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Book Reviews

Joseph W. McKnight

Kenneth S. Tollett

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BOOK REVIEWS

FREDERICK WILLIAM MAITLAND AND THE HISTORY OF ENGLISH LAW. BY JAMES R. CAMERON. Norman: University of Oklahoma Press. 1961. Pp. xvi, 214. \$4.00.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. 2D EDITION REPRINTED. BY SIR FREDERICK POLLOCK, BART., AND FREDERIC WILLIAM MAITLAND. Washington, D.C.: Lawyers' Literary Club. 1959. Two volumes, Pp. xxxviii, 688; xiv, 691. \$7.50.

I think it is fair to say that Frederic William Maitland (He spelled his first name Frederic.) is the greatest legal historian of our Anglo-American legal tradition. He outshines Pollock, Holdsworth, and Fifoot in England and Holmes, Ames, Goebel, and Howe in this country. The earlier English "legal historians" cannot always be taken too seriously since they were generally repeaters or inventors of traditions. We must, therefore, look a bit askance at some of the utterances of Hale, Coke, and Blackstone. Their approach was not very scientific.

Maitland's great contribution to historical enquiry is two-fold. He dug out, translated, and edited medieval legal texts. He was also able to give an accurate, comprehensive picture of the development of English law in a concise and readable form. This was an enormous achievement. His work demonstrates an apparently tireless energy of mind and body (especially eyes) to seek out details hitherto unknown. All this was coupled with a remarkable facility for making accurate and readable generalizations. All of his generalizations, as the author points out, have not always withstood the findings of modern research. His conclusion with respect to the medieval borough and village, the Romanist influence on English law, and the Elizabethan religious settlement are cases in point. But Maitland set straight a number of important misconceptions of earlier historians, and much of his analysis serves as the foundation on which modern legal-historical research is built.

This appreciation and criticism of Maitland's contributions to legal-historical scholarship will be of particular interest to specialists in legal and constitutional history. It will also serve to acquaint the more general reader with some of Maitland's work of general interest. This is not, however, a biography or even an effort to assess Maitland's achievements systematically. The author merely treats of particular topics of interest to Maitland, *e.g.*, his contributions to

our knowledge of early Parliaments, the origin of the common law courts, the canon law in England, and the Year Books of Edward II, to mention a few. This is an introduction to Maitland and his work. The exhaustive bibliography at the end of the book gives a complete list of Maitland's works from which to choose further reading.

Those who have tried unsuccessfully to acquire a set of Pollock and Maitland's *History of English Law* will be pleased to know that it is again available in a photographic reproduction of the second edition of 1898. The work is, of course, largely Maitland's as Pollock acknowledged in the preface to the first edition. The conventions of the time demanded that the senior contributor be named first on the title page, which is now amended to show the current publisher and date of publication. The preface to the second edition is, however, left in its original form and might mislead the unwary to believe that there is new material not included in earlier editions. But that is a small criticism of what is an otherwise admirable job of reproduction.

*Joseph W. McKnight**

THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW. BY MORTON A. KAPLAN AND NICHOLAS DE B. KATZENBACH. New York: John Wiley & Sons, Inc. 1961. Pp. xi, 372. \$6.95.

The Cold War has frozen the world into a state of anxious shock and uneasiness. Thermonuclear devices, missiles, and aircrafts in the arsenals of the United States and Union of Soviet Socialist Republics have indeed made war "unthinkable." The Cold War, like the weather, is complained about by all, but no one seems able to do anything really significant about it. Continual crises threaten to catapult the world into a cataclysmic holocaust. Everyone senses the need of the rule of law in international affairs. Even the American Bar Association in recent years has preached the importance of finding a prescription for satisfying this need. The alternatives are starkly clear: international law and order or internecine conflict and destruction. The prognosis has been made. Will homo sapiens devise and administer a prophylaxis in time? The disease poisoning the international body politic is disorder. The prophylaxis is law and order. How well do we understand the disease and its effects? The book under review is an excellent introduction to the minimum

* Associate Professor of Law, Southern Methodist University.

knowledge needed by informed laymen to begin an intelligent approach to the prescription.

This book is not a study of war and peace. Its objective is not so Tolstoian in scope or grand in execution. Its title accurately reflects what it is—an inquiry into and study of the political foundations of international law.

It is fortunate that the book is the collaborative effort of a perceptive political scientist and a sophisticated lawyer. This combination gives a balance of emphasis and perspective which might not otherwise have been possible had only a political scientist or a lawyer been the author. The interdependence of politics and law is hardly appreciated on the national level, but surely no realistic study of international law can begin without a sensitive awareness of the political factors in international relations. Moreover, this book is even of value to those who wish to further their knowledge of national politics and law, since it clearly restates the interrelation between law and politics—whether on the national or international level.

The authors' purpose is to help scholars, statesmen, and the public in general to understand contemporary problems in the chosen field. A theory of systems in international politics is used as "an illuminating theoretical perspective" (p. v). The two perspectives or frames of reference utilized are the nineteenth century "balance of power" system and the contemporary "loose bipolar" system. Although these terms define a theoretical perspective, they are also intended to be descriptive of the international political situation. The possibility, existence, and meaning of international law can be understood only by a study of these political systems.

The authors state that "law exists, and legal institutions operate, only in particular political contexts" (p. 3). A purest concept of law is that in which "an impartial judge objectively applies a pre-established rule to decide a controversy." A purest concept of politics is "that in which the stronger interest or influence regulates the social distribution of values" (p. 3). These concepts may define separate and distinct disciplines for study, but in the world of reality the operation and function of law and politics coalesce and interpenetrate. Although the international legal order is not primarily vertical or hierarchical, as are national legal orders (*e.g.*, the United States, with a supreme court at the apex), but is horizontal (in which various national tribunals of coequal authority announce international law in the face of the limited efficacy of the International Court of Justice), there are, nevertheless, national and supra-

national interests which support constraining international rules. These interests are largely why international law is not only possible but exists.

The book is divided into three main parts. The first part, "Introduction," contains a perceptive, general analysis of the nature and operation of the legal and political processes. Contrary to the frequent statement that international law is illusory because there is no international sovereign to enforce it, the introduction makes a very significant contribution in asserting and practically proving that there are interests or influences which support constraining international rules. Indeed, manifestations of the "balance of power" system caused the development of much contemporary international legal doctrine. The instability of this earlier system was responsible for the transition to a "loose bipolar" system, which had its beginnings with the cession of Alsace-Lorraine after the Franco-Prussian War. The subsequent gravitational polarization of political power in Russia and America after the Second World War has caused a greater change in political organization and order than in the international legal order.¹ However, the developments in the international political system necessarily foreshadow great changes and the need for adjustment in the legal order. A historical survey indicates that there are three periods which must be considered in the development of the theory of international law: "Theory Before 1815 (roughly from the Renaissance to the Congress of Vienna): Natural Law and the Law of Nations" (pp. 57-62); "From the Congress of Vienna to the Second World War: Positivism" (pp. 62-70); and "Theory Since 1914" (pp. 70-76). The authors observe, "Law, by its very nature, conserves the values of a social system. And when the values are themselves in transition, the system of law gives way to political or quasi-legal activity" (p. 44). Values, interests, and influences have changed in large segments of international society. These modifications are established by a contrasting analysis of the "balance of power" system and the "loose bipolar" system.²

The second part, "The Doctrinal Framework," as evidenced by its chapter titles, deals with the conventional doctrines and principles of international law, that is, "The 'State' System: Orthodoxy and Change"; "Recognition"; "Sovereignty and Territorial Rights"; "Jurisdiction"; and "Resort to Force: War and Neutrality" (pp.

¹ In chapter 6, entitled "The Pattern of International Politics," the authors enumerate the factors and characteristics that distinguish the "balance of power" and the "loose bipolar" systems.

² See source cited note 1 *supra*.

83-228). In this part one gets the customary textbook treatment of international law. However, the great value of the analysis is that the authors relate the genesis of much of the doctrine comprising the "balance of power" system and point out the unstabilizing impact of the "loose bipolar system." A most incisive statement on legal rules, be they national or international, is proffered:

The point to be kept in mind is the general one that legal rules prescribe consequences to be attached by decision makers to specified factual conditions in order to promote policies. Therefore, the decision maker must always inquire as to whether or not the particular facts are those envisioned by the rule; one measure of this inquiry is whether or not the policy encompassed by the rule will be served by its application or by its rejection. In addition, as factual conditions change, the rule itself may become outmoded and may no longer be suited to the policy envisioned and served when the rule was first formulated. (p. 85)

It may be noted that the United States is committed to much conventional doctrine. Although George F. Kennan's stricture that we have been too legalistic in our foreign relations is somewhat of an overstatement, certainly the present "loose bipolar" system does strain many of our venerable customs. For example, neither the United States nor the Union of Soviet Socialist Republics, the poles in the "bipolar" system, can long tolerate a hostile enclave within its bloc or sphere of influence.³ Yet, since we are a law abiding nation and believe that democracy depends upon the rule of law, we stood behind the "democratic" though seldom-honored doctrine of non-intervention in the Cuban invasion episode—much to our embarrassment and detriment. Thus our commitment to old doctrine in the light of political reality and self-interest poses an agonizing dilemma.⁴

International law or doctrine does not operate or develop *in vacuo*. The flesh of the law must grow and develop upon a skeletal structure. The authors observe, "It is commonplace that law is a process, not a body of self-executing rules, and that the institutional framework in which doctrine is created, invoked, and applied is of decisive

³ Witness the Cuban invasion and the Hungarian massacre.

⁴ Another problem that comes to mind is the classical or absolute theory of sovereign immunity. According to this theory a sovereign cannot, without his consent, be sued in the courts of another sovereign. This theory developed when governments entered into business as a direct participant only very infrequently. But with socialism spreading and states participating in and owning the means of production and commerce more and more, this doctrine or theory has been modified. The newer or restrictive theory of sovereign immunity has supplanted it in many countries. It recognizes sovereign immunity with regard to sovereign or public acts (*jure imperii*), but not with regard to private acts (*jure gestionis*). The increasing practice of governments engaging in commercial activity made it prudent for the United States to shift from the classical or absolute theory to the newer or restrictive theory of sovereign immunity in 1952.

importance in understanding the decision-making process" (p. 231). Thus, the third and last part of the work, entitled "The Organizational Framework," deals with the sources, institutions, and organizations of international law, to wit, "'Sources' of International Law"; "The Institutions of International Decision Making"; "Supranational Organization of the Universal Type"; "Supranational Organization of the Bloc Type"; and "The Role of Norms in International Politics" (pp. 231-354). A fresh analysis is given to the traditional sources of international law, *viz.*, treaties, customs, general principles of law, judicial precedents, textbooks, and reason. The authors apparently equate sources with techniques, for in the conclusion to the chapter on sources, the authors state:

There is a sense of frustration in discussion of the sources of law that brings the student no closer to understanding the process. In fact, we are talking here merely of techniques, the mechanics of process, and this provides no clue for answering the question of what the legal norm is in any given situation. (p. 264)

There is nothing to suggest that the various sources listed above are haphazardly and indiscriminately resorted to as a technique of decision. One or the other may seem more relevant, given a specific dispute. However, whatever particular source is resorted to, decision makers should recall that it is only a technique of decision and that the other dimensions of a situation must be carefully considered. The point is made with special effectiveness with regard to customs as a source or technique of decision (pp. 246-57).

The section on institutions discusses the decision makers in international disputes. They are the national and international tribunals, including the International Court of Justice at the Hague. Although they may play a crucial role in international justice, like law itself they are status quo oriented (p. 280) and are of limited value in a world in transition.

One of the unusual characteristics of the institutional system is pointed out. During the "balance of power" era many nations could very appropriately offer their "good offices, mediate, or conciliate international disputes."⁵ But the "loose bipolar" system finds few states sufficiently neutral to serve in such capacities (p. 274). Would either America or Russia be willing for India to mediate the current Berlin crisis? Of course, this is not the happiest example, for both parties would be unwilling, not so much because they question India's neutrality (America would probably question it most), but because

⁵ Like diplomacy, these are the classical techniques and procedures for composing international differences.

they have identified the claims in their statements of position with their vital interests. These interests are relinquished only in the face of superior force, thus the present saber-rattling stalemate.

The next two chapters deal respectively with the United Nations and the bloc, supranational organizations such as NATO. Here the authors indicate the value and purpose of the United Nations. In the "loose bipolar" system the United Nations' principal roles are "those of mediation, of conciliation, and of providing a forum" (p. 309). They urge that we should not get impatient with the United Nations. Blocs are a peculiar phenomenon of the "loose bipolar" system. They herald a decline in the importance of the nation state (p. 316).⁶ This decline will be a source of great difficulty, because the emerging and underdeveloped nations are surging forth on a high tide of nineteenth-century-like nationalism.

The treatise is concluded with a perceptive statement of the advantages of principled action. Nations are interested in more than national values. One might even say that this is a commitment of international Communism, at least in doctrine and theory. It certainly is not foreign to our heritage either.⁷ But, perhaps more important, most nations have an interest in law and order. Order can only be maintained if there are principles and rules for settling disputes. However, "commitment to principle is not an advantage if it is engaged in mechanically" (p. 345). Sociological jurisprudence has already established this proposition in our national legal system. The authors wisely and appropriately add, "A nation ought to commit itself only to principles with which it can live"⁸ (p. 345). International relations are not devoid of principles. Internal motivations and external action are constraining influences upon national action in the international arena. A better understanding of the political foundations of international law and order will make it possible, if there is the will to do so, to adapt principle and doctrine to present international conditions. The authors have done much to contribute to that understanding.

*Kenneth S. Tollett**

⁶ However, I should note that the present doctrinal schism in Communism between Red China and Russia may foreshadow the cracking of ice at the Communist pole. "Polycentrism" is the word that has already been coined for this state of affairs in the Communist Camp by the Italian Communist Leader Palmiro Togliatti.

⁷ Neither the Marshall Plan, Point Four, nor the Alliance for Progress program were solely motivated by self-interest, for frequently we say "enlightened" self-interest, which connotes a generosity in foreign aid that does not result immediately in direct self-gain.

⁸ See note 3 *supra* and accompanying text. If Cuba granted Russia air bases and missile launching sites, could we indeed *live* with the principle of non-intervention?

* Acting Dean, Texas Southern University School of Law.