Notre Dame Law Review

Volume 37 | Issue 1 Article 11

10-1-1961

Book Reviews

Theodore M. Hesburgh

Benjamin Piser

W. J. Wagner

John R. Martzell

BOOK REVIEWS

ATOMIC ENERGY AND LAW: INTERAMERICAN SYMPOSIUM. Editor, Dr. Jaro Mayda. — Rio Piedras: University of Puerto Rico, 1961. Pp. 258. — This volume is the record of the Interamerican Symposium on legal and administrative problems connected with peaceful atomic energy programs. This first international symposium of its kind took place in San Juan, Puerto Rico, on November 16-19, 1959. The symposium was also unique in that it constituted a meeting of both lawyers and scientists, at which the scientists were allowed to speak first. There was an obvious reason for this procedure: lawyers must be informed of facts before they can legislate or regulate. Legislation and regulation are expressions of policy, of social purposes to be realized, of values to be protected through legal concepts and techniques. There are few facts more complicated, more dangerous, more internationally widespread in their consequences than the scientific facts relating to the uses of atomic energy — even its peaceful applications. This completely new field for law is a maze that makes workmen's compensation or traffic torts seem childishly simple. Here in the field of atomic energy one finds enormous risks and international liabilities that transcend anything now treated in any existing national or international laws. To regulate the risks without suffocating the development of the peaceful uses of atomic energy, to assess the liabilities so that the public welfare and individual rights are preserved, are indeed staggering legal problems.

To compound the difficulty, the scientific facts range from a millionth of a curie to many millions of curies, microcuries to megacuries. They range from applications to power, food production, transportation, industrial practice and medicine to correlative problems of insurance, safety factors in production, transport, and use of fissile materials, third party liability, and radioactive waste disposal. It was only about 20 years ago that the first nuclear reactor "went critical." It was only 15 years ago that more than 100,000 persons were incinerated in the first two atomic explosions. It was within the past decade that President Eisenhower called upon all the nations of the world to form an International Atomic Energy Agency at United Nations in New York. At the Statute Conference in 1956, lawyers and scientists framed the constitution of this international body to promote the peaceful uses of nuclear energy. Although they were at first reluctant, even the Soviet Union and its satellites capitulated to world opinion by becoming members. It soon became obvious that the orderly growth of this explosive new technology would require a whole new field of legal inquiry and formulation, that its problems transcended purely national concerns. There are few areas of human activity that are so international by nature and consequence as atomic energy, whether considered technologically or legally. Intergovernmental cooperation in this field is not optional, but imperative, and spurred on by the urgency of an expanding science whose consequences cannot await decades of legal discussion. Already in the five short years of its life, the International Atomic Energy Agency has undertaken studies of uniform international standards for the safe transport of radioisotopes and radioactive materials, provision of criteria for health and public safety in peaceful atomic projects, the problems of radioactive waste disposal in the sea and in geological structures. In this latter domain, an infant nuclear power industry is already producing 505 million gallons of radioactive wastes a year, posing an urgent problem affecting the health and future of mankind. The IAEA has also sponsored an international study of third party liability for nuclear damage, with ten experts representing several legal systems working under the Chairmanship of Dr. Paul Ruegger of Switzerland. The IAEA has finally elaborated a system of safeguards to assure that nuclear materials delivered to a nation for peaceful uses are not diverted to military uses.

The lawyers of today and tomorrow will be urgently pressed to keep up with their scientific confreres in this field. Despite the fact that we have made thousands

of shipments of radioactive materials in the United States, there is still no satisfactory set of national laws governing this highly dangerous operation. The question was asked repeatedly at this symposium: Will the law be able to keep up with the onward rush of scientific development, with all its unprecedented risks and liabilities in the international context of atomic energy programs? All this is by nature "ultrahazardous" activity which stretches legal thinking in countries where "civil law" does not generally accept the idea of absolute liability. The international dimension of the risks calls for another kind of legal breakthrough. The proclivity of the lawmaker to face a problem only after it has arisen, rather than trying to provide normative and preventative framework in advance, makes this a work of true legal pioneering that will require both scientific and legal competence of the highest order. Wherever there is nuclear activity there is the possibility of nuclear catastrophe. Hence the sense of urgency that haunted the participants of this symposium — an urgency somewhat alien to the usual slow process that characterizes the millennium-long development of our legal system.

Urgent though it be, the development of law relating to atomic projects promises no easy solutions to the legal scholar or legislator. He must connect the various possible sources and sizes of risks with the concepts of liability, without making liability so impossible that both technological development and insurance coverage become impossible. He must connect the enormous production, control and use problems with the concepts of public and private welfare, national and international law. He must finally connect the international technology and risks with the concepts of national and international jurisdiction. And all non-lawyers will say that all this should be done by tomorrow, if not yesterday. At least, all seem agreed that in this burgeoning field a delicate legal balance must be maintained between responsibility and flexibility. Certainly, the protection of public health and safety must be attained by adequate law and regulation. But, at the same time, a degree of administrative discretion is essential so that the greatest possible freedom may be given to scientists, educators, and industrialists, if they are to make progress in developing all the vast potentials of peaceful applications of atomic energy for the good of mankind. Here is a dilemma of no mean proportions, even for the lawyer who is professionally trained to solve dilemmas. If one more legal complication might be added to this new field of law on the domestic scene, there is also the ever-present problem of federal-state relationships in the matter of regulations.

Such are some of the vistas that confront one desiring to embark upon what may be the newest specialty: nuclear law. For all its difficulties, there is always the attraction and promise of the new frontier. The wholesale inspiration of mature national legal systems by international models of nuclear law may eventually go far beyond the scope of the classical receptions of Roman, English, or Napoleonic laws.

*Theodore M. Hesburgh, C.S.C.**

THE FEDERAL STATES AND THEIR JUDICIARY. By W. J. Wagner. The Hague: Mouton & Co., 1959. Pp. 390. Dr. Wagner has written, with painstaking and meticulous study, a comprehensive work devoted to the comparative judicial powers in the federal states. This is the first work of its kind to be published. The author, a graduate of law schools in Warsaw, Paris, and Northwestern University, is uniquely qualified for writing this work. He has held a judicial post in Poland. His linguistic ability and his experience as a practitioner and teacher[1] enable him to present his topic in a profitable and interesting manner.

* PH.B. S.T.D., President, University of Notre Dame.

1 Professor of Law, University of Notre Dame.

The federal states studied, though primarily the United States, include Canada, Australia, Switzerland, Argentina, Brazil, and Mexico. The author does not consider the U.S.S.R., Yugoslavia, the Union of South Africa, and Venezuela as states having a definite federal structure. Federal states recently formed such as Western Germany, India, and Pakistan are without well settled and traditional federal-state concepts. This is set forth in the first part of his book. Therefore, this book will be helpful to a practitioner should he have a case dealing with Mexican, Brazilian, or Swiss law, for example. He can determine what Court in that foreign state would have jurisdiction of his particular case.

The ideal judge is one who owes nothing to anyone except the rule of law. This ideal is most nearly approached in the federal judiciary, particularly in the United States. Therefore, for one who practices in the federal courts of the United States, Part Two of the book dealing with the federal judiciary is significant. From the chapter entitled "The Judges" the following comment from Dr. Wagner's book is interesting:

> Nothing can be more evident than that good judges are an extremely valuable asset in every judicial system. It seems that they are still more important than a good organization of courts, which, if staffed by poor magistrates, will be unable to render substantive justice to the litigants even if they are well organized.
>
> The tasks of the federal judges are always more difficult and delicate than those of judges in unitary states. The existence of two legal systems, necessarily overlapping; the importance of upholding the principle of supremacy of the federal constitution and laws, and at the same time of permitting the state legal systems to be applicable in all, not just some, situations provided for by the constitution, make the federal judge face special problems which he has to solve by a keen analysis and thorough knowledge of the basic law of the country and the principles of federalism. He must use all his tact and avoid unnecessary federal-state friction. In most federal states, judges have broad powers of judicial review. This task renders their duties still more delicate and heavy in consequences. They should have a background as broad as possible; be familiar with political science, sociology, economics. It has been asserted that they should be philosophers, but not too abstract, so as not to be lost in merely theoretical speculations. Of course, it is difficult to say what weight is given to all the above considerations in appointment of federal judges. Probably, not too much, in many instances.[2]

and further, again at page 191,

> It seems that the first quality of any judge, federal or not, is the elementary one of knowing well the law. Contrary to that of many other federal states, the Constitution of the United States does not set, however, any requirements as to the legal training and practice of the members of the bench. . . . Juristic proficiency of the candidates is a basic consideration, another one being, unfortunately, their political affiliations and activities.[3]

The qualifications of the judges in the other federal states are modeled after those of the United States. It is interesting to note that in Brazil, judicial candidates "must pass competitive examination organized by the tribunal of justice with collaboration of the sectional council of the order of attorneys of Brazil."[4]

In Switzerland, the author points out, the Assembly pays regard to the religion and political convictions of the judges.[5]

One will read with interest Dr. Wagner's chapter dealing with "Political Questions." The Supreme Court of the United States has spoken many times on this subject. After quoting Chief Justice Marshall, who spoke through *Marbury v. Madison* as follows:

> The province of the court is, solely, to decide on the rights of in-

2 Text at 187.
3 *Id.* at 191.
4 *Id.* at 195.
5 *Id.* at 201.

> dividuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[6]

the author shows how questions "in their nature political" have been difficult to determine. The Supreme Court, despite this task, has increased the scope of concept of "political questions."[7] This chapter is fascinating to a student of constitutional law.

Dr. Wagner's work represents a contribution to legal literature on the problems of federalism. A lawyer whose interest or practice is not limited to his own country will find the book instructive and useful. The material is effectively and ably organized. It points up how, through the limitation and decentralization of powers, a democracy brings freedom to the constituent members of a federal state as well as to each of its citizens.

**Benjamin Piser*

ETUDES DE DROIT CONTEMPORAIN — CONTRIBUTIONS FRANCAISES AUX III ET IV CONGRÈS INTERNATIONAUX DE DROIT COMPARÉ — Section II; published by the Institut de Droit Comparé de l'Université de Paris, 1959. 428 pp. +v, a foreword by the former Dean Julliot de la Morandière. In this volume, which unfortunately was delayed in publication, are published 21 contributions from France (out of 80, as is stated in the foreword) to the International Congresses of Comparative Law of 1950 and 1954.

International conventions, the great merit of which is to bring together people from different countries and facilitate their exchange of views and understanding, have often the weakness of stopping at oral discussions and not leaving any permanent record of the contributions submitted. The present volume of the French Institute of Comparative Law has the merit of offering some of them to the general public.

The book includes 9 French papers presented in 1950 (out of 30) and 12 submitted four years later (out of 50). In spite of the fact that public law assumed a position of great importance at the second of the two congresses,[1] the bulk of the papers deal with private law: eleven of them attack different problems of civil law (one being classified as a subject of "rural" law). Six contributions are in the field of international private law (conflicts), two in that of civil procedure; one deals with judgments (characteristics of declaratory judgments), and the last paper discusses the guaranties of the independence of the judges.

In a short book review, it is impossible to give details about the contents of the papers published. Suffice it to say that they offer interesting reading on selected topics, to the French jurist as well as the comparativist. They were written by the following authors: Vasseur, Veaux, Stark, Hémard, Becqué, Esmein, Lévy, Weill, Lucas, Delaume, Lampué, Ponsard, Plaisant, Motulsky, and Raynaud. Messrs. Savatier, Goré, and Hébraud are responsible each for two contributions.

*W. J. Wagner**

---

6 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
7 Text at 273.
* A.B., J.D., Member of Indiana bar.

---

1 Foreword, at ii.
* Professor of Law, University of Notre Dame.

SOUTH AFRICA AND THE RULE OF LAW. Geneva: International Commission of Jurists, 1960. Pp. 239. This Report is one of a series[1] made by the International Commission of Jurists on a variety of world situations as they comport with the Commission's conception of the Rule of Law. The Commission has Consultative Status with the United Nations Economic and Social Council and claims support from "37,000 judges, lawyers and teachers of law throughout the world. . . ."[2] The avowed purpose of the Commission is to "foster understanding of, and respect for, the Rule of Law."[3]

The present Report focuses principally on South Africa's own variety of racial segregation, styled "apartheid."[4] In the main, the Report is divided into two parts: (1) the Commission's own statement of the facts of South African apartheid and (2) a series of appendices consisting of public documents gathered in South Africa calculated to throw into sharp relief the sorry state of human rights in South Africa by convicting the residents out of their own mouths. The particular elements of these sections will be discussed presently.

Notwithstanding the ultimately high aims and intentions of the Commission, one is at first struck with the temerity of any non-governmental agency to delve into the internal affairs of a sovereign state and solemnly compare that state's form of government with that agency's notion of what the Rule of Law ought to be. The incendiary implications of the objective facts set out in the Report are not left to conjecture in the mind of the reader. The Commission leaves no doubt as to its own feeling. It states:

> The Commission holds that the *application* of the principle of apartheid which has come under scrutiny *in this Report* is morally reprehensible and violates the Rule of Law.[5] (Emphasis added.)

and further:

> It [the Commission] does not wish to submit to the world legal community a mere indictment of the ideology and political practice currently applied in the Union. The Commission desires rather to create an awareness, both in South Africa and abroad, of the full legal and moral implications of the current situation and to stress the pressing need for a change of policy that will bring about understanding and cooperation between the various races.[6]

In addition, save for the casual but inquisitive sojourn of one of its members in South Africa, the Commission did its investigating at home. The historical section of the Report appears well documented, but excepting the case, above mentioned and later reviewed, all sources are secondary. While the sources give no indication of being readily impeachable, one cannot resist the impression that the Report's primary virtues are condensation and compilation. However, in all fairness it must be admitted that, given the stinging indictment which is the mainstream of the Report, there is great doubt that an extensive and notorious personal investigation would long have been tolerated by the South African government.

Although the case against apartheid may at first awaken the humanitarian

1 Other similar reports include: THE HUNGARIAN SITUATION AND THE RULE OF LAW (1957); THE QUESTION OF TIBET AND THE RULE OF LAW (1959); TIBET AND THE CHINESE PEOPLE'S REPUBLIC (1960).

2 Text at 8.

3 *Id.* at masthead.

4 *Id.* at 5, Apartheid is defined in the Afrikaans Dictionary as:

> A political tendency or trend in South Africa, based on the general principles
>
> a) of a differentiation corresponding to differences of race and/or level of civilization, as opposed to assimilation;
>
> b) of the maintenance and perpetuation of the individuality (identity) of the different colour groups of which the population is composed, and of the separate development of these groups in accordance with their individual nature, traditions and capabilities, as opposed to integration. . . .

5 *Id.* at 6.

6 *Id.* at 92.

outrage of the layman and violate the justice-seeking aspirations of the lawyer, more sober second-thought raises the questions whether the presentation of such a case is within the ambit of a consultative body of the United Nations, or whether the world community is so unified in its purpose and fortified in its principles that it may cast the first stone at any segment of the whole. That the stone is cast at a deplorable condition is clear; that it is rightfully the first stone is not.

Although the reader may consistently entertain doubts as to the propriety of the Report, he will nevertheless be struck by the sad results that law, by dint of sheer power, has brought to the human condition in South Africa. The Commission proceeds by setting out portions of the Universal Declaration of Human Rights[7] at the beginning of each section and then setting out facts, figures and statutes which indicate to the Commission a violation of that particular section of the Declaration. This encompasses such broad areas as Racial Classification, Movement and Residence, Rights and Freedoms, and Marriage. By far the most noteworthy aspect of the South African situation is the way in which legislation is resorted to in almost every instance in which the white minority seeks to effectuate apartheid. While separation is the principle, suppression is the rule. The Commission takes great pains to absolve bench and bar and goes so far as to suggest that the bench is under severe public pressure to effectuate apartheid and that the independence of the bar is threatened because of its attitude of concern for the colored citizens and residents of South Africa. Nevertheless, the Commission sees the Rule of Law as having a potentially successful champion in the courts:

> The ultimate interpretation of apartheid legislation lies with the Judiciary, which has up to now always enjoyed a high reputation for independence, impartiality and concern for fundamental human rights. Yet the judge can only apply and interpret the law as he finds it. If then there exists little justice for many in South Africa today, it is primarily because the laws themselves are not just.[8]

If the attitude of the Commission, as seen by its comparative approach to apartheid, can be categorized, it certainly cannot be called "integrationist." Since the Commission, as was seen before, is most candid in its opinion of the situation, the charge of race-mixing cannot be leveled. The historical and factual section of the Report protests a violation of fundamental human rights which, in this instance, takes the shape of racial suppression. As one African woman is quoted as saying, "They are teaching our children just enough to keep them as menial servants. They have shut the door on our progress."[9]

The second half of the Report consists of a series of appendices including a press conference with the Commission's emissary to South Africa, a draft of the proposed constitution of South Africa, the administrative scheme for recruitment of African farm labor, the trial records of two cases involving the release of two Africans from forced farm labor, and a reprint of several emergency proclamations and regulations. For the most part, its is submitted, the appendices make a skillful, if not valuable, presentation of the case against the political framework of South Africa.

While criticism may be leveled at the Commission for failure to make an on-the-spot investigation, its one attempt in this direction appears generally unsatisfactory. The press conference with Mr. F. Elwyn Jones involves his impressions of what is rotten in the state of South Africa. Apparently Mr. Jones was given free rein to wander in and out of the various trials in session while he was in South Africa. He talked to a number of judges and people in the area who were apparently more than candid with him. His personal impressions range from detecting a faint smile on the face of a judge hearing a case to the drama of a young policeman on the witness stand. Much of his information is hearsay, and

7 UNITED NATIONS GENERAL ASSEMBLY RES., No. 217 (III), Dec. 10, 1948.
8 Text at 92.
9 *Id.* at 106.

on occasion his inquisitiveness is reminiscent of that of an ace reporter for a metropolitan newspaper. The publication of his news conference in so auspicious an organ as this Report will no doubt come as a shock to the jurists and officials of South Africa who met Mr. Jones on his trip there. In substance, this portion of the Report is out of line with the general tenor of well-documented, objectively factual reporting that is evident in the balance of the Report.

Little comment is necessary on the remainder of the Report for it only involves reprints of official documents. Nevertheless, contrasting the proposed constitution with the trial records of such a pitiful case as the legal kidnapping of several Africans and their "sale" to a farmer and long detention as farm workers under sub-human conditions strikes a responsive chord more effectively than anything the Commission might have said in its own right.

Taken as a whole, the Report makes its point: It is hard to imagine any philosophical conception of the Rule of Law which is not violated in South Africa. The Report is skillfully developed and, except for the statements of Mr. Jones, closely documented. The facts and conclusions of the Commission suggest revolution to the zealot and severe legal reform to even the most conversative. Nevertheless, the Report smacks of a prying and presumptuous exposé. It compels a feeling that the World Rule of Law is not necessarily best served in a Report by an organ which associates itself closely with the United Nations, whose first and most formidable aim is to save mankind from self-destruction. Only then can it raise mankind to equal justice.

John R. Martzell

BOOKS RECEIVED

*Atomic Energy and Law: Interamerican Symposium. Editor, Dr. Jaro Mayda.
Rio Piedras: University of Puerto Rico, 1961. Pp. 258.

Reports of Judgments, Advisory Opinions and Orders, 1960.
Netherlands: International Court of Justice, 1961. Pp. 261.

Review of Contemporary Law.
Brussels, Belgium: International Association of Democratic Lawyers, 1960. Pp. 398. $2.00.

*South Africa and the Rule of Law.
Geneva: International Commission of Jurists, 1960. Pp. 239.

Status of Multilateral Conventions in Respect of Which the Secretary-General Acts as a Depository. United Nations (looseleaf binder).
New York: Columbia University Press, 1960. Pp. viii, loose leaf. $10.00.

Studies in World Public Order. By Myres S. McDougal and Associates.
New Haven: Yale University Press, 1960. Pp. xx, 1058. $15.00.

The Rule of Law in a Free Society.
Geneva: International Commission of Jurists, 1960. Pp. 340.

Tibet and the Chinese People's Republic.
Geneva: International Commission of Jurists, 1960. Pp. xiii, 345.

Yearbook 1959-1960.
Netherlands: International Court of Justice, 1960. Pp. 374.

Yearbook of the International Law Commission, 1953
New York: Columbia University Press, 1960. Pp. vii, 409. $4.00.

Yearbook of the International Law Commission, 1959
New York: Columbia University Press, 1960. Pp. iii, 124. $1.50.

* Reviewed in this issue.