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Book Reviews

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BOOK REVIEWS

THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW. By E. K. Nantwi. Leyden, Netherlands: A. W. Sijthoff, N.V., 1966. Pp. xv, 209.

"International law . . . has at times, like the common law . . . a twilight existence during which it is hardly distinguishable from morality or justice, until at length the imprimatur of a court attests its jural quality."[1] Justice Cardozo's dictum points up the usefulness of international judicial or arbitral dispute settlement in establishing international legal norms by which nations may guide their own conduct and on which they may base their expectations concerning the conduct of others. But parties to an international dispute are less concerned with the long-range jurisprudential effect of a tribunal's decisions than with the more pragmatic consideration: to what extent will this judicial determination serve as a basis for the effective adjustment of the relative positions of *these* parties in *this* dispute? It is with the effective enforcement of international adjudications that Mr. Nantwi's book deals.

The book is divided into two parts. Part I describes the history and theory of international adjudication. Developing the concept that a state's power to consent to be bound by an international judgment is a function of sovereignty, the author establishes the principle that effective consent—either express or implied—to participate in an international adjudicatory proceeding carries with it consent to comply with the tribunal's final determination; therefore, the tribunal's decision creates a binding international rule between the parties which may be enforced by all legal means. Part II divides these means of enforcement into two broad classes: enforcement by the successful party acting alone and enforcement through international organizations.

The author discusses four methods of self-help for enforcing an international judgment: resort to armed force, application of economic sanctions, enforcement through municipal courts, and use of diplomatic pressure. He approves all but the first, pointing out that "the use of force" is explicitly prohibited by article 2(4) of the United Nations Charter. The effectiveness of the triumphant party's self-help measures depends, to a great extent, upon the nature of the relief sought and upon that party's ability by means of its power or prestige to exercise

1. New Jersey v. Delaware, 291 U.S. 361, 363 (1934) (Cardozo, J.).

appropriate leverage on the recalcitrant state.[2]

Enforcement of an international award by an international organization is the closest parallel to enforcement of a municipal judgment by extra-judicial authority. Mr. Nantwi examines the enforcement powers of the two principal bodies of the United Nations—the General Assembly and the Security Council, under articles 10 and 94(2) respectively—and determines that, although machinery exists for enforcing international judgments, that machinery has not yet been effectively employed.[3] He concludes this part with an examination of more specific provisions for enforcement by international agencies and regional organizations and with a short discussion of the effect of war on international obligations.

The book is most useful for its exposition of the various methods by which international decisions and awards may be enforced and for its tracing of the past effectiveness of these enforcement techniques. Of particular value as a research tool is the author's summary of the results in twenty-four instances in which parties to a dispute refused to comply with an international judicial or arbitral decision.[4] The entire work is especially valuable as a comprehensive survey of the broad area with which it deals. In this sense, it is a useful reference work for the international practitioner.

The book's principal fault lies not in what it covers, but in what it does not cover. The author does not deal with the role played by a state's self-interest as a determining factor in its decision to obey or disobey the mandate of an international tribunal. The reason for this rests in part on the author's failure to effectively distinguish the international legal system and its adjudicatory machinery from a system of law and judgment in a municipal setting. A recognition of this distinction is a *sine qua non* for any constructive critique of present methods for enforcing international judgments.

It is perhaps asking too much of a work of this relatively limited scope to require a full-fledged analysis of the political and practical distinctions between municipal and international judgments and the relevance of these distinctions to the problem of enforcing international awards. But even in the context of the book's purely expository objectives, one often receives the impression that the author has fallen into the trap of "the man of law, whose particular view of things inclines him to find a place for every dispute on the plane of legal debate."[5]

2. NANTWI, THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW 120-47 (1966).

3. *Id.* at 148-62.

4. *Id.* at 85-119.

5. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 332 (1957).

One illustration of this difficulty will be sufficient. While discussing the possible role of the General Assembly as an enforcer of international judgments, Mr. Nantwi laments the fact that article 10 of the Charter limits the General Assembly to the promulgation of non-obligatory recommendations:

> The State to whom such recommendations are made is under no legal obligation to implement them. It may reject them. If the latter course of action is adopted, it would seem that the State against whom a judicial pronouncement has been made can disregard it with impunity; and such action would be legal.[6]

But classification of an act or omission as "legal" is not controlling here. Rather, a workable solution to the problem requires a recognition of the realities of international relations—the effect of the interactions of political self-interest in the international community. The failure to give the General Assembly power to "bind" its members by recommendations had its genesis in the same kind of political factors which may prompt a state to refuse to respect the mandate of an international tribunal.

The effective resolution of international disputes can not be achieved by creating a paper legality to support the classification of a state's activities as "illegal" but rather through a continuing effort to make it evident, by means of the development of international traditions of mutual respect and confidence, that obedience to the rule of law is in every state's practical self-interest. Until this result has been accomplished, no international rule will consistently realize its desired purpose, and a mere classification of a desired norm of conduct as "law" or of a judgment as "legally binding" will not appreciably affect the tendency of a state to reject it when observance appears to be contrary to the more immediate requirements of unilaterally determined political necessity.

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6. NANTWI, *op. cit. supra* note 2, at 162.

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LEGAL PAPERS OF JOHN ADAMS. Edited by L. Kinvin Wroth* and Hiller B. Zobel.** Cambridge: The Belknap Press of Harvard University Press, 1965. Vol. 1, pp. cxliv, 334. Vol. 2, pp. x, 441. Vol. 3, pp. viii, 434. $30.00 the set.

Only rarely does there appear a work so far ahead of almost every

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other book currently being published, both in subject-matter and technique, that hardly anyone is really qualified to review it. The *Legal Papers of John Adams* is such a work because it presents a combination of expertise in three areas that few if any individuals besides the editors can fairly claim.

First, these volumes are a reconstruction of the basic outlines of John Adams' law practice. The reconstruction is based on the notes preserved by Adams and his descendants through the vicissitudes of war and time,[1] but it is supplemented in large (and in many instances overwhelming) measure by meticulous research in the files of the Massachusetts courts of Adams' day—files that are still amazingly complete today.

The materials are collected under sixty-four cases, which are arranged by legal topics. The third volume is devoted entirely to two Boston Massacre trials, that of Captain Preston and that of the soldiers. Also included are Adams' student notes and his Pleadings Book.

Second, these volumes place Adams' cases in their historical matrix—the stirring events of Massachusetts history from 1758, when he was admitted to practice, until 1774-1775, when the history of royal justice in the Province of Massachusetts Bay came to an end (shortly after Adams left for Philadelphia as a Delegate to the Continental Congress).[2] Thumbnail biographies of the Massachusetts bench and bar of the period round out the background. The portraits of a number of these men, the majority from the perceptive brush of John Singleton Copley, enable the reader to evaluate their character.

Third, these volumes reconstruct the contemporary law, procedure, and practice both of Massachusetts Bay and of England. The first necessitated search through many volumes of the Massachusetts *Acts and Resolves*; the second required detailed examination of a spate of contemporary law reports, digests, and books of practice. While the results of the editors' research are unobstrusively and indeed modestly set forth in footnotes and in the editorial introduc-

1. "Adams himself said that he lost important papers from his house and office during the British occupation of Boston in 1775-1776. Both the fragmentary character of many of the surviving pieces and the disorder in which the corpus was found strongly suggest that these are simply what happened to survive—in effect the sweepings of his office. This suggestion is supported by the fact that the manuscripts document more or less satisfactorily only a few hundred cases among the many hundreds in which we know from other evidence that Adams was professionally concerned." Preface by L. H. Butterfield, Editor in Chief of The Adams Papers, vol. 1, p. xxi.

2. Adams left Boston for the Continental Congress in August 1774. Thereafter the only matter in which he was ever again concerned as counsel was *Penhallow v. The Lusanna,* a prize case tried in the Court Maritime of the State of New Hampshire that ultimately reached the Supreme Court of the United States, *sub nom. Penhallow v. Doane's Adm'rs,* 3 Dall. 54 (U.S. 1795). [Editor's note—the footnotes of this book review are printed as submitted in light of the reviewer's opinions expressed in note 6 *infra.*]

tions to the several cases, the work involved in this process of reconstruction was obviously stupendous, indeed breathtakingly so. Surely no living scholar, be he lawyer or historian or (far less likely) learned both in law and history, is truly competent to appraise the completed work in every detail from a vantage point of deeper or broader knowledge.

A good many individuals, to be sure, are experienced in the process of piecing together the forgotten past from documents scattered in widely separated repositories. Similarly, there is today no dearth of historians eminently knowledgeable in American colonial history. And there may be, here and there, a few persons who can recite on the law of eighteenth century England and Massachusetts with the same facility with which a competent law teacher discourses on the law of our own day. But how many persons are there, anywhere in the English-speaking world, who are truly expert in all three areas?

The pure historians, no matter how eminent in their own discipline, have not been notably proficient in tracing the development of legal doctrines. Mastery of the law, after all, cannot be acquired by osmosis; it requires, at a bare minimum, three years of uninterrupted and sustained study simply to understand the fundamentals. Those historians who had the opportunity to attend the famous get-rich-quick one year course in law that Harvard formerly offered to historians, economists, and political scientists under a Carnegie Fellowship program, have come away primarily with a realization of the vastness of the unknown deep. Devotees of Clio not so favored have been notoriously unsuccessful in their attempts to deal with legal history, though it would assuredly be unkind, and doubtless invidious as well, to list their failures, however easy the compilation of such a catalogue would be.

Lawyers are apt to be more successful as historians than vice versa—with one significant qualification, to be discussed below. This is true because lawyers, by which I mean trained and perceptive lawyers, during all of their professional lives deal with the searching out, the evaluation, and the piecing together of scattered bits of evidence drawn from many sources and witnesses. Over the years they learn to spot hearsay by instinct, without need for laborious analysis, and their feeling for the best evidence rule cautions them against placing too much trust in any authorities that are obviously secondary and that signal their own unreliability. Lawyers can read and absorb historical works far more easily than a historian without legal background can comprehend legal treatises or than either lawyer or historian can understand a closely-written medical monograph.

It is only when the lawyer approaches history as an advocate—when

he undertakes to document and to advance the cause of a client or of a proposition or to proceed with any purpose other than the ascertainment of historical fact—that he falls down, often flat on his face. And this is equally true of lawyers who grace the bench. Far too many judicial opinions that purport to rest on history would never qualify as senior papers in any respectable liberal arts college. Here again, it would not require extended research to supply a list of leading cases that are characterized by misreading, demonstrable misstatement, and studied disregard of easily accessible historical materials. However, the circumstance that many of the scars occasioned by such cases have not yet healed is doubtless in itself a sufficient reason for refraining from the effort.

The editors of the *Legal Papers of John Adams*, fortunately, did not set out to "document" a thesis; rather they sought to ascertain the state of the law—and succeeded admirably in doing so. And in the process, their regard for the truth exposed a fact that punctures an ideal long cherished by the Children of Light.

John Adams' defense of Captain Preston and the soldiers for their part in the Boston Massacre is justly esteemed as an example of a lawyer's espousal of an unpopular cause. (*Quaere:* Was Adams free to reject the proffered retainer, as an American lawyer would be free today, or was he bound by the etiquette of the English bar, where a barrister has no such option? The available materials suggest that Adams and his colleagues were actually free to refuse.)[3] But the editors make it clear in addition that Adams' defense of Captain Preston was substantially assisted by the circumstance that the trial jury was significantly packed in the defendant's favor.[4]

It would be tempting to linger on other fascinating details of this superb work, to give more of its flavor and its scope, and to point out particular nuances that delight a reader.[5] Alas, space does not permit; those interested are advised, indeed strongly urged, to see for themselves what a magnificent contribution Professor Wroth and Mr. Zobel have made to American history in general and to American legal history in particular.[6]

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3. Vol. 3, pp. 5-7; Vol. 2, p. 401.

4. Vol. 3, pp. 17-19.

5. "Gage, like many another out-of-town client, could not resist pointing out the simplicity of the case [against Captain Preston]." Vol. 3, p. 16.

6. The two principal flaws noted concern only form and are not attributable to the editors. First, their volumes follow the citation forms prescribed by that abomination, the schoolboys' *Uniform System of Citation*. Thus, they cite the early Supreme Court cases by number rather than by the reporters' names—a practice which not only offends professional tradition but actually runs counter to the form always used in the official United States reports, from the beginning down to the present day. Also, they cite

printed works with the edition and date following the page instead of after the title, of which both edition and date are integral parts. Second, repositories of documents are designated, not by intelligible abbreviations, but by the symbols of the Library of Congress Union Catalogue. Any reasonably literate reader would recognize "NYPL" as meaning the New York Public Library. Why then should he have to turn constantly to the editorial apparatus to translate "NN" into the same institution? The purpose of abbreviations, after all, is to save the time of all concerned, not to challenge readers to a continuing cryptographic contest.

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