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## Book Reviews

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## BOOK REVIEWS

THE STRUCTURE OF IMPARTIALITY. By Thomas M. Franck. New York: The Macmillan Company. 1968. Pp. 344. \$8.95.

This book is dedicated to Professor Louis B. Sohn and to the late Edmond Cahn. Having in this manner gotten off to a good start, the author proceeds to examine carefully the riddle of one law in a fragmented world.

For a variety of reasons I find *The Structure of Impartiality* to be an uncommonly good book. It is an imaginative undertaking and its fluid argument is well organized. There has been an effective selection of illustrations to support the propositions and insights that have been recorded. The theme is a critical and important one. The author, writing in an interesting style, combines realism and speculation in an appealing and meaningful manner and he effectively blends past history with prediction for the future. His points come home. All of these qualities have combined to give this reviewer a considerable amount of pleasure. Naturally enough, it is also good to know that there are others who perceive ideas and life along the lines of one's own persuasion.

But, of course, it is the reviewer's function to be objective as well as appreciative. What then are Professor Franck's perspectives, theses, issues, and conclusions?

The perspectives are wide ones. In analyzing the world decisional and law-making process he draws upon a variety of sources. These include international law and organization, United States constitutional law, traditional jurisprudence, moral and political philosophy, science, religion, and a considerable appreciation for *Weltanschauung*. The latter term contains "those beacons of conduct, policy, and intent that guide a developing community through the twilight zone between the substantive, imperfect *is*, and the postulated perfect *ought* of legal order."<sup>1</sup> To this concept is also attributed the indication of "the tendency of a shrinking world toward fundamental value-conformity: a process of psychological and social growing together, an affERENCE that is already a well-known tendency within nations made up of historically disparate cultures and tribes."<sup>2</sup> Again,

it is necessary that international decision-makers have access to the best possible data on the state of values of the emergent international community. An informed guess is that a voyage of discovery to world public opinion would reveal that both among the mass and the specialists can be found a far greater sense of shared values and sense of community-identification, of *weltanschauung*, than is apparent from the conduct of those political leaders whose role in national governments gives them, however unconsciously realized, a vested interest in preserving the social, cultural, and political differences that underlie and justify the existence, in an age of interstellar relations, of one hundred and forty sovereign states on just this one minor planet.<sup>3</sup>

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1 T. FRANCK, THE STRUCTURE OF IMPARTIALITY 133 (1968).

2 *Id.* at 145.

3 *Id.* at 154.

The author's critical and important thesis is that there is enough in the relations of states to constitute a world community. He affirms the significance of law in such an existing community, and notes that "[t]o say that a state or an individual cannot be limited by any rules, except by voluntary acquiescence, is simply to misconceive the interdependence of rights and duties in an interdependent community."<sup>4</sup> To be sure, conflict does exist, but it exists within a community with a commonality of interests that would be lacking, for example, in a mere international arena.

Disputes within such a community, according to this thesis, are susceptible to lawful resolution. Pursuant to the author's value standards, such an outcome is to be preferred to violence and even to non-solution. Negotiated settlements and third-party judgments are preferable to violence. Thus,

[o]nly when nations are prepared to meet each other as equals, contending before a forum which is a respecter neither of self-styled racial superiority, military, nor even of economic or any other kind of power, save only that of human *reason* — only then can third-party law be made to work.<sup>5</sup>

If that reason were not a sufficient argument, the author makes it quite clear that violence has long since demonstrated its inutility and, in more recent years, its practical ineffectiveness as a technique for resolving disputes.

The factual use of law in a dispute-resolving situation receives a realistic appraisal by the author. He feels that law is a living institution in a living society; history—as well as experience and logic—teaches that law is “in a constant process of becoming, of developing, of growing.”<sup>6</sup> Does this mean that because the world's legal system has spawned a primitive set of institutions the law of this system is equally primitive? It may be realistic to admit that the community is a primitive one and lacking in sophisticated institutions. But this need not and does not mean that the law of the community is equally primitive. In fact the exact contrary is the case as is thoroughly attested by many illustrations.

The author is not so pedestrian as to confine himself to an analysis of facts. His speculative approach serves many needs. He notes, for example, that “a system of law resting on coercive governmental force is not necessarily the only hypothesis upon which a social and legal order can be postulated.”<sup>7</sup> This is certainly true as every international lawyer knows, even though on occasion perhaps he would be pleased to be able to accept the more positive affirmations of the law as derived from more formal institutional processes. However, the institution and the formality of the law are clearly secondary to a sense of legal obligation. To the author's credit he points specifically to the basic foundations for this sense of obligation. These are identified as: a consciousness or moral duty, a preference for consistency, the presence of a system of practical reasoning, a suitable and regular respect for reciprocal benefits, and a fear of coercive

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4 *Id.* at 131.

5 *Id.* at 92.

6 *Id.* at 7.

7 *Id.* at 6.

power. Such forces as these make law meaningful. They also give security to law and legal systems (to the extent this is desirable) and sanctions (to the extent these must be utilized), and confidence in the impartiality of authoritative decision-makers (to the extent that this process is preferred over violence and negotiations).

This brings us back to the essential thesis of the author. It is his view that the key to the development of international law is more than the exercises of power and the negotiated compromises which take place between states. Rather the key is the utilization of law through the objective or neutral involvement of third parties in the disputes of others. This may be summarized:

It is the function of the third-party process to proclaim, let us say it frankly: to *make* law. But the subjectivity of this process need not render it capricious or lacking in standards. *Within* the decision-maker, and in the relations *between* the decision-maker and other actors in the law-making and order-creating drama there occurs a kind of interaction, a weighing and bargaining, which brings into play the decision-maker's subjective reason, his "feel" for a situation, his human predilection to philosophically consistent standards, as well as evidence of the facts, empirical observation of what may be comparable experimental solutions, the relevant "black-letter law," the "general pattern of conduct of the community," and the "public intent" or the public policy of what appears to be the relevant "community." Out of all this emerges a response, hopefully one that "works" in the instant but also sets out a principle capable of being coupled with what has gone before and what is yet to come. This response, balancing the experiential and the philosophical, formulated by an official law-perceiver and generally ratified by the community in action, is called *law*.<sup>8</sup>

The exclusive characteristic of this process is its impartiality.

Having come this far the time has been reached when the primary issue must be identified: Is there or can there be a structure of impartiality worked into the third-party dispute-resolving process for nations? Obviously, there is a large need to be able to answer this question in the affirmative. Nonetheless, the test of impartiality is subject to the criteria of impartiality. The author has identified the problem in these words:

*Whether the struggle to create a climate of human impartiality succeeds will determine the scope, if any, given by society to a system of third-party law-making.* That there is a direct relationship between the impartiality of third-party impartial decision-makers and the extent to which the community utilizes the third-party decision-making process would appear to be axiomatic, and is the underlying hypothesis of this book. Put conversely, it is assumed that no administrative or judicial decision-making system, except in a dictatorship, can expect to be widely accepted and routinely resorted to until it has established its essential credential of impartiality.<sup>9</sup>

The author then examines the criteria which must be applied by decision-

8 *Id.* at 166.

9 *Id.* at 29.

makers if the condition of impartiality is to result. The fundamental consideration would appear to be an awareness on the part of the judges that their function is to apply legal norms in an even-handed manner to disputes, and a recognition on their part that such norms have relevancy. Thus, it would appear that a loyalty to the process, until a better one comes along, is the first and unqualified condition for impartiality. Many additional criteria are suitably identified. Included among them is the nature or type of dispute, and the author expresses a preference for issues that are susceptible to "yes" or "no" answers. This seems to be too much to ask, for in the real world disputes do not present themselves in simplistic alternatives. Another favored condition is the denationalization of the trial process whereby every effort is made to identify the interpersonal rather than the international elements of the conflict. Other important factors include the minimization of the psychological biases of the decision-makers, the resolution of conflict in a low pressure environment, and the neutralization of divisive historical and religious factors with simultaneous exploitation of the plus factors that can be plumbed from historical and religious values.

The author, having posed a most difficult question, has striven courageously, and on the whole successfully, to demonstrate that with a modicum of common intelligence on the part of decision-makers impartiality is possible. In the course of arriving at this conclusion, much experience, including even the attitudes and practices of the ideological contestants in a bi-polar world, was considered. The author's analysis has contributed in its own right as one more building block in the arsenal of those who are seriously interested in proving the art of the possible. The methodology and the conclusion have substantial appeal for this particular reviewer.

In the final analysis the problem comes down to a question of alternatives. The answer, after all the arguments have been heard, realistically comes back to the factor of necessity. As the author notes, "no community is structurally equipped to overcome its problems of social order until some impartial *third-party* decision-making system is brought into operation."<sup>10</sup>

It is obvious that such dispute-resolving institutions are critically essential. They are emerging. Unanswered is the question: Are they emerging fast enough and with sufficient powers? The relativity of such a question suggests that a fair answer can also be couched in relative terms. Certainly one must not ask of law and legal processes more than they can reasonably deliver. They must be related to the currently possible, *i.e.*, to "that which reasonable men may reasonably be expected to do in good faith at *this* moment in *these* circumstances."<sup>11</sup>

Yet law is more than that, and of this the author is abundantly aware. Law can give direction to and hope for the future, for it is an art as well as a science. Professor Franck makes the point that law is not an ultimate truth and should not be likened to religious revelation or scientific verification. Indeed, it may be suggested that law possesses a statecraft of its own.

Perhaps this book is testimony to the author's faith in the ultimate reason-

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10 *Id.* at 43.

11 *Id.* at 62.

ableness of decision-makers. But it certainly is much more than that: It is a book which takes mankind as it is, and acknowledges human imperfections. Perhaps man is essentially good, even if his good efforts are frequently misinterpreted. Perhaps man is essentially bad, even if his evil is often counterproductive. Being both good and evil, man produces tensions, disputes, conflicts, and much social disorganization. But being both good and evil, he hopes for social organization and for solutions, and once they are offered to him, he is prone to debate their utility.

In short, we are treated to the theme that social change is possible, that law and the legal process are critical elements in such change, and that under modestly favorable circumstances, law has a significant impact on such change. In the world community, law has an important role to play. The measure of this role is that law has some, though yet not enough, authority over states, but that this "some" is constantly moving in the direction of "enough."

Having made these points perhaps this review should be brought to a close. However, I am impelled to extract yet another point from this book. On three occasions, the 1962 Cuban missile crisis is used in support of the author's argument. In choosing this illustration, the author necessarily invites comment as to the quality of impartiality brought to the assessment of that event. Let us suppose, for example, that the author and the reviewer perceive the event through somewhat different perspectives — that our *Weltanschauung* provides somewhat different attitudes and convictions. Let us further assume that the reviewer also seeks the unpersonal quality of impartiality in his total appraisal of that specific event. Since we are both controlled by the criteria of impartiality, I take it that such a limited disagreement might be subjected to the process of negotiation or the more formal process of third-party decision. With our respective facts and perceptions open to a form of legal dialogue, it would be expected that varying viewpoints would be more clearly identifiable — even reconciled if required. Thus, through the application of the structure of impartiality, any differences — real or imagined — between the author and reviewer would readily be identified, resolved, and, further, might even serve as a law-creating event governing the fascinating functions of writing and reviewing. It should be noted that the process of force was not mentioned as a means for dispute-resolving or law-creating as between our several functions.

On a broader plane, one must necessarily agree that the use of power is a poor way to create or secure clear rules of international law. Yet I feel that this is not to say that such rules can never emerge with at least adequate clarity from disagreeable events. With the author I deplore the prospect that the law may have to evolve through such processes, and with him I urge a more complete reference to the rational elements of man's behavior as the preferred source of law creation.

I think that one cannot conclude any better than the author. His final summation reads:

It is precisely because the content of impartiality is not objectively definable except in terms of its outer perimeter — what it is not — and is always tempered by the subjectivity of the perceiving human intellect, that its yoke

is so eminently wearable and its achievement, always relative to its failure, affords civilization so grandiose a challenge, so ennobling [*sic*] a quest.<sup>12</sup>

Carl Q. Christol\*

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PROBLEMS IN HOSPITAL LAW. Pittsburgh: Health Law Center. 1968. Pp. 203. \$10.00.

The role of the private non-profit hospital vis-à-vis the community, no longer limited to the furnishing of physical facilities and equipment where a physician treats his private patients and practices his profession in his individualized way, has been rapidly changing. The hospital is no longer simply the "doctor's workshop." Rather, the hospital has been maturing and developing as a true community health center. Medical practice has become increasingly institutionalized, with the physician dependent upon the hospital and the hospital dependent upon the doctor. Specialization of practice and the need for consultation in the care of patients inevitably lead to institutionalization. Moreover, the hospital's emergency room services, outpatient services, and diagnostic services all continue to expand rapidly; hospital-based home care programs are being developed; accelerated by Medicare, contractual arrangements with extended care facilities are increasing in number and significance. Increasing costs of providing hospital and medical services make area-wide planning of facilities and services mandatory. State planning procedures are now detailed as a matter of law in New York,<sup>1</sup> and similar statutes could well be adopted in the near future in other states. In the words of Anne R. Somers, "The hospital of the mid-Seventies will be the central coordinating force — the organizational hub — of the entire system of community health services."<sup>2</sup>

All of this change and concern regarding the nation's third largest industry — health care — has imposed extremely demanding tasks on hospital trustees, administrators, department heads, and counsel. These are the people responsible for hospital management and they must be aware of the major legal and quasi-legal issues facing them as the hospital's role continues to evolve. Litigation involving hospitals has increased during the 1960's and management must develop procedures and policies designed to prevent or at least minimize problem areas. The best defense against litigation and legal misunderstanding is a good offense — an offense designed to promote medical care of the highest possible quality and genuine community service.

No group in the country has done more during the past decade in making both lay administration and attorneys aware of hospital legal problems than the

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<sup>12</sup> *Id.* at 331.

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<sup>1</sup> N.Y. PUB. HEALTH LAW §§2801-09 (McKinney Supp. 1968).

<sup>2</sup> Keynote Address by Anne R. Somers, Fifth Annual Hospital Medical Staff Conference, Sept. 30 - Oct. 4, 1968, University of Colorado School of Medicine.

Health Law Center, now a division of the Aspen Systems Corporation, Pittsburgh, under the directorship of John F. Harty, Esq. In 1959 the Center first published its multi-volume *Hospital Law Manual*, a loose-leaf service brought up to date regularly with quarterly supplements, for administrators and attorneys. The book under review is a much condensed version of the *Manual*. It is a single volume prepared under the editorial supervision of Professor Nathan Hershey, Research Professor of Health Law, Graduate School of Public Health, University of Pittsburgh.

The book is aimed primarily for use by hospital administrators, department heads and trustees. Its purpose is to make these lay people aware of legal problems surrounding medical care administration so that they will make better use of counsel and better understand any legal advice rendered. Lawyers should always appreciate intelligent, knowledgeable clients because they are better able to implement advice. In the complicated world of hospital administration, a concise legal work written specifically for laymen in readily understood language was badly needed. Lawyers should call this book to the attention of their clients. Hospital counsel, however, will find the book inadequate for their own purposes of research and will want to use the far more extensive *Manual* and other sources for up to the minute citations of authority.

The book can also be used as a basic text for an academic course in hospital law in university programs in hospital administration. The twin purposes of a course in law to lay students are simply to make the students aware of the major legal issues they will likely face in the course of their professional careers and to impress upon them the need of securing competent legal counsel. This publication implements these twin purposes quite admirably with respect to the topics of law discussed.

The book consists of sixteen chapters, each dealing with a major legal topic. As would be expected in a work of this kind, some chapters are more thorough and complete than others. All, however, cite leading cases and statutory authority where applicable, explained in a way understandable to laymen. Advice given is well documented. There are chapters on the corporate structure of the hospital and on the responsibilities of the governing body, the role and authority of the administrator, the organization of the hospital auxiliary, and the relationship of the medical staff to the hospital. The hospital-medical staff relationship is currently one of the most crucial of legal problems in the field of medical care. The celebrated case of *Darling v. Charleston Community Memorial Hospital*<sup>3</sup> is discussed and analyzed in the medical staff chapter and it illustrates the point that hospital administrators must be cognizant of the institution's obligations to review and evaluate the quality of medical care being rendered by their staffs.

The hospital-patient relationship is well explained in chapters on the admission and discharge of patients, consent to medical and surgical treatment, hospital liability, medical-moral problems (abortion, sterilization, and artificial insemination), and autopsy. The chapter on consent to treatment presents recommended consent forms which can be consulted with much profit by hospital counsel when drafting forms for use by their clients. Too many hospitals are

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3 33 Ill.2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966).



still relying on a brief all-purpose consent form similar to one which the Louisiana Appellate Court struck down in 1960 as nearly worthless.<sup>4</sup>

A short chapter deals briefly with the liability of nurses. Others discuss the ownership, retention, and disclosure of information from medical records, and the operation of the hospital pharmacy. Finally, there are chapters on labor relations and hospital taxation. Both of these latter subjects involve relatively new legal and public policy issues which demand increased attention.

The arrangement of the chapters is not entirely logical. For example, it would seem preferable to discuss the hospital-medical staff relationship earlier in the book than is actually done since this is such an important matter. Also, the chapter on charitable and governmental immunity from tort liability should, in the reviewer's opinion, logically precede or at least go hand-in-hand with the chapter on hospital liability rather than be separated by insertion of the short chapter on the liability of nurses. The chapters on labor relations and taxation, separated by seventy-one pages, could well be presented together since both are essentially concerned with matters of public rather than private law.

Regrettably, there are omissions of important material. Hospital administrators, for example, should be aware of New York's hospital planning legislation; as noted earlier, planning will be an increasingly important issue in the 1970's and administrators should be familiar with New York's attempt to give a legal base to new institutional construction and expansion of existing facilities. Moreover, the book does not discuss licensure of hospitals and professional individuals. There are some crucial legal issues surrounding licensure and these should be brought to the attention of those responsible for hospital management. A comprehensive index is not provided and some readers might find this to be a serious omission.

Nevertheless, these faults of commission and omission do not seriously detract from the book's value to hospital personnel. Some hospital administrators, trustees, and physicians have been hesitant to recognize the rapidly changing role of the community hospital and the corresponding increase in the legal issues which confront hospital management. Properly used by those for whom it is intended, this book can contribute substantially to an understanding of many significant areas of hospital law.

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<sup>4</sup> *Rogers v. Lumbermens Mut. Cas. Co.*, 119 So.2d 649 (La. App. 1960).

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