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Law, Institutions and the Global Environment

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BOOK REVIEWS

LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT

John Lawrence Hargrove, ed. Dobbs, Ferry Oceana/Sitjhoff, 1972

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With the growing awareness of the global interdependence of our environment, this book is a timely contribution. It addresses itself to the essential task lawyers, policy makers and others must confront: designing institutions and developing legal principles to control and protect our life-support systems.

Abram Chayes lays down the gauntlet at the outset:

> The fundamental message of the environment is that mankind inhabits a finite planet with finite resources. If the human race is to survive under conditions that make life worthwhile, it must devise ways of maximizing the productivity of this finite stock of resources and of sharing the product in some rational and equitable way.[1]

Chayes rejects the suggestions of George Kennan and others that the global pollution challenge can be met by an elite organization of the major industrial powers. While the industrial powers are the worst pollutors, the bulk of the world's people and resources are concentrated in the less developed countries. In many cases the developed countries depend on those resources and, therefore, "[t]he need to implicate the developing countries both in the process of identifying and combating current threats and in the long-term planning and management of resources cannot be met in the setting of a rich man's club."[2]

Professor Chayes suggests, probably correctly, that there is no institutional alternative to the U.N. since the developing countries would not "countenance an effort to bypass the international forum that they regard as peculiarly their own."[3] He concludes, however, that neither a new agency outside the U.N., nor a new one inside it, nor the present fragmented system within existing U.N. agencies can do the job effectively.[4]

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[1] LAW, INSTITUTIONS & THE GLOBAL ENVIRONMENT 3 (J.L. Hargrove ed. 1972).

[2] *Id.*, at 5.

[3] *Id.*

[4] *Id.*, at 9.

What is needed is "some form of high level policy, planning, coordination and review unit within the U.N. proper."[5] However, a global environmental authority, like that envisaged by U Thant,[6] with operating and regulatory authority, is not yet acceptable to the world community.

Chayes persuasively argues for two environmental institutions. First, he suggests a U.N. environmental advisory unit, autonomous and prestigious, composed of no more than fifty outstanding professionals, which would perform policy planning and review. It, in turn, would be supported by a scientific institute, chartered by the U.N., but organized and operated by the scientific community itself.

Professor Chayes would remit the actual "execution of international environmental policy primarily to national governments. The power of the U.N. environmental unit vis-a-vis governments would be essentially the power to persuade, backed by detailed knowledge of the scientific and other elements of the problem. That is as it must be in a world still constituted of sovereign and independent states."[7]

Professor Chayes thus settles for a pragmatic, two-tier approach in a world community which is not yet ready to give up its sovereign traditions, an approach consistent with the Stockholm Conference proposal for a U.N. Council for Environmental Programs.

The fundamental question in designing international environmental institutions is how much centralization in policy making, supervision and enforcement can be placed in the international entity. There is no doubt that unified planning and administration of common resources is necessary for optimal utilization, but there is little reason to expect that the nations of the world are ready to establish such supranational agencies. For the foreseeable future institutions must continue to be designed within the context of an international community of loosely associated sovereign states.

By way of example, Robert Stein, in his chapter on Regional Organizations, surveys the experience of the Danube and Rhine Rivers. The Commission for the Protection of the Rhine Against Pollution is largely advisory in competence,[8] and Stein concludes that "faced with a serious problem, the

[5] *Id.*
[6] *Id.*, at 6.
[7] *Id.*, at 25.
[8] *Id.*, at 265.

four riparian states were not sufficiently willing to internationalize the management functions because their interests were different, and the impetus for the new commission was largely the idea of one state."[9] Likewise, although the Danube has been supervised by an international commission since the Congress of Paris in 1856, "the riparian states coordinate with one another within their own reach of the river, rather than meeting as a collegial body to consider the problems of the Danube as a whole."[10]

Austria opposes centralization of competence in the commission because she "is one of the major contributors to the pollution of water flowing into Hungary."[11] The U.S.S.R. opposes international administration of the Danube, "basing their position on the concept of sovereignty and sovereign equality. They consider that international solutions consist only of coordination of national policies."[12]

Similarly, Richard Builder reviews the efforts of the United States and Canada to control pollution in the Great Lakes and concludes that even after the 1972 Agreement, "the concept and structure is still primarily binational cooperation rather than international regulation."[13] There are few countries with as much commonality of interests, traditions, culture and development as the United States and Canada, yet, based on U.S.-Canadian experience, Professor Builder correctly suggests that "governments will be reluctant to subject their flexibility and freedom of action . . . to international constraints . . . [and] may often prefer loose cooperative arrangements. . . ."[14]

Given such reluctance on the part of nations, truly international administration of many resources such as international drainage basins and airsheds is not likely in the immediately foreseeable future. The central question is, therefore, how to influence states in order to achieve coordination of national planning and administration of shared resources. The two-tier approach suggested by Professor Chayes commends itself.

Zdenek Slonka, in his chapter on International Environmental Controls, supports the two-tier approach. He divides the policy-making into "assessment", which is a cognitive pro-

[9] *Id.*, at 267.
[10] *Id.*, at 269.
[11] *Id.*
[12] *Id.*
[13] *Id.*, at 343.
[14] *Id.*, at 348-49.

cess, and "regulation", which is a political one.[15]

He sees "a single two-tier process in which the understandings, apprehensions and goals, continuously articulated, assessed and reevaluated on the global level, are allowed to seep down to the second tier of the sub-system and gently civilize the harsh but unavoidable particular solutions to which individual states, pressed by technological flux, will increasingly resort."[16] He asks us

> to see the two levels of decision-making as a hierarchical structure in which the global level guides and modifies the lower. In order to obtain policy action at a speed commensurate with that of technological change, and at the same time not to end up with an amorphous mass of inqualities and self-centered practices with low levels of international responsiveness, the action has to start from below — guided by the light coming from the global assessment process above, however dim and flickering that light may be.[17]

It is critical that the agency be able to respond to the speed of technological change, and under the two-tier approach, the individual national participants must perceive their own self-interest clearly enough to implement within their own borders the policy recommendations of the international advisory commission. The commission must be able not only to coordinate in the traditional sense, but must have authority to initiate studies and acquire that information base for policy recommendations; it is imperative that its credibility and consequent prestige be maintained rigorously.

The prime goal of the international commission under the two-tier approach would be to influence the conduct of states and private citizens; it would supply the "motive power" to get national regulatory machinery performing.[18] The international agency must not only perform the functions of information acquisition and dissemination, but must produce that information "under circumstances that will maximize the probability of political action."[19]

Tom Mensah provides a helpful insight into the Intergovernmental Maritime Consultative Organization (IMCO) experience in developing an international consensus, particularly in regard to maritime pollution, and Daniel Serwer gives a useful overview of the technical and administrative processes for the

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[15] *Id.*, at 229.
[16] *Id.*, at 230.
[17] *Id.*, at 230-31.
[18] *Id.*, at 174.
[19] *Id.*, at 176.

establishment of various types of standards and for inducing compliance through the imposition of sanctions and registration and licensing.

An addition to this exploration into the design of institutions for environmental administration, Fred Goldie provides balance to the book by contributing to the formulation and elaboration of principles of international environmental law for application by the adjudicatory process, in contrast to the administrative process, to which most of the book is devoted.

The development of these legal doctrines is a crucial aspect of environmental control, and the complementary, yet distinct, roles of the administrator and adjudicator are essential companions in the overall task. Particularly helpful is Professor Goldie's appraisal of contemporary public international law and his dicsussion of liability for environmental damage. He observes that principles of the international law of environmental accountability and liability should be "viewed as the means of distributing the loss when breakdowns in the orderly and regulated conduct of exploration occur. Liability and accountability fit into the total protective context as supplementary to complex regional and international systems of inter-locking regulations through preventive laws and treaties."[20]

Law, Institutions and the Global Environment makes an important contribution to the formulation of principles of international environmental law and to the understanding of the design of international administrative institutions. Not the least of the book's worthwhile contributions are John Hargrove's editorial comments which not only serve to provide continuity, but also thoughtful insight into the problems and prospects which arise in dealing with the global environment.

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[20] *Id.*, at 148.

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BOOK REVIEWS

LAW AND THE INDO-CHINA WAR. By John Norton Moore. Princeton University Press, 1971. 684 pp. Cloth, $22.50; paper $9.50.

This book is an important contribution to the literature of international law. Although most of its chapters appeared elsewhere between 1967 and 1971, Professor Moore and his publishers have rendered a valuable service by making this collection of his writings available in a single volume. Moreover, Chapter I, dealing with the role of law in the management of international conflict, is new and alone is worth much of the book's price. With the publication of this work, Professor Moore's place as one of the leading international law experts of our time seems assured.

Even though much of the book focuses specifically on our involvement in Indo-China, its discussion and analysis far transcend what has occurred in recent years in that unhappy land. Indeed, it is in a way unfortunate that the Indo-China war occupies so central a part of this work, for it is likely that emotional views concerning the war will color at least some readers' appraisal of the merits of Professor Moore's broader legal analysis.[1] On the other hand, for those seeking to enhance their understanding of the factual and legal bases for the military intervention of the United States in Indo-China, this book should be regarded as "must" reading.

Professor Moore's general conclusion is that our intervention in Indo-China was proper under current conceptions of international law. Whether or not that intervention was wise as a matter of policy is a separate question, and one that Professor Moore does not attempt to answer, prudently leaving this complex issue to the judgment of history. As one editorial writer so aptly has put it, "the final impact of that experience

[1] In regard to this point, Professor Richard A. Falk finds a discontinuity between Professor Moore's legal analysis of the Indo-China War (Falk strongly disapproves of Moore's conclusions concerning the legality of the war) and his general approach to intervention in foreign societies (which Falk warmly praises). Falk, *Alchemy and Analysis: The Two Faces of John Norton Moore*, 13 VA. J. INT'L. L. 120, 124 (1972). This review by Professor Falk, who frequently has crossed swords with Professor Moore over the issue of Indo-China, is not nearly so unfriendly as its title would suggest. For another, and highly instructive review of Moore's book, by an author who agrees with Moore's conclusions on Indo-China, *see* Rusk, *Reflections on Law and the Indo-China War*, 13 VA. J. INT'L. L. 107 (1972).

[Vietnam] is still to be determined, both by events and by how men see it in their minds."[2] Whatever ones views of this multi-faceted question, it is difficult to fault Professor Moore's analysis of the relevant legal issues or the conclusions he draws therefrom.

Despite the obvious importance of the chapters dealing specifically with Indo-China, the most enduring significance of this book lies in its chapters dealing generally with what Professor Myres McDougal refers to in a Foreword as "conditions of minimum public order in the world of tomorrow."[3] These include the aforementioned Chapter I, plus Chapters III, IV, V, and VI which together comprise a major segment of the book subtitled "World Order Perspectives." The analysis contained in these chapters is intriguing, impressive, and complex; in a brief review such as this one cannot possibly provide an adequate summary of Professor Moore's methodology or of the substance of his thought. He believes, however, that international law can be a significant force in managing international conflict, and he makes a persuasive case for this point of view, pointing out many weaknesses of the anti-legalist position, yet cautioning against overestimation of the role of international law. Throughout, his approach is balanced, thoughtful and policy-oriented, with law viewed not merely as rules, judges, and courts, but as a *process* for the pursuit of values and the resolution of conflict, and as a social force that can have constructive uses in the international arena as well as in the domestic one.

Chapter II is a special bonus and deserves particular mention. Entitled "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell," it contains the best brief introduction I have seen to the McDougal-Lasswell system. Every serious student of international law needs to be familiar with the policy-oriented jurisprudence of these two seminal thinkers. Those who have not yet gotten their feet wet in this jurisprudential ocean will find that Professor Moore has made the water seem much less forbidding if not positively attractive. In addition to describing the terminology and methodology of the McDougal-Lasswell system, Professor Moore deals with several of the most frequently voiced criticisms of the system: that its terminology is needlessly esoteric, that it depends on a particular value orientation that not everyone shares, and

[2] The Wall Street Journal, January 24, 1973, p. 18, col. 2.
[3] J. MOORE, LAW AND THE INDO-CHINA WAR XIV (1971).

that the system is too cumbersome to be useful in the everyday operation of the legal system. Professor Moore refutes these criticisms in a most convincing way, using examples of application of the system to major problems of international law to illustrate the comprehensiveness and the utility of the McDougal-Lasswell approach. He emphasizes that although this system does not automatically solve problems (neither does any other system), it does have great potential as a better way of analyzing problems, formulating policy alternatives and getting value judgments out into the open. As one who long has been an enthusiastic admirer of Professor McDougal, I am pleased to see his and Professor Lasswell's unique contribution to our locker of jurisprudential tools presented and demonstrated by so lucid and competent a craftsman as Professor Moore.

Mention also should be made of the concluding chapters of the book, which discuss constitutional issues: the proper allocation of power between Congress and the President to commit the nation to war, and the role of the courts in dealing with the constitutional (and international) issues which arise out of the commitment of military forces to foreign wars. Both Congress and the President have enormous powers in this area, and Professor Moore recognizes the importance of cooperation between the two branches if the national interest is to be well served. With respect to the courts, he points to large difficulties in judicial review of executive-congressional action authorizing the use of armed forces abroad, but suggests that certain kinds of war-peace issues may be justiciable. He does not believe, however, that the basic international and constitutional questions arising out of the Indo-China war are properly subject to judicial review, and he asserts that "[t]here are important systemic policies suggesting that for the most part the resolution of claims that a particular use of force abroad has not been constitutionally authorized or is in violation of international law should be left to the interplay of political forces."[4] This is perhaps another way of saying that foreign policy decisions are entrusted to branches of government other than the judiciary and, as a practical matter, that the intrusion of the courts into these matters would place an unacceptable burden on the conduct of our nation's foreign affairs. As Professor Moore points out, to date the courts have impliedly accepted this limitation on the tradition of judicial

[4] *Id.*, at 598.

review, in that so far no court has held justiciable a challenge to the commitment of military forces abroad. While apparently in agreement with that result, he would prefer the courts to articulate fully the reasons for their decision rather than simply to invoke the "political question" doctrine or to deny a hearing without stating a reason.

The book concludes with a valuable set of documents retlating to the American involvement in Indo-China, an excellent bibliography, and a very adequate index. Professor Moore also has included a brief analysis of the now famous Pentagon Papers, which were published by the New York Times after the completion of his chapters on the Indo-China conflict. His basic conclusions with respect to the Pentagon Papers can be summarized as follows: (1) they confirm all the major factual assumptions of his chapters dealing with the legal aspects of the conflict; (2) they confirm that the principal objective of the United States was to assist South Vietanm and Laos (and later Cambodia) in their defense against North Vietnamese military intervention; (3) the papers provide further evidence of North Vietnamese participation in the insurgency in South Vietnam, lending additional support to the conclusion that U.S. assistance was lawful counter-intervention to offset prior North Vietnamese intervention; (4) although the papers support the lawfulness of the U.S. military involvement in the Indo-China war, they also suggest that international legal perspectives were not systematically taken into account in top-level planning; rather, Professor Moore ventures, "[t]he predominant tone of the papers is one of *Realpolitik* planning heavily influenced by contemporary decision theory."[5] (To remedy this problem, Professor Moore advocates that the Legal Adviser of the Department of State become an Under Secretary of State and that a Special Assistant for International Law be added to the White House staff).[6]

The quality of the scholarship and writing found in this book is excellent from start to finish. I wholeheartedly agree with Professor Falk's observation that Professor Moore has managed "to combine the sweep and sophistication of McDougal's work with the clarity of presentation and argument that one associates with positivist approaches at their best."[7]

[5] *Id.*, at xxviii.

[6] Former Secretary of State Dean Rusk finds this suggestion unpersuasive: "There s a virus endemic to bureaucracy for which no vaccine has yet been found. It is the idea that power and influence are related to titles." Rusk, *supra* note 1, at 117.

[7] Falk, *supra* note 1, at 133.

All in all, it is one of the most impressive major pieces of legal writing I have encountered. I highly recommend this book to every lawyer, teacher, and student who seeks a deeper understanding of international law, its uses, and its potential in the management of international conflict.

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