1955

Stone: Legal Controls of International Conflict

Edward McWhinney

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylj/vol64/iss6/14
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 conceived 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 BEER†


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).
†Visiting Lecturer in Law, Yale Law School.
Stone's latest work is an attempt to survey public international law from the wide viewpoint of jurisprudence and legal theory, with particular emphasis on the techniques and general teachings of the sociological school. It is notable for the evidence it provides of the range and catholicity of Stone's scholarship. As might be expected from his joint English and American training, Stone has canvassed thoroughly English and American source materials; but he seems to have exhausted also the relevant French and German authorities, he has dipped deeply into Italian and Spanish literature, and as an extra service he has given ample attention to the writings of the modern Scandinavian school of jurisprudence founded by Hägerström, who regrettably is still too little known in the common law countries.

A principal result of Stone's background and training in sociological jurisprudence is, throughout the present work, his emphasis on the historical relativism of many of the existing rules of international law. He points to the Christian, Western European origins of many of the positive law rules, for example, the conception of international law, widely held up to the close of the nineteenth century, as the public law of Europe. This approach involves problems, in the vastly expanded world community of the present era, not merely in finding a sufficiency of commonly held values and assumptions throughout the various nation-states to buttress existing positive law rules, but even in arriving at common verbal symbols of communication between nations. Thus the doctrine of the "rights of man," Stone suggests, had a fuller common meaning to Frenchmen and Americans in 1780 than it has in 1955—and one may be pardoned, indeed, for wondering whether the spokesmen of the Western democratic countries and the Soviet bloc leaders are in the same universe of discourse in discussing such contemporary United Nations projects as the draft Declaration of Human Rights. As another aspect of his sociological approach, Stone is quick to see analogies between the development of international law rules and the stages of evolution of law within individual nation-states:

"Just as the English legislature's nineteenth century activity marched with a conception of municipal law as the command of a Sovereign, so the nineteenth century pre-eminence of international treaty-law helped to consolidate the theory that international law derives its binding force from the mere consent of States. The conventional theory of international law, despite Austin's dissent, matches in function mutatis mutandis the imperative theory of municipal law. Both emanate from sovereign entities, the former being agreed between the subjects, the latter being imposed by each of them on its respective subjects."

Again, Stone relates the failure of the high hopes of those who codified the rules of war at The Hague Conventions of 1899 and 1907 in part to their reliance on the classical nineteenth century laissez-faire formula separating economics from politics: with the growing role of government in economic life, many rules of maritime warfare, of belligerent occupation, of the immunities of
sovereigns and their ships, and of the functions and immunities of diplomatic and consular agents were undermined.

Stone is clearly at his best when in quest of the historical origins of existing rules of international law and in noting symbiosis between particular positive law provisions and societal facts of the time and place where those rules were devised. In this vein he categorically rejects, as inadequate descriptions of the facts of contemporary international society, the polar positions of present-day authority on international law which he regards as represented by "the dichotomy of Power Politics (leading to perdition) and World Community (living by the Sermon on the Mount)."

This very avoidance of absolutes—an end product of the relativism of values and institutions that is bound up in the approach of the school of sociological jurisprudence—does, however, seem to worry Stone at times when he gets into the main "tension" problems of contemporary international law, and by the same token to produce some apparent inconsistencies in his basic method for solution of these problems. Thus, in discussing United Nations intervention in the Korean war, Stone is critical of Professor McDougal's arguments supporting the legality of the action which was taken by the Security Council in the absence of a permanent member, the Soviet Union. The legal arguments marshalled by Professor Stone are detailed and considered, but he then proceeds, somewhat ingeniously, to reach the same result as Professor McDougal by classifying the Security Council action as a "recommendation" only and not a "decision," and therefore not, in terms of the United Nations Charter, requiring the affirmative votes of permanent members of the Security Council. Stone's method of approach to this problem is essentially positivist, relying as he does on close study and analysis of the history of the adoption of relevant Charter provisions and of past League of Nations and United Nations practice.

Again, in discussing the problem of forced repatriation of prisoners-of-war, which arose in the aftermath of the Korean War, Stone concludes that the precedents in favor of the captor state's granting asylum to prisoners-of-war are somewhat inconclusive "in view of the contemporary conditions of ideological and political warfare." He then supports his conclusion that such asylum should not be permitted on purely pragmatic grounds: the danger that captors less scrupulous than the United Nations would refuse to return prisoners on

---


5. P. 664.
the spurious ground that their own "screening" had found the prisoners afraid of persecution on their return, and unwilling to be repatriated, and the danger of interfering with the municipal law of belligerent states relative to treason and sedition. 6

And, in discussing the legal bases of the Nuremberg trials and the effects of the maxim *nulla poena sine lege*, Stone seems to rest, ultimately, on a purely natural law position:

"[T]he ethical import of the maxim is confronted by the countervailing ethical principles supporting the counts and sentences. Killing, maiming, torturing and humiliating innocent people are acts condemned by the value-judgments of all civilised men, and punishable by every civilised municipal legal system. The calculated instigation of the scourge of war as an instrument of national policy was also so condemned. All this was known to the accused when they acted, though they hoped, no doubt, to be protected by the law of a victorious Nazi State from punishment. If, then, the rules applied at Nuremberg were not previously rules of positive international law, they were at least rules of positive ethics accepted by civilised men everywhere, to which the accused could properly be held in the form of ethics." 7

The difficulties Stone has in hewing consistently to purely relativist criteria are not surprising. Stone's great teacher, Roscoe Pound, was exercised by this same problem though Pound's basic conception of law as a hand-maiden to society and his consequent awareness of the practical limitations to the effectiveness of the positive law when it seeks to run counter to the main trends of society caused him to eschew the escape device resorted to by Kohler of, in effect, authorizing the abandonment by decision-makers of pure social tests in favor of positive law in the case of "retrogressive civilizations." In approaching the task of building a more effective contemporary international law Stone looks with some sympathy on jurists like Judge Alvarez and Professor F.S.C. Northrop who, in calling for the reconstruction of international law on the basis of "the world living law pluralism," are seeking a sort of international *jus gentium* that will be more representative in its appeal than the present essentially Christian, Western European-derived body of doctrine. At the same time, Stone points out that an approach such as this assumes, rather than proves, the mutual harmony and even the compatibility of the plurality of national Weltanschauungen which determine the "living law" and the basic norms of the several "cultural entities" into which the world is divided. It may be, indeed, an attempted twentieth century revival of the belief that there is an innate harmony of free-playing human activities: a similar assumption was a main drive of nineteenth century libertarian and laissez-faire theories, and history has scarcely justified the belief in that context. Stone, in the present treatise, accepting the fact of the present bi-polar political division of the world, does make a most telling examination of the Soviet and Western approaches

to international law, noting the major points of conflict, and yet finding a substantial number of rules that are generally observed. These rules, though they are mainly of a utilitarian or instrumental nature, covering matters which do not engage the major interests or convictions of states, would have to be accounted for as either adopted independently by each side in the present power struggle, or as "binding all States independently of their membership in either camp in a kind of partial ad hoc association." Stone's program for action in the absence of what he regards as any present basis for projecting a single world community with a single legal order, though it is consistent with and flows inevitably from his sociological major premise, is still a rather Spartan formula to offer the student of international law during the current world crisis:

"[T]he international lawyer can only do his best to approach traditional principles and treaty-law as they stand in the books, with a constant awareness that they may not correspond wholly or at all to 'law in action.' At the worst, little will be lost by such an approach. At the best, such activity will preserve, and perhaps develop somewhat, the area of successful universal legal regulation already mentioned, as well as maintain a universal legal framework, which could, if international conditions changed, serve for a truly universal community of States."

Edward McWhinney


This is the fifth volume—although numbered Volume Six—of the second edition of Professor Moore's treatise on the Federal Rules of Civil Procedure, originally published in 1938. It covers rules 54 through 60(a), the author having indicated that material on subdivision (b) of rule 60 will be included in Volume Seven which is to appear soon. In examining the first edition published some sixteen years ago, one finds that rules 54 through 60 consumed 134 pages. Volume Six of the second edition is more than ten times that size.

Professor Moore's reputation in federal practice is firmly established. Moore's Federal Practice is a treatise without equal in that field. Volume Six can only serve to enhance the stature of both. It provides a complete, accurate coverage of all the minutia of the rules included. Yet, at the same time, it places its central emphasis on the points of real, current controversy

8. P. 57 et seq.
9. P. 64.
10. Cf. Pound's own reaction, in his latter-day writings, against the consequences of "neo-Kantian relativism," Pound, Contemporary Juristic Theory (1940), and his characterization of the "Give-It-Up Philosophies."
11. P. 64.

†Barrister-at-Law, Assistant Professor of Political Science, Yale University.