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Book Review. World Legal Order -- Possible Contributions by the People of the United States by W. McClure

Wencelas J. Wagner

Indiana University School of Law

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argue like that. Seen against that background, Ramus's glorification of a natural, prescientific logic becomes manifest as the foundation of a movement that was intellectually retrograde. A natural logic, like a natural law, is not automatically self-validating. Insofar as these are purely descriptive concepts, they have only the value of that degree of cultivation of nature which they describe. Ramus was prepared to find nature but little cultivated, and to till the ground very little more. The "Arts" world showed itself ready to go along with him for two centuries at least, so far as logic was concerned; and it is remarkable that this book, so rich in many kinds of erudition, should contrive to spare us even the reduced technicalities of Ramus's syllogistic.

Ivo Thomas


This is an excellent book which has long been needed. In a persuasive and well documented study, Mr. McClure points out not only the importance, but also the necessity, of establishing a solid world order based on sound principles of mutual respect of nations and obedience to international obligations if the human race is to survive in this era of nuclear bombs, I.C.B.M.'s, and sputniks. Special emphasis is laid by the author on the situation in the United States and the contribution which the American people should bring to the cause of a better world.

The main thesis of the book is not new and has been stated many times by enlightened jurists and leaders in foreign countries and here: there is a unity of the legal system in the world. Just as municipal ordinances must conform to state law, the latter cannot be repugnant to the federal legal order, and the laws of every state, be it unitary or federal, should comply with the principles of the law of nations. But many of the author's arguments are novel. His analysis of many American and international cases is keen and deep, and his recommendations and conclusions are worthy of utmost attention.

McClure first gives an interesting history of the American attitude toward international treaties. He points out that the Framers were fully aware of the international responsibilities of the United States, and never intended that treaties be invalidated by courts on the ground of inconsistency with a later statute. The Constitution itself directed the courts to enforce all treaties made under the authority of the United States, without any exception. "To assert that the Constitution . . . requires or permits national infidelity to higher-level law is to do violence alike to the history and the hardly deniable mandate of that admirable instrument."1

And, at the very beginning of the existence of the Union, the courts properly understood their duties in this respect. A treaty was given precedence over a Virginia statute in the early case of Ware v. Hylton,2 and a few years later,

2. Ware v. Hylton, 3 U.S. 199 (1796).
an act of Congress was held to have been invalidated by a treaty with France in *United States v. Schooner “Peggy.”*³

An “era of international responsibility”⁴ followed, with the notable exception of the case of *Foster and Elam v. Neilson.*⁵ In that case the Supreme Court denied effect to a treaty with Spain by understanding incorrectly that one of its provisions required Congress to implement the treaty by a statute before it could be enforced. Although in 1840 the Supreme Court expressly repudiated the *Foster* case,⁶ the unfortunate theory of “non-self-executing treaties” was born. This gave rise to the era of the “judicial violation of treaty obligation,”⁷ culminating in the “Chinese Exclusion Case,”⁸ in which “violent emotion replace[d] reason,”⁹ and a congressional statute in derogation of a treaty with China was given full effect by the Supreme Court. It is unfortunate that Congress violated international obligations, and still worse, that the Court complied by asserting that a treaty can “be repealed or modified at the pleasure of Congress.”¹⁰ On this point the author comments:

An ironic touch is in the language the Supreme Court of the United States used about the Chinese laborers of the time, who were said to have “loose notions . . . of the obligation of an oath.” Can it be honestly maintained that the Supreme Court of the United States itself possessed any but “loose notions” of the obligation of a treaty?¹¹

Such an approach seems to have founded the fallacious theory “of inalienable supremacy of national over international law — necessarily a denial of international law — or else to be an assertion that national power is supreme over law in international affairs.”¹²

In Justice Bradley’s dissenting opinion in the *Cherokee Tobacco* case he suggested that there should be a mitigation of the harshness of the doctrine that where a treaty and an act of Congress are in conflict the more recent will be given effect.¹³ He asserted that a treaty should be invalidated only if Congress clearly indicated its intention that it should be so; otherwise, provisions of a treaty anterior to a statute and inconsistent with it should prevail. This approach was the forerunner of a more enlightened twentieth century view towards international obligations of the United States. Thus, in *Ex parte Toscano*¹⁴ a federal district court gave effect to the multilateral Hague Convention of 1907 as against the contention that it was a “non-self-executing” treaty, implying that even though Congress may regulate the method of giving effect to an international act, the executive branch of the government should enforce it in absence of a statute implementing it. The same should be said about the judicial branch.

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12. *Id.* at 93.
After a few other cases, the Supreme Court decided *Cook v. United States*, in which Bradley's dissent became good law, the Court saying that a “treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.” In another well-reasoned case, *Missouri v. Holland*, the Court sustained the validity of the Secretary of Agriculture regulations giving effect to a treaty with Canada as against the contention that the subject matter of the treaty and of the regulations was not delegated by the Constitution to the United States.

In those decisions the author sees a “tendency . . . toward a fade-out of the anachronism of supposed legal equality of treaties and statutes and toward the general acknowledgment of treaties as higher-level law.” The author emphasizes the principle of “pacta sunt servanda” which should be the basis of every system of law, be it municipal or international, and asserts that

in declaring treaties, constitutionally valid statutes, and the Constitution itself to be the “supreme law of the land,” without specifying which should be accounted first, the Constitution presupposes the primacy of treaties should there be lack of harmony among the three kinds of law.

McClure continues:

International acts are made jointly by two or more, sometimes by nearly all, nations. Such acts cannot in the nature of things be superseded by an act of one of the joint enactors . . . For a national constitution to assert the supremacy of national legislation over international legislation would be to assert an insupportable contradiction . . .

The author suggests that the “later in date” theory has no support either in reason or in the Constitution, and that


to clarify their own constitutional-legal situation in this respect either by decision of their courts reinterpreting the present constitutional provision or by formal constitutional amendment proclaiming the higher level of treaties over statutes would seem to be the appropriate first contribution by the people of the United States — achievable wholly on their own motion — toward the strengthening of world legal order.

But treaties are not the only source of international obligations of the United States. The great bulk of the law of nations is customary international law, or the “common law of nations.” It has been recognized as “the law of the land,” but it, even more easily than treaties, may be abrogated by Congress.

The author points out how improper this approach is. The very fact that the United States and other nations have an independent existence is in part due to the fact that the rules of international law permit it. Therefore,
the national Constitution cannot in any realistic sense be final or supreme so far as the legal government of the United States or any other nation-state is concerned; but, accurately posited, the Constitution is an instrument existing under the community law of nations...  

Mr. Justice Black’s assertion that the United States is only “a creature of the Constitution” has a “fanciful nature.” McClure cites Brierly’s statement that the doctrine of sovereignty, as it came to be understood, developed into a tool of “international anarchy.” The author could have expanded on the disastrousness of this concept, used and misused not only by independent countries, but also by members of federal states; but he chose not to do so probably because many other scholars have administered heavy blows to the idea of sovereignty in recent years. As one of the mottoes of his study, however, McClure selected the words of the Preamble to the Constitution of the Islamic Republic of Pakistan of 1956 that “sovereignty... belongs to Allah Almighty alone...”. It can be added that the Pakistani Constitution (since then repealed) was not the only one taking this stand.

The United States Supreme Court explicitly recognized that the government of this country derives certain powers directly from the law of nations, which at the end of the eighteenth century was “closely connected” with the concept of natural law, constituting the background of the Declaration of Independence. This approach was nothing new. Huig de Groot (Hugo Grotius), the father of modern international law, used the law of nature in the beginning of the seventeenth century “as a basis for the acceptance of a [new] law governing the relations between states.” And the very title of the most important treatise by the great legal scholar Emmerich de Vattel, whose influence on the members of the Constitutional Convention of 1787 was obvious, was the following: Le Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite & aux affaires des Nations & des Souverains. In the course of his monumental work, Vattel explained:

Under the conviction of the little reliance that can be placed upon the natural obligations of political bodies and upon the mutual duties which

22. Id. at 177.
25. Ibid.
29. Sec. 1 of the Constitution of the Union of South Africa: “The people of the Union acknowledge the sovereignty and guidance of Almighty God.” See Wagner, op. cit. supra note 27, at 25.
30. McClure, op. cit. supra note 1, at 182.
31. Id. at 178.
33. The Law of Nations, or Principles of Natural Law Applied to the Behavior and the Affairs of Nations and Sovereigns (1758).
their moral personality imposes upon them, the more prudent Nations seek to obtain through treaties that help and those benefits which would be secured to them by the natural law were that law not rendered ineffective by the mischievous designs of dishonest statesmen.34

The author himself states that "the unfolding concept of the universal law of nature has been one of the most fruitful . . .," for in international law more than in any other field of law, "philosophers . . . have sought to clarify the idea that an all-pervading natural law exists applicable to particular situations, which all reasonable men will discover and admit a compulsion to abide by as well as to utilize for the betterment of mankind."35

From all these considerations it follows that "international law, not national law must be enforced by the courts in cases wherein they cannot be reconciled," and that national courts should "find possible a decision that both treaties and what clearly is international customary law must prevail over any kind of national law and that for national governments the supreme constitution is the supravening law of nations."36

According to this approach, national constitutions must be treated as "integral parts of world legal order."37 And happily, the modern basic laws of some countries recognize the precedence of international law over their own municipal legal system and are pledged to observe its mandates.38

In the light of these developments and the fact that a modern state, with ever-increasing intercourse with other states, has a much larger area of matters to regulate by international arrangements than previously, the efforts to amend the United States Constitution on the pattern of the Bricker Amendment is a sad example of the anachronistic state of mind of many American senators and of part of public opinion. "There is insuperable difficulty in finding any logic in the proposition that the law of one nation is superior to the law of more than one."39 And the suggestion that the treaty-making power is subject to the limitations of the Tenth Amendment and if so, should be exercised, in some cases, only with consent by each of the fifty states, would result in reducing the power to "incompetence."40

It would signify a retrogression to the manner of thinking of some 200 years ago, before the Fathers framed the Constitution. It would render the United States a cripple in the field of international relations, and would mean to the world that the country enters the path of isolationism and distrust of international cooperation.41

In the last part of his book, McClure analyzes the legal structure of the

34. VATTEL, Book II, ch. XII, par. 1, cited by McClure at 48.
35. MCCLURE, op. cit. supra note 1, at 19.
36. Id. at 191.
37. Id. at 192 (in the title of Chapter 8).
38. The French Constitution of 1946 (MCCLURE at 192) and of 1958 (id. at 131); the Dutch Constitution, as amended in 1953 (id. at 193); Constitutions of some German Laender (id. at 197); the Italian and Japanese Constitutions (id. at 198).
39. MCCLURE, op. cit. supra note 1, at 201.
40. Id. at 203.
world community. After a sketchy treatment of legislation in the community of nations, he passes to adjudication of disputes. After describing the essential functions of the International Court of Justice, the author discusses the Nürnberg and other postwar trials by international tribunals and the European Economic Community Court, the competence of which “includes the review of decisions of national courts interpreting Community Treaties.” A longer discussion is devoted to law enforcement in the community of nations, and particularly to the Korean and the Suez crises.

In his final observations about the United Nations, McClure points out that instead of being an instrument of national policy, the world organization should be its objective. Unfortunately, some nations shortsightedly undermine some of the most uncontroversial principles of organized international life. As far as the United States is concerned, the most shocking example is the reservations that the Senate deemed proper to impose upon the acceptance by the United States of the compulsory jurisdiction of the International Court of Justice. They either lack purpose or discredit this country’s fidelity to the rule of law in international relations. The ill-famed reservation providing that the United States withdraws from the jurisdiction of the Court “disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America,” is strikingly contrary to the “axiom of all law, emphatically of Anglo-American law, that a litigant must not be the judge of his or its own case, . . . [and] is utterly repugnant to . . . national jurisprudence [of the United States].” This attitude “may be compared to the assumption of a State of the United States of the right to decide whether some litigation raised only state law questions, or involved federal law, to the exclusion of the federal courts.”

Another striking example of the pernicious American attitude in this matter was a clear violation of an arbitration and conciliation treaty with Switzerland by declining to submit a dispute to arbitration, in accordance with a Swiss request in 1957, under the excuse that the matter was within the domestic jurisdiction of the United States. The author’s hope that the approach of the United States to international adjudication will change is substantiated by some recent trends in public opinion, and particularly, President Eisenhower’s promise of a “reexamination of our own relation to the International Court of Justice,” and Senator Humphrey’s resolution to change the terms of the United States accedence to the International Court.

The failure of the United States to live up to what may be expected of the leader of the free world may clearly be seen in the fact that we did not ratify some apparently noncontroversial international conventions which were accepted

43. *Id.* at 232.
44. *Id.* at 272.
45. The so-called “Connally Amendment.”
46. McClure, *op. cit. supra* note 1, at 274.
49. *Id.* at 282.
50. *Id.* at 283.
by many other nations. One of these is the Convention on Privileges and Immunities, dealing with the diplomatic status of the Secretary-General and the Assistant Secretaries-General of the United Nations, and with the rights of all officials and employees of the Organization.\textsuperscript{51} The fact that the seat of the United Nations is in New York makes it clearly imperative that the United States should do its best to facilitate the work of international employees. It should be mentioned that difficulties in obtaining American visas for persons having some lawful business in the United Nations, which are made by American authorities on the ground of "very doubtful needs of national security," were "very far out of accord with a policy of upbuilding the United Nations"\textsuperscript{52} and could hardly contribute to the increase of the prestige of the United States.

But the most scandalous failure of the United States is that of nonratifying the Convention on Genocide, which is "defined as certain stated acts committed with intent to destroy a national, ethical, racial, or religious group in whole or in part."\textsuperscript{53} On this point, the author has the following comments:

It was the outstanding savagery of World War II; at the very least its outlawry by enacted supranational law and at most its reduction and prevention through punishment would seem one of the minimum prerequisites of a satisfactory world legal order. Yet the people of the United States failed to compel their Senate to make the wholly costless gesture of their participation in it, an omission symbolic of the shortsightedness of their policy concerning the United Nations and of the fruitfulness of their contribution if that policy were regenerated.\textsuperscript{54}

Why did this happen?

Although a representative of the Department of Justice testified at Senate hearings that the crime of genocide . . . never had been committed in the United States . . . , hence, that the treaty would not result in any kind of governmental action within the United States, certain persons have chosen the view that it was an instrument for altering the balance of power between the federal government and the governments of the states and to oppose it as such . . . .\textsuperscript{55}

Passing to the role of the United States President with respect to the United Nations, McClure has two interesting suggestions. One is that the President should lead the United States delegation to the international organization, and be present at some of its sessions, whenever it would be possible.\textsuperscript{56} This recommendation was made before the spectacular United Nations session in the fall of 1960, which was attended by the heads of most of the nations. The second suggestion is to include in the delegation two members of each house of Congress,\textsuperscript{57} so as to enable American legislators to participate in the process of international legislation.

51. Id. at 225.
52. Id. at 290.
53. Id. at 291.
54. Id. at 292.
55. Id. at 291.
56. Id. at 296-297.
57. Id. at 299.
Summing up, McClure restates which “United States politico-judicial doctrines become untenable — if, indeed, they ever possessed any validity either in law or logic,” and recommends action that should be taken by the people of the United States. In the conclusion, entitled “Human Civilization and the Law,” the author points out that the last spectacular inventions have “revealed humanity in new splendor and in new degradation.” He goes on to say:

The sublime expression of the human intellect . . . is mocked by the unprecedented brute-cruelty of the first utilization of atomic energy and by the adolescent vanity and jealousy of men more concerned about the particular spot where the first man-made space explorer happened to be launched than about appreciation of its magnificence as a human achievement. Herein lies cause for somber reflection for the future, for such abuse of man’s achievement leaves no assurance that he will muster the wisdom to use his new-found knowledge for the welfare of all peoples rather than for all-inclusive genocide.

In this situation, the only hope for a better future of mankind is to improve and enforce international law, law being . . . “an expression of human self-control.” One of the most important functions of the law is “the protection of civilization.” And with the achievements of humanity we are enjoying, McClure hopes that man will be reasonable enough to avoid destruction. It could be added that after both the First and the Second World War, two distinct trends appeared in the life of the nations: one, to assure independence of each nation with respect to any other single one; and another trend, to submit all nations to the authority and control of the international community. Even if this development may be arrested or even turned back in some areas of the globe, it may be expected that in the long run it will progress towards the final and absolute recognition of order in the life of nations. And this international legal order is significant only as part of a universal legal order which comprises also all the national legal orders . . . the international legal order determines the territorial, personal, and temporal spheres of validity of the national legal orders, thus making possible the coexistence of a multitude of states . . .

Unity of internal and international law was emphasized also by many other legal scholars, among whom Scelle was outstanding. For him, both “dissolve . . . in a unified Law of Society.” In the light of these theories, the United

58. Id. at 294.
59. Id. at 305.
60. Id. at 309.
61. Ibid.
62. Id. at 310.
63. Id. at 325.
States doctrine of the "suprasupreme Constitution" is devoid of any logical basis.

McClure's book should be read by legal scholars, politicians, students, and particularly by judges, senators, and statesmen responsible for the conduct of international affairs of the United States. The use of the book is facilitated by a table of cases, a table of international legislation and constitutions and an index, which is incomplete but helpful (8 pages). A 10-page bibliography is also annexed.

W. J. Wagner

67. McClure, op cit. supra note 1, at 43.


An outstanding problem in American pluralistic society is that those holding varying philosophies make little effort to understand one another. The same observation holds for the varying religions and theologies and the varying power groups such as labor and farm and management. Of course, some of those in one group will readily give answers for the deepest problems of any other group: labor easily handles management's problems, and vice versa; and at the drop of the hat either or both will show the farmer the way out of his bafflement. But really to know another group's position and its strong points and its real difficulties — this is uncommon.

Happily we have several instances of dissident groups coming together for serious conference. The attempt is to intercommunicate and to understand, and (we hope) at least then to allow for the other position. Most notable in this regard is the "dialogue" being engaged in by the several faiths or religions, and the most successful of these efforts to date, we believe, have been three: the conference called by the Fund for the Republic under the title Religion in a Free Society (published in paperback, 1958, by Meridian as Religion in America); the interfaith meetings now for several years in the Boston area; and of course the National Conference of Christians and Jews, formed in the first place to try to overcome the misunderstanding,—to say nothing of the lack of good will—and the consequent intolerance so obvious in the 1928 political campaign. We have much evidence that the "dialogue," if less crucially needed than a generation ago, is badly needed and will continue to be badly needed in American society. In passing we remark that urban renewal and redevelopment programs are going to depend absolutely on interfaith understanding and cooperation; and these are going to be hard to secure.

Teamed with those three is the series of conferences that have been held over several years at the Institute for Religious and Social Studies of the Jewish Theological Seminary of America. Patterns of Ethics consists of lectures given at the Institute. In 1959 the Institute brought together leaders of various faiths who spoke on moral norms as seen by the philosophy and theology each represented.