

## BOOK REVIEWS

**THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW.** By Charles de Visscher. Translated from the French by P. E. Corbett. Princeton: Princeton University Press, 1957. Pp. xvi, 381. \$5.00.

It is a great privilege to review Charles de Visscher's book which, by all accounts, already ranks among the classics of international law. It is not a systematic study. The learned author chose "the most fundamental institutions" "to illustrate views calculated to vitalize the study of positive international law by throwing new light upon it. . . ." (p. 164). This approach covers Books III and IV, and the longest part of the work. To this we may add the preliminary study (Book I) "of the political system within which international relations have been conducted since the beginnings of the modern State." (p. xiii). Thus the anatomy, physiology and pathology of the "heart" of international law have been the subject of a masterly exposition.

The author has fulfilled his aim to "re-establish contact with the realities of every kind." As he notes, "the vistas that it reveals assuredly lack the intellectual elegance and the dialectical charm of the theories that jealously insist on the autonomy of law. They have one merit: they open upon life." (p. xiii).

This leads the author to reject the pure theory of law in so far as it gives "a purely formal image of the legal order" and identifies the State "with norms." For Professor de Visscher, "the State is a social reality whose elements cannot be brought within the confines of so transcendental a view." (p. 66). Kelsen himself "seems to have abandoned some of the dogmatic rigidity of his earlier writings." (p. 65, n.22).

The author comes very near to unifying form and life, logic and reality; in his own theory of law in general, and of international law in particular. Although this reviewer is very reluctant to speak of de Visscher's own theory as it is patent that he wants to escape "theorizing" as far as possible, one still feels in the book a nostalgia of natural law doctrines which is never—it is true—allowed to distort the significance of realities. Here we beg to differ. We cannot agree that "the ultimate explanation of society as of law is found beyond society, in individual consciences." (p. 99). Bergonism may be a good philosophy. It is outside the realm of the science of law. The ethical element in law cannot be injected from the outside, from above the social milieu. It is part and parcel of this social milieu and reflects it. The morality of law cannot be different from the morality of the society it regulates.

Form and norm are given a transcendental value in the pure theory of law. This transcendental value is given by de Visscher to morals. In both cases we step outside legal science proper.

This explains why the theory of power, as evolved by the learned author, is not very satisfactory. Power he opposes to law. But power is never defined. Sometimes it appears to be pure force, sometimes social pressure, sometimes political, military, economic or even spiritual power, and sometimes competence or jurisdiction. Sometimes it stands for the men in power or the organs of the State or the State itself. "Power, like love," Professor Jessup has reminded us, "is 'a many splendored thing.'"<sup>1</sup>

It seems to us that what is called "General Relations of Power and Law" (Book II), is in fact a survey of the relations between the social milieu and law. As such it is highly educational. The author brings in his wide experience as a negotiator, a judge and a scholar.

Thus, a consideration of the social milieu as it is "prevents us especially from assimilating resort to force in the present regime of self-help to the legal sanction, monopoly of power in the internal order." (p. 72). Noting that here power means the State, one cannot but agree with this view. As Professor de Visscher explains, self-help is not simply the consequence of a lower degree of centralization in international society. It cannot be described as a legal sanction as long as it is not used with "the impersonal character of constraint in the service of law." (p. 72). It is true that in the internal order legal sanctions may be used to pursue personal aims. But a machinery for redress exists. And such an abuse (*detournement depouvoir*) is exceptional.

The effects of what the author describes as "hegemonial tensions" (p. 82) are bluntly analyzed:

"Any lasting antagonism produces a measure of similarity in the opponents. . . . Methods become similar: the psychological war preached by Secretary of State John Foster Dulles answers the Soviet Government's propaganda of subversion. . . . [T]he United States of America's patronage of 'European Communities' is the reply to the establishment of the satellite States." (pp. 83-84).

As a European writing a review for an American audience, I deem it necessary to underline such an analysis that comes from one whose moderation and objectivity cannot be challenged. It explains, in part, the misapprehensions felt in many quarters. Lucidly the author does not deny that "some hegemonial tensions, while changing political structures, may facilitate transition from the traditional juxtaposition of sovereignties to the confederate or federal organization and thus make possible in the legal domain the progress that may be expected from a reduction of national exclusivism." (p. 86).

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1. JESSUP, *TRANSNATIONAL LAW* 12 (1956).

The explanation of the "veto" in the Security Council is entirely devoid of wishful thinking:

"The permanent members' right of veto was the *sine qua non* of the Charter. It might be said that the principle was inscribed in international reality even before it was sanctioned by a text. Criticism errs when it treats the veto as the decisive factor in the paralysis that has overtaken the Security Council. With or without the veto, no decision of real political importance, and especially no measure of coercion, could have been taken either directly against a great Power or even, in the present divided condition of the world, against a State protected by a great Power. In all this the veto is only an instrument; the real cause lies in the state of basic political relations among the great Powers." (pp. 109-10).

These few examples give a fair idea of the richness of the work. The development of international law is put in its proper prospective in little more than sixty pages (pp. 3-67) that no student of international relations or law should omit to read. We might, perhaps, like the author to re-examine his opinion of Hobbes. We do not agree that "Hobbes' idea can lead only to the denial of international law." (p. 15). In fact, we find many common points in the observations of Hobbes and those of de Visscher.

More than two-thirds of the book deals with positive international law, ". . . the law which is effectively applied in the relations of States by reason of the obligatory character that they recognize in it." (p. 133). Every rule, to retain its full force of application must satisfy a double requirement: (1) it must correspond to social needs, and (2) the accuracy of its formal expression must compare with the practice of States.

Perhaps we find a trace of natural law doctrines in the criticism offered of the "double function" theory developed by Professor Georges Scelle. (p. 137). "Whatever importance may be attributed to power, effectiveness, the accomplished fact, and, in a word, to force in the existing process of developing of international law," comments Professor de Visscher, "the jurist cannot agree to regard the activities cited, where particular and contingent political interests play so large a part, as the performance of constitutional functions." (p. 138). This leads us astray from a realistic interpretation of international law. First of all, "power" as exercised is never "pure" force, it integrates military, economic, political, and also moral elements. Secondly, not all activities make law, but only those satisfying the double requirement mentioned.

Rightly, the State is still given "a key position" in the international order. (Book III, c. II). The creation and disappearance of States is examined. "Recognizing the appearance on a territory of a political entity showing the characteristics generally attributed to the State, it [the international legal order] merely invests it with personality in the law of nations

and requires it to fulfill the international duties that corresponds to its authority." (p. 166).

Professor de Visscher rejects "a current but inexact terminology" that refers to state "succession." (p. 170). We may mention our own remarks on O'Connell's well documented work in the *Journal de Droit International*.<sup>2</sup> We also underline the importance of the application of the principle of the continuity of law or the legal order in such a case.

Two sections deal with *Man* and *Territory* in positive international law. The chapter ends with an examination of the status of international organization, the reserved domain and the so-called European integration agreements. (pp. 219-27).

*Inter-State Relations* is the title of Chapter III. It deals first with international recognition. The nature of the recognition of States and governments is aptly and realistically described:

"In practice the recognition of a State has two aspects: objectively it takes note of the State's existence as a subject of international law; subjectively, it implies that the conditions under which the State established itself are not contrary to the rights or interests of the recognizing State. It is in this second aspect that recognition has political significance and is subject to the unfettered discretion of the government granting it. This explains, on the one hand, why the existence of a new State, with all the associated legal effects, is not affected by the refusal of one or more States to recognize it, and, on the other hand, the special value for a new State of recognition granted by States that have been most interested in contesting its establishment." (p. 228).

The following sections examine the *Respect Due to Foreign Sovereignty* (Immunities of the foreign State, extraterritorial effect of its public acts, attempts on its safety), the *International Treaty* (a special mention should be made of the remarks on constitutional limitations (p. 248) and the political element in interpretation) (p. 249), *Diplomatic Protection and International Responsibility, Recourse to Force*.

The pessimistic outlook in the chapter on *Peaceful Change* is well grounded. Article 19 of the Covenant of the League of Nations was a dead letter. As to the new provision in the United Nations Charter, article 14, there is a small chance that it will be more effective. (p. 324).

Finally in his examination of the judicial settlement of disputes (Book IV), Professor de Visscher concentrates in relatively few pages his experience as a member of the International Court of Justice and Arbitration Tribunals.

The teacher appears in the conclusion. The study of international law cannot be separated from the study of the social sciences. But what is needed above all is personal contact between teacher and student, the reduction of "master courses." (p. 364). And "let us not forget that a

2. 83 JOURNAL DU DROIT INTERNATIONAL 1073 (France 1956).

general culture, nourished with the teachings of history and philosophy, is still the secret of that degree of intellectual detachment which, on the borders of different disciplines, perceives their limits and presages their convergences." Professor de Visscher has fulfilled these three aims. Even personal contact can be established through the printed word.

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**EQUAL JUSTICE UNDER LAW: The American Legal System.**  
By Carroll C. Moreland. Oceana Publications, Inc., New York,  
1957. Pp. 128. \$2.75. Copyright 1957.

Carroll C. Moreland, Biddle Librarian of the University of Pennsylvania Law School, has most laudably undertaken a challenging task in the public interest in condensing into sixty-five pages (exclusive of appendices) "This brief survey of our legal system . . . in the hope that it will give the reader an understanding of its operation. . . ." because, as he states, "Of all the phases of life in the United States, perhaps the one least clearly understood is the administration of justice through the courts." The material is drawn from 190 authorities listed in the Bibliography and many other cited sources. It must be recognized that in such a brief work the author of necessity has had to limit himself. Therefore, the usefulness of the volume is enhanced by the lists of selected readings appearing at the end of every chapter. David F. Maxwell, Immediate Past President of the American Bar Association, in his Introduction, and Dean Jefferson B. Fordham of the University of Pennsylvania Law School, in his Epilogue, give emphasis to the author's objectives. This reviewer, in his twenty years' experience in American citizenship education, has found that general public ignorance of and the resultant apathy toward this basic phase of "the separation of powers" in our Government is a national danger since the successful operation of our Republic depends upon an informed electorate. Our independent judiciary is a precious basic asset which needs constant participation and attention from all citizens, laymen as well as judges and lawyers. Until our people learn at least as much about it as they comprehend of the executive and legislative branches, our system of judicial administration will not improve as it should.

Starting with a history of the origin of our courts in colonial days and their development into our present dual federal and state systems under the Federal and state Constitutions respectively, down to and including the minor judiciary, the author outlines their jurisdictions, organizations and procedures in both the civil and criminal fields. Useful charts of the federal courts and of the Pennsylvania court system and their jurisdictions

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are added. The operation of the jury system is explained and its continuance is urgently recommended.

Under the caption "Constitutional Guaranties," the author places them in three categories: civil liberties, personal rights and civil rights, and traces their development and application. Obviously, this involved extensive study. The main subjects are succinctly and lucidly explained, particularly the application of the fourteenth amendment under the recent decisions of the Supreme Court of the United States in *Brown v. Board of Educ.*<sup>1</sup> and *Shelley v. Kraemer.*<sup>2</sup> Many subjects on which the public generally is vague or actually misinformed are extremely well explained, notably the presumption of innocence and the burden of proof in criminal trials. Trial procedures, including paragraphs on rules of evidence with particular attention to hearsay and circumstantial evidence, are most informative. In referring to article III, section 9 of the Constitution pertaining to the writ of habeas corpus, the author recognizes that the so-called Bill of Rights is not exclusive; that many other rights are stated in the original Constitution as well as in the amendments subsequent to the tenth amendment. There are appended a listing of the Virginia Declaration of Rights (adopted June 12, 1776), the Federal Bill of Rights (proclaimed December 15, 1791), and the personal rights and liberties specifically provided for in state and federal bills of rights, a searching comparison of the several states' adaptation of the Bill of Rights.

In the chapter entitled "Manning the Legal System," the author dwells upon the function of the lawyer, his preparation in law school and the requirements for admission to the bar, the important role of the organized bar, and the selection and qualification of judges. Inclusion in the Appendix of the Codes of Judicial and Professional Ethics of the American Bar Association should prove of particular significance to the reader.

Under the caption "Justice For All," appropriate credit is given to the vital part played by legal aid societies, lawyers' referral plans, neighborhood law offices, public defenders and court-assigned lawyers.

The reviewer is disappointed to find that the important subjects of contracts and property rights, which constitute the basis of our whole economic system, are conspicuous by their absence. The sanctity of contracts is embodied in article I, section 10 of the Constitution: "No State shall . . . pass any . . . Law impairing the obligation of contracts. . . ." The sole reference to property rights, aside from the treatment of *Shelley v. Kraemer*, is the phrase from the fifth amendment: ". . . nor shall private property be taken for public use without just compensation." Unfortunately, the earlier clause in the same amendment ". . . no person shall be deprived of life, liberty or property without due process of law," and the like provision in the fourteenth amendment are omitted. Considerations of space should not be permitted to stand in the

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1. 347 U.S. 483 (1954).

2. 334 U.S. 1 (1948).

way of giving adequate coverage to this important class of rights, at least to the same extent to which other rights are explained. It would not have been amiss, in the treatment of civil rights, to state their origin—our Creator—and to point out that government is merely their protector.

The potential areas of usefulness for this work are vast. Its employment is recommended for secondary schools and colleges, for all bar association citizenship committees, attorneys engaged in court visitation programs for school students, adult education programs of chambers of commerce and labor unions. Finally, our State Department might see that it has its proper place in American libraries in foreign countries.

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**ARCHEION OR, A DISCOURSE UPON THE HIGH COURTS OF JUSTICE IN ENGLAND.** By William Lambarde. Edited by Charles H. McIlwain and Paul L. Ward. Ames Foundation. Harvard University Press, 1957. Pp. ix, 176. \$5.00.

An ancient maxim tells us that a contemporary exposition has greatest weight in understanding a legal rule, and this saying is even more applicable to the understanding of legal history generally. Much interest, therefore, attaches to William Lambarde's description of the English courts at the end of the sixteenth century. Lambarde was an antiquary of note, author of one of the earliest county histories, and editor of an early collection of the Anglo-Saxon laws. He was also a lawyer who not only knew the courts of common law but had as well some familiarity with the Court of Chancery. His description of these central courts, written as it was in a critical period in the development of the English constitution, has a significance which should not escape the attention of legal and constitutional historians.

The seventeenth-century conflicts between what may be termed executive justice and the rule of law—between the prerogative courts on the one hand and the common-law courts on the other—has tended to obscure the important sixteenth-century contributions of the prerogative courts. Those courts, as Trevelyan reminds us, introduced new legal principles and enforced respect for the law by thwarting the intimidation of judges and juries by local mobs and local magnates. Viewed from the standpoint of abuses under the Stuarts, the Star Chamber is generally pictured as the epitome of arbitrary justice; and yet, in the sixteenth century, for example, that court afforded effective remedies to copyholders who lost their lands as a result of the inclosure movement. So easy is it to read back into history the convictions of a later day that contemporary views, when available, are a necessity. Thus, Lambarde's "Confutation of some Objections against

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the Star-chamber" (pp. 175-81) has special value, for he had had access to its records and was familiar with its proceedings. Again, from the standpoint of the clash that was soon to come between Chancery and the courts of common law, his exposition of the merits of equity as administered in the Court of Chancery (pp. 58-77) has special significance. Although Lambarde's descriptions of many of the courts are meagre or fragmentary, they are interspersed with such discourses as the "Conflicts betweene the Law absolute and ordinarie," "The Office of the King," and "The true moderation of Iurisdiction absolute" (pp. 108-32), which no student of legal or political thought should overlook. Lambarde's history is often wrong, as when he describes King's Bench and Parliament as existing before the Conquest; his etymologies, for one who knew both Greek and Latin, are often far-fetched or impossible. These short-comings, however, must not be allowed to obscure the value of those portions of the *Archeion* which describe the courts and their functions as Lambarde knew them.

Lambarde wrote and revised his manuscript in the closing years of the sixteenth century, but the book was not printed until 1635, when an unrevised version was published by Daniel Frere. Thereafter, and in the same year, an "author's" version was published by Lambarde's grandson because of the "crying errors" in the earlier and unauthorized edition. The second edition is the text reprinted and annotated by Professors McIlwain and Ward. The latter, a former student of Professor McIlwain, has undertaken in an extensive Appendix to deal with the difficult problems of textual accuracy, and his reconstruction is careful and painstaking. Professor McIlwain has supplied a short Introduction explaining the importance of a new edition of the 1635 work. Although all readers will undoubtedly regret that this master of English constitutional history did not expand the Introduction into an extended essay on political thought in the Tudor age, it must be said in his defense that such an essay would have overshadowed, if not eclipsed, the text of Lambarde.

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