Schiffer: The Legal Community of Mankind

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rights of an accused in a criminal case or even those of a respondent in an administrative proceeding. But it can insure against one-man investigating committees, require the screening of defamatory matter in executive session before it is publicized, and provide for a limited right of reply and even for a brief cross-examination of the accusing witness.

We are thus left with Mr. Taylor's "political" solution and his conclusion that unless "the temper of the country" is changed, little can be accomplished by statute. Of course this is a political problem and the censure of Senator McCarthy (regardless of the text of the censure resolution) has done more to warn those who might desire to follow in his footsteps than a score of statutes or court decisions. But the temper of the country can also be affected by agitation for a code of fair procedures. No less important in the creation of that public morality are works as perceptive and searching as Grand Inquest.

Will Maslow†


"[T]he more one reads of man's notions about the meaning and method of civil society, the more often is one inclined in despair to say that truth has as little to do with politics as it has with most politicians . . . . If ideas in politics more than elsewhere are the children of practical needs, the less it is true, that the actual world is the result of men's thoughts. The existing arrangement of political forces is dependent at least as much upon ideas, as it is upon men's perception of their interests."1 This in a nutshell is the problem with which the late Walter Schiffer deals in his study The Legal Community of Mankind. He attempts "to describe and explain the growth of the pattern of thought on which this idea of a universal organization [the League of Nations] was based, and demonstrate to what extent this idea was contradictory in itself."2 In his endeavor the author traces the evolution of the concept of universal organization, from the breakdown of medieval Christian unity through the drafting of the League of Nations Covenant, by expounding the ideas and doctrines of political thinkers beginning with Grotius, Pufendorf, Wolff, and Kant up to the positivist and progressive schools of the nineteenth and twentieth centuries. Mr. Schiffer's scholarly and comprehensive work is bound to have a notable impact on present thinking on the nature, function, and potentiality of a world organization.

The excellence and importance of this study, with its high scholarship and impressive erudition, require one to examine carefully Mr. Schiffer's presup-

†Director, Commission on Law and Social Action, American Jewish Congress.
1. Figgis, Studies of Political Thought from Gerson to Grotius 1414-1625, at 1 (1923).
2. P. 278.
positions and the manner in which he approaches the subject. The author's decision not "to analyze in detail the relationship between the ideas which constitute the object of this study and the political and social conditions out of which they grew"3 suggests the main weakness of the work. By disregarding the socio-political matrix of these ideas, his presentation becomes merely historical. Figgis has reminded us: "We must not study the political theories apart from the political conditions. We must never lose sight of the connection between theory and practice. In actual facts, we shall find, if not always the cause of new doctrines, at least the conditions of their prevalence and efficacy . . . . We are always in danger of reading our thoughts into their words; of drawing modern deductions from non-modern premises."4 Unfortunately this is exactly the mistake the author commits. By uprooting ideas and doctrines from the soil in which they were nurtured, he deprives them of their experience content. In any society, political and legal ideas and doctrines are manipulated to promote specific objectives: they are primarily used as justifications or rationalizations for expedient actions.5 Ideas concerning the development of a world order are no exception to this social process. It will be instructive to examine some ideas which were manipulated, toward the end of the period of Christian unity, as instruments in the formation of nation-states.

Despite the rather detached attitude he took in his De Iure Belli Ac Pacis,6 Grotius was by no means the sterile doctrinaire, shying away from the problems of his day, that Mr. Schiffer describes.7 De Iure Belli is a further elaboration of ideas Grotius previously expressed in his Commentary on the Law of Prize and Booty (De Iure Praedae Commentarius)—a study very likely undertaken to justify the interests of the Great United Company of East Indies in trading freely with the Indies and in defending its ships against Portuguese vessels.8 And at the time of the Peace Treaty between the Low Countries and Spain, when Spain contested their right to the East Indies trade, Grotius

4. Figgis, op. cit. supra note 1, at 27.
7. See, e.g., Grotius' observation: "among the traits characteristic of man is an impelling desire for society, that is for the social life—not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind . . . ." Prolegomena to his De Iure Belli Ac Pacis Libri Tres para. 6, p. 11 (Scott ed. 1925). Of this, one commentator has remarked: "Grotius is here much nearer to the truth as revealed by modern psychology than is Hobbes, who regarded society as a contractual agreement made by men naturally solitary and anti-social, or even than is Bentham, who conceived society as based merely on an intellectual recognition of the part of isolated individuals that they would gain by association and cooperation." Hearnsshaw, Some Great Political Idealists of the Christian Era 91 (1937).
revised chapter XII of this Commentary and published it separately as his famous *Mare Liberum.* Grotius himself enunciated his motives:

"[W]hen I saw that the commerce with that India which is called East was of great importance for the safety of our country and it was quite clear that this commerce could not be maintained without arms while the Portuguese were opposing it through violence and trickery, I gave my attention to stirring up the minds of our fellow-countrymen to guard bravely what had been felicitably begun, putting before their eyes the justice and equity of the case . . . But when a short time thereafter, some hope for peace or truce with our country was extended by the Spaniards but with an unjust condition demanded by them, namely, that we refrain from commerce with India, a part of that Commentary in which it was shown that this demand rested neither upon law nor upon any probable color of law, I determined to publish separately under the title *Mare Liberum,* with the intention and hope that I might encourage our countrymen not to withdraw a tittle from their manifest right and might find out whether it were possible to induce the Spaniards to treat the case a little more leniently after it had been deprived not only of its strongest argument but also of the authority of their own people. Both of these considerations were not without success . . . ."  

In formulating his doctrines Grotius assumed a realistic stand, never losing sight of existing conditions. His law of nations "grew of and grew up with the political facts of the time and its fundamental conception was an accurate reflection of an existing political system . . . ." On the facts, he was justified, for instance, in depicting the patrimonial state as physically represented by the king or the prince and in making them internationally responsible: "When Grotius thought of the duties of sovereign as the duties of individual men, he was not thinking metaphorically. He was thinking in terms of the moral and legal duties that rested on Ferdinand and Louis and Philip and James . . . ."  

Recognizing the breakdown of Christian unity, as it was steadily undermined by the growing nation-states, Grotius foresaw the dangerous consequences of complete atomization of society into independent states. This fear motivated him to formulate a system of law of nations applicable to rulers and individuals alike. He advocated a complete subjection of international relations to this law. And he relied on a natural law applicable to the community of mankind in an attempt to salvage some of the strength of the crumbling structure of medieval Christian society and thus to span the widening gulf between the newly established political units.

9. Id. at 39-43.
12. Id. at 78.
Similarly the real meaning and function of the ideas of other thinkers discussed in vacuo by Mr. Schiffer could be discovered by examining them in their factual context. As the centrifugal force of the emerging nation-state increased, the doctrines of territoriality and nationality, hitherto nebulous and vague, became convenient vehicles for consolidating the position of the state. This tendency is clearly discernible in the writings of Vattel, whose thought was dominated by a policy of nation-state independence which left very little room for a world order: “It is for each Nation to decide what its conscience demands of it, what it can or can not do . . . and therefore it is for each Nation to consider and determine what duties it can fulfill towards others without failing in its duty towards itself.” A more atomistic view of international society could hardly be found.

Because of his inadequate clarification of the purposes of the various writers of the sixteenth and seventeenth centuries, the author glosses over the intrinsically opposite nature of the doctrines which operated towards the fall of the Christian unity, and the ideas which formed the basis for the League of Nations. The medieval writers were bent primarily on the destruction of the rule of the Church, the binding force of Western cohesiveness, with only an incidental conservative effort to preserve some of the familiar links among the new political units. The supporters of the League, however, sought to reverse this trend and promote unity in the world community through the operation of an international organization.

Obviously, an attempt to attain this modern objective through application of traditional and sacrosanct doctrines of international law, abstracted from the events which created them, has slight chance of success. And if Mr. Schiffer’s is the only approach, his conclusion is undeniable—the League was doomed to failure. Unhappily, Mr. Schiffer is not alone. The hypnotic grip of ancient doctrines is evident in this typically positivistic despair for international protection of human rights: “to make individuals direct subjects of international law . . . has no chance to be realized for theoretical as well as practical reasons . . . .” Dean Pound has pointed to the fallacy: “the seventeenth- and eighteenth-century theory of international law grew out of and was an interpretation of the facts, whereas the nineteenth- and twentieth-century applications of that theory . . . do not interpret and grow out of the facts, but give the facts a juristic or metaphysical cast to make them fit the theory." A plea for strict application of Grotius’ doctrines would be absurd today. But if viewed in historical context, Grotius, by his practical, creative approach to the problems of

16. 1 Vattel, The Law of Nations or the Principles of Natural Law 6 (Fenwick ed. 1916). See further Van Vollenhoven, supra note 6, at 78-81 (1926).
18. Pound, supra note 11, at 75.
his day, does offer a healthy antidote to the petrifying influence of legal positivism. However valuable its logical systematization may be, positivistic thought has frozen international law into a rigid system of rules and has strangled creative efforts to formulate legal prescriptions which meet existing needs. By invoking doctrines out of touch with reality, the positivists have pushed the function of legal prescriptions as instruments of social control far into the background. Thus, for example, the “act of state” doctrine, by many categorically defended today, was originally invented as a “useful theory of those who wished to free the representatives of States from any rule of moral or reason. Now the State, ex hypothesi, was not bound by any objective rule, could not sin, could not be punished, could not even blush.” In the infancy of nation-states this doctrine was understandable, though unnecessary. But to cling to such a principle today, when a few individuals can wipe out whole nations, is inexcusable. A similar air of unrealism hangs about the traditional laws of war which attempted, through concepts of “state of war” and “neutrality,” to localize war in time and space. Under present circumstances a sharp dichotomy of war and peace, or belligerence and neutrality, is outdated. Likewise, the doctrine of diplomatic protection of citizens abroad is obsolete and inadequate in a world where the increasing number of individuals crossing national boundaries demands the recognition of international rights which can be claimed without the intercession of the state. The creation of international organizations raises, of course, a host of new problems which cannot be solved by the principles of an atomistic international law.

Given his positivistic and abstract approach, it is not surprising that Mr. Schiffer finds in the alleged logical inconsistencies of the Covenant the seeds of destruction of the League and that he refuses a priori to recognize that a functioning political institution founded on such inconsistent principles can have any potential effects: “the League was an attempt to deal with the

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19. For further discussion of the inadequacies of the traditional international law, see McDougal, International Law, Power, and Policy: A Contemporary Conception, 82 HAGUE RECUEIL DES COURS 143-62 (1952).
21. The fiction of the personality of the state is still frequently resorted to, helping to obscure the fact that “acts of state” are acts of individuals acting on its behalf. See, e.g., KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 49 (1954). Although refusing to recognize “morality as a general criterion for the determination of the behaviour of states and above all as a criterion for measuring and comparing the behaviour of different states,” he still does not look at “acts of state” in terms of the morality of the individual acting on behalf of the state. His concept, carried to its logical conclusion, would wipe out the principle of the Nuremberg Trial.
24. P. 283.
problem arising from political divergencies between the states into which the world was divided, by methods the successful functioning of which presupposed an essential unity of purpose among the peoples of the world, and therefore the absence of political discord. Without having reached the highest degree of perfection mankind could not hope, through the League, to perform the task which this institution was supposed to accomplish. But conditions were changed by the mere formation of this new political institution, and there is reasonable ground to believe that its operation would, in the long run, have modified political discord. Furthermore, Mr. Schiffer's rigid "either-or" approach, which assumes that world organization must be either a cooperation among the states, or a perfect world state, discharging all state functions on a world scale, ignores the possible development of entirely new political institutions. Yet, paradoxically, the author chose as the point of departure of his study the emergence of a new social institution, the nation-state. "The continuity of life is not the continuity of its institutions . . . . Organizations are removed from without, they are reformed, or scrapped and replaced." A few years ago no one con sidered of a political institution such as the European Coal and Steel Community.

Unfortunately, for all its superb scholarship, Mr. Schiffer's study illuminates only one aspect of the development of ideas, calling forth—perhaps unwittingly—examination of the areas which remain in the dark. In the end Mr. Schiffer has only confirmed Mannheim's insight that "thinking in terms of humanity as a whole is no longer chimerical dreaming, but the demand of the hour." "This vision may still be beyond the reach of many of our self-styled 'hard-boiled' realists whose 'realism' consists in thinking and acting according to the ideas of a bygone age."

GERHARD BEBR{T


Julius Stone is best known to American readers for his two works in jurisprudence, Law and Society (in three volumes, with Sidney Post Simpson), and The Province and Function of Law. The latter is both the most authoritative interpretation of the views of Stone's teacher and former colleague at Harvard Law School, Dean Roscoe Pound, and also perhaps the most detailed and comprehensive venture in sociological jurisprudence produced to date in the common law countries.

25. Ibid.
26. See, e.g., pp. 4, 5, 8, 293.
27. MACIVER, THE MODERN STATE 330 (1926).
28. MANNHEIM, FREEDOM, POWER AND DEMOCRATIC PLANNING 74 (1950).
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