1-1-1935

Book Review: Judicial Aspects of Foreign Relations

Edwin Borchard
Yale Law School

claims thus disposed of, as the rules laid down in the special convention of 1923 were susceptible of interpretation in a sense hardly consonant with the great principle of the equality of nations, according to which, as Chief Justice Marshall well said, "Russia and Geneva have equal rights." "Power or weakness," declared Vattel, "does not in this respect produce any difference."

Of international law, the adjudication of claims and controversies by international tribunals, usually arbitral in form and in constitution, should be one of the chief sources. As Judge Nielsen points out, such tribunals, generally speaking, finally adjudicate differences which diplomacy has failed to solve, and which, although the amount of money at stake may be small, presumptively involve questions of law the decision of which may have far-reaching effects. In any event such decisions should tend to make certain and to stabilize the law. For these reasons it is highly important that the members of such tribunals should be chosen with the greatest care, and solely with reference to their qualifications for the performance of international judicial functions. They should be impartial, without special predilection for one nation as against another; they should know international law in that real and comprehensive sense which does not, by treating the law prior to 1914 as obsolete, put a premium on ignorance and raise propagandists to the rank of oracles; they should also, as far as possible, be men of experience in affairs, who are accustomed to deal with realities, and to apply principles to concrete facts, rather than to pursue imaginary goods, or, as Milton calls them, the faery visions that live in the colors of the rainbow.

The present volume is divided into two parts. The first part contains a discussion of general principles the application of which is constantly invoked in the adjudication of international claims. These embrace such questions as the nature and sources of international law, and the rules by which it is to be determined and applied; the right of "interposition" by a government in behalf of its nationals, including the connotation of the term "denial of justice"; nationality, whether single or dual, and the right of expulsion; the responsibility of governments for injuries inflicted upon aliens by private persons, including bandits and mobs; complaints arising out of false arrest, improper prosecution, delays in trial and mistreatment in prison; the responsibility of governments for acts of insurgents; the jurisdiction of governments over merchant vessels in their territorial waters, and various questions relating to the procedure of international tribunals and the rules of evidence which they apply. The second and principal part of the volume contains opinions in international cases and, as the title indicates, mainly in cases that have come before the commissions under the conventions of 1923 between the United States and Mexico. To these there is added the author's dissenting opinion in the *Salem* case, which was lately adjudicated by an arbitral board of three members constituted under the protocol between the United States and Egypt of January 20, 1931. The claim was disallowed, but the United States arbitrator dissented from the conclusions of his colleagues on certain points.

John Bassett Moore.†

JUDICIAL ASPECTS OF FOREIGN RELATIONS, IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS. By Louis L. Jaffe. Harvard University Press, Cambridge, 1933. Pp. viii, 278. Price: $3.50.

In this sprightly volume, the author has undertaken to subject to critical examination the occasionally professed dependence of the courts—principally English and American—on the political departments of the government (primarily the executive) in the determination of issues involving questions of for-

† Formerly Judge of the Permanent Court of International Justice, The Hague.

eign relations. He sustains vigorously the thesis, which in the last few years has gained increasing currency, that the courts have shown too great a dependence upon the executive, particularly in making their judgments as to the capacity of foreign governments to sue and as to the legal effect to be given to laws and administrative acts of such governments, depend upon the irrelevant fact of the political recognition or non-recognition of these governments by the executive of the forum. Interest in the subject was doubtless stimulated by the gyrations of American courts in seeking to pay deference to the governmental policy which refused so long to recognize the Bolshevik government of Russia, and which, down to 1922, assumed to recognize instead Kerensky's ambassador as the authorized spokesman for Russia. The author exhibits an acute power of analysis and with other critics of the New York decisions may derive satisfaction from the recent judgments of the Court of Appeals in *Salimoff v. Standard Oil Co.*,[1] and *Goldberg-Rudkowsky v. Equitable Life Ins. Co.*,[2] both disavowing the factor of political recognition or non-recognition as a criterion for giving or refusing legal effect to Soviet laws and decrees.

The book is divided into four principal chapters: (1) a general background on Political Questions in Cases Involving International Relations so far as they arise in the courts, and especially questions of sovereign immunity, neutrality, interpretation of treaties and statutes affecting the prize courts; (2) the theory and practice of recognition as a political act; (3) the effect of non-recognition in the courts on the status and rights of the unrecognized state or government as plaintiff or defendant and on the validity accorded to the laws and acts of the unrecognized government in their internal and external manifestations; (4) recognition and the courts. The author deals with so many important topics, both theoretical and practical, that in a brief review attention can be given only to a few matters. He seeks to show, if possible, when the courts should legitimately follow the executive and when they should profess independence. It is a worthy goal, and for the author's lucid and challenging views which, on the whole, are sound and sensible, he is entitled to much credit. But the treatment is not very systematic. He jumps from thought to thought in an often baffling fashion, yet his style is stimulating and attractive and sustains the reader's interest.

On the question of "constitutional understandings",[3] I should not have thought it doubtful that when the President and Senate conclude a treaty the House of Representatives is legally bound to execute it, even by the appropriation of money; they have no option to refuse. They can, of course, physically violate a treaty, but this is not legally privileged. Prize courts[4] are, of course, bound by legislative decrees and orders in council, and though it is quite true that when these violate international law the prize courts will not then be administering international law, the fact remains. The remedy for legislative as for judicial breaches of international law is through the diplomatic channel or international arbitration, so that in a legal system the rule of international law must ultimately prevail over a contrary municipal law. Occasional physical violations of this rule do not militate against its validity. *The Zamora*,[5] dealt only with the exceptional and rare *prerogative* order in council, not a legislative order in council;[6] but the decision was used by the official and unofficial propaganda

1. 262 N. Y. 220, 186 N. E. 679 (1933).
2. 266 N. Y. (1935).
3. Pp. 9-12.
4. Pp. 41-51.
5. Pp. 16, 28, 43-50.
6. For a description of the distinction between the two, see JENKS, SOURCES AND JUDICIAL ORGANIZATION OF ENGLISH LAW (1931) 18-20.

in the late war to bolster the legally unsustainable legislative orders in council which mocked international law. In no case did or could a British prize court set aside these important orders in council or disregard them. The author correctly plays down recognition as a criterion of legal results, and even as an operative political fact. On the contrary, he is correct in exposing the dangerous tendency to use non-recognition as a form of political reprisal in the pursuit of Noble Impulses, more likely to promote further chaos and war. But he is brash, to say the least, in suggesting [7] that our most profound international lawyer and statesman, John Bassett Moore, ought to revise his conception that the United States actually did recognize the Soviets in concluding with them the Kellogg Pact, especially when the author himself concedes that the word "recognition" has been used to express various ideas from the admission of existence to the formal exchange of diplomatic representatives.

The author might have said more about the *de facto* government (a constitutional term), whose acts within its own territory should be deemed judicially unchallengable in foreign courts, regardless of recognition; the assumption of the *Oetjen* case as to the "retroactivity of recognition" places the admission of validity or the impropriety of foreign judicial challenge on the wrong ground. On the effect to be given to the laws of an unrecognized state or government the author severely attacks [8] the decisions of the New York Court of Appeals, which seemed to conclude that political non-recognition warranted refusal to give the Soviet decrees or acts legal effect, even on property or corporations in Russia. Public policy in New York might well have warranted refusal to give extra-territorial effect to some of these decrees so far as they concern property *in New York,* but this doctrine applies equally to the laws of a recognized state or government. Courts need follow the Executive only where it would be politically awkward to differ, as in the determination of the political status or territorial boundaries of a foreign state or on the existence of a treaty; but in the administration of justice, the court should remain free from political control and hew close to the line of actual facts so as to promote legal order and protection. The author has taken pains to penetrate the underlying philosophical reasons for judicial independence and the justification for drawing the line where independence should begin. On the effect of war on treaties [9] the case of *Flensburger Dampfercompagnie v. United States* [10] has been overlooked. The author may be optimistic [11] in estimating the opportunities "for the conquest of international politics by the judicial temperament". A few typographical errors,[12] do not mar a book which may be ranked as a genuine contribution to its subject.

Edwin M. Borchard.†

CASES ON LABOR LAW. By James M. Landis. The Foundation Press, Inc., Chicago, 1934. Pp. xiv., 718. Price: $7.50.

This book was announced for publication in the spring of 1933 just before the author was appointed a Federal Trade Commissioner, to become, a year later, an original member of the Securities and Exchange Commission. During these first months that Professor Landis was in Washington, new national legislation and a series of administrative decisions had so enriched the law of labor

† Professor of Law, Yale University.
7. P. 118.
8. Pp. 162-198.
9. Pp. 1, 77.
10. 73 Ct. Cl. 646 (1932).
11. P. 38.
12. P. 145, 1903 for 1913; p. 147, "inimicable"; p. 219, B. for R.