more easily controlled than the internal pressures like the psychology and morality of the decision-maker. Professor Franck explores methods of controlling internal pressures on the decision-maker, and suggests that a useful beginning towards psychological impartiality would be international application of the basic legal maxim that no man shall be a judge of his own case.

In this connection, he recommends that judges of an international court not be permitted to sit on cases where their own countries are parties before the court, and, of course, that the special ad hoc judge be eliminated from panels of the court. Professor Franck goes even further, saying that judges whose nations or citizenship have a political or economic stake in the outcome of a dispute should not be called upon to decide the dispute even though they are not parties to it, and, moreover, that persons should not even be called upon to decide a controversy who are citizens of states allied with a disputant or who are known to have strong personal feelings of friendship or antipathy toward a disputing state. Professor Franck proposes a modified form of the Missouri Plan for use in selection of judges for the International Court of Justice. His plan would include a selection method based upon acceptability of the individual by his professional peers, his national government, and the community of states. In order to remain in office, he would have to retain approval of all three. Thus the decision-maker

⁶ T. FRANCK, *THE STRUCTURE OF IMPARTIALITY* 130 (1968).

would be exposed to, and conditioned by, a balance of influences structured to make him responsive to all but captive to none.

Professor Franck notes that the judge often appears to be just another interfering social worker to those equipped to look after their own interests. On the other hand, the large powers have an important stake in making sure that the use of third-party methods of international settlement become routine procedure. If they do not they may easily be drawn into nuclear confrontations, even in situations where their interests are not at stake. Although not every dispute is subject to decision by a court or by impartial body, it is evident that a great number are.

Professor Franck believes that it is a mistake to limit the parties which may appear before the World Court to states. Not only will the judge know far too much about the parties before him, but psychologically it makes too prominent the fact that the dispute pits one country against another in the decision-making process. The affected individuals tend to get lost in the shuffle. He correctly points out that if the Supreme Court of the United States from the beginning had been assigned to do nothing but decide disputes between states of the Union, or suits attacking state action, it long ago would have been relegated to judicial history's refuse heap.⁷

International courts provide the impartiality that Professor Franck thinks is absent when national courts apply international law in deciding disputes. Consider, for example, the potential charge of partiality in the *Banco Nacional de Cuba v. Sabbatino*⁸ decision had the parties been reversed and a Cuban court dismissed a suit by an American plaintiff. Such charges of prejudice might also have been levelled against Turkey in the *Lotus Case*,⁹ if the Turkish Court had been content to determine

⁷ Professor Franck does not discuss the problem of the execution of the writ in a suit between individuals before an international court. Would the writ be enforceable within the losing party's country, and would it be subject to collateral attack in national courts?

⁸ 193 F. Supp. 375 (S.D.N.Y. 1961), *rev'd* 376 U.S. 398 (1964). A New York buyer contracted with a Cuban corporation to buy sugar. After the Cuban government nationalized the selling company and the buyer signed a new contract with the converted corporation, which subsequently delivered the sugar, the New York court appointed a receiver to administer New York assets of the nationalized company. Included among the assets were the proceeds from the sale, which the buyer turned over to the receiver. Dismissing an action brought by the Cuban company against the buyer and the receiver, the lower court held that the nationalization violated international law and refused to enforce the Cuban law. Reversing the district court, the Court held, in an opinion by Mr. Justice Harlan, that although the United States can apply international law as part of its own law in appropriate circumstances, "the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders." *Id.* at 423.

⁹ Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9; see J. BRIERLY, *THE LAW OF NATIONS* 301-04 (1963). A French officer was prosecuted in the Turkish Courts for criminal negligence in a collision between the French ship *Lotus* and a Turkish ship, which caused the death of a Turkish crewman. Rejecting the defense of lack of jurisdiction, the International Court of Justice held that Turkey did have jurisdiction over persons causing injury within Turkish territory. The ship was in Turkish territory in this case.

for itself whether it had jurisdiction over a French naval officer. But submission to the International Court gave the Turkish court's decision an imprimatur of international impartiality. Such an imprimatur could be insured in other cases by a procedure in which decisions of national courts that interpret treaties or decide other issues of international law between citizens of different states be subject to review by international tribunals.

Referring to ancient thinkers and early cases from many countries, he relates the problems they faced and the solutions they developed to the problems facing the international community today. For example, he contrasts Ghengis Kahn's skill in obtaining the support of local people with the corresponding inability of General Westmoreland, thereby relating past and present, East and West.

Although the title may be somewhat foreboding, it is a very readable book. It has the casual style of an informal talk, although the conversational nature of the book is impaired occasionally by phrases such as, "[T]he uniqueness of the existential relativism in the order-creating system of judge-made law" Professor Franck is also given to excessive use of italics.

Lastly, it is an important book because it focuses on the real problem retarding the acceptance of third-party international decision-making: the question of impartiality. Impartiality is not only a necessity for the international arbiter, it is a fundamental prerequisite to the acceptance of an international civil service and an international governing body. Until countries are satisfied that the United Nations is impartial, quasi-legislative acts of the General Assembly will be ignored, and specialized committees will find their solutions to world problems considered suspect. Professor Franck has opened a dialogue which should be studied, replied to, and dissected. The book should be valuable supplementary reading in any course dealing with international law.