# BOOK REVIEWS

LAW AND SOCIETY IN THE RELATIONS OF STATES. By P. E. Corbett. Harcourt, Brace & Co., Inc., New York, 1951. Pp. 337. $4.75.

Publishers are notoriously immoderate when it comes to describing their wares, and Harcourt, Brace would appear to be no exception. The dust-jacket claims that *Law and Society in the Relations of States* "marks a radical departure from all previous thinking in this vitally important field." The contents of the volume belie this breezy assertion; the simple truth is that the merit of *Law and Society* lies largely in its refusal to be sidetracked into "radical" analyses or nostrums. It would perhaps be more accurate to describe it as a worthy addition to the admirable series sponsored by the Yale Institute of International Studies, a series which has included Spykman's *America's Strategy in World Politics,* Griswold's *Far Eastern Policy of the United States,* Dahl's *Congress and Foreign Policy,* and, most recently, Almond's *American People and Foreign Policy* and Barghoorn's *Soviet Image of the United States.* Like its predecessors, *Law and Society* is distinguished by its careful, patient examination of the phenomena of political life and its lucid and objective interpretation of these phenomena.

Professor Corbett attempts to steer a middle course between the extravagances of doctrinaire natural-law theorists and the somewhat negative excesses of those who, appalled by the present anarchic international scene, would deny the very existence of international law or morality. In a brief opening section he shows how theory has "imposed a lasting fashion of apriorism upon the literature of the subject." The *jus gentium* of Roman and medieval jurists is little more than a fitful and absent-minded borrowing of convenient principles from the municipal law. The Renaissance brought with it a renewed interest in a law of nations as such, *i.e.,* a law purportedly governing the relations of states rather than a law universally applicable to persons, regardless of political allegiance. And here abstract theory ran head-on into observable practice. The dust has not yet cleared away. On the one hand, it is certainly true that states often act at variance or in conflict with international "law." On the other hand, it is equally true that states have constant recourse to legal argument, both in defending their own conduct and in attacking that of other states, and that these arguments and the assumptions underlying them influence international conduct, even if they are not the controlling influence. In this sense, "law" is a very real determinant in relations among states. It is furthermore an observable fact that usages and practices lead eventually to an accepted pattern of international conduct and that deviation from the pattern gives rise to serious and sustained protest. In these cases, it is alleged that a rule of law has been established by usage and by the consent, expressed or implied, of the "society" of states. Professor Corbett seriously doubts whether the attempt

to elevate usage to the plane of law (in the absence of a competent adjudicating agency) serves any purpose other than to compound confusion. The answer, therefore, lies in "a tougher sort of institutions based upon interests so clearly defined and so broadly and firmly apprehended that they will prevail over particular and temporary defections."

But here, teetering on the very brink of world government, Professor Corbett cautiously draws back. The "institutions" to which he refers are "arrangements for the supranational administration of *specific* common interests." (Italics supplied.) These interests must be carefully selected; there must be a strong probability that in the area chosen states "will discern lasting advantage in subordination of the national will to collective decision. . . ." A corollary is that in these individual spheres of interest states will be willing to submit to adjudication of differences by a supranational authority—an ad hoc or permanent tribunal.

The road to world government is thus seen to be a long and rocky one; each step forward will necessarily presuppose an already existent community of interest transcending, but not precluding, national interest. (The process bears a striking resemblance to what Professor Popper calls, in a more limited context, "piecemeal social engineering.")

The bulk of the volume is devoted to a description of how far (or how little) we have already progressed along this road. In quick succession Professor Corbett reviews, under "Patterns of Practice," the conduct of states with respect to Land, Waters, Air, Individuals, Immunities, War, and Neutrality. If the achievement has not been impressive, it nevertheless offers glimmerings of hope for the future. In the matter of international waters, to be sure, a centuries-old trend has been reversed since World War II, with freedom of the seas threatened by seaward extension of various aspects of national administration and freedom of river navigation, in the case of the Danube, somewhat circumscribed by the Belgrade Convention of 1948, which not only ousts non-riparian states from the Control Commission but carefully omits from membership two riparians, Austria and Germany, as well. On the other hand, the relatively new field of air navigation gives promise of developing an extensive law and organization of its own. In the brief history of air transport Professor Corbett finds two underlying tendencies which characterize the modern approach to international cooperation:

> "One is the fact that governments no longer leave the development of common institutions to the spontaneous, but slow, evolution of custom. They feel constrained to join in a conscious collective endeavor to devise bits of mechanism capable of achieving a common purpose with the least possible subjection of the State to central direction.
>
> "The second characteristic is the very minor role played by doctrine. Always there are lawyers at work, their special concern being the formal preservation of the precious myth of sovereignty and the

> largest possible substantial discretion for their States. But a priori theory, though it shuttles back and forth in the conferences, plays little part in decision. There the dominant influences, expressed in dialectical form, are, first, the thesis of the status quo fortified by the desire of each State to keep intact its freedom of action, and second, the antithesis of a pressing need of joint regulation. Where conference succeeds, it produces a synthesis, vulgarly and sensibly known as the compromise, in the form of an international agency." [1]

At the Chicago Conference in 1944 a program of "five freedoms" was broached. When it came to ratification, however, only two—the right of transit for aircraft engaged in scheduled international transportation and the right to land for "non-traffic" purposes—were acceptable to most signatories of the Civil Aviation Convention. The remaining three became the subject of a network of bilateral treaties and arrangements among signatory states. In his concern that a more extensive agreement was not reached, Professor Corbett fails to underscore the fact that the incident is an excellent example of the gradual and piecemeal approach which he advocates. On too many occasions in the past such problems have been handled on an "all-or-nothing" basis; it is encouraging that at Chicago the baby was not thrown out with the bath, that minimum agreement was not spurned merely because perfect agreement was unattainable.

In a concluding section, "Organized Development", Professor Corbett takes a hard look at the contemporary scene. The two principal movements urging a larger political union today advocate, respectively, world federation and a *pax democratica*—a union of the Western political democracies to save the world from Communism and bring it into the democratic camp. The first he dismisses as "remotely utopian"; the second, he says, should be regarded not as a step toward world order but as a coalition dictated by fear of Soviet expansion. If the present Soviet regime decided to cooperate or was replaced by a regime friendly to the West, the *raison d'être* of an Atlantic Union (which Professor Corbett never mentions by name) would vanish. And subsequent conduct of the members would be determined not by arrangements made to meet the present emergency but by their respective views of their interests once the emergency had passed.

The solution, Professor Corbett feels, must stem from a recognition that the primary purpose of government, on whatever plane, is to insure the welfare of the individual. "What is proposed here is not the scrapping of the United Nations. It is rather the *gradual* re-orientation of that institution around the focus of human rights." (Italics in original.) That is a large order, and while the Declaration of Human Rights adopted by the United Nations General Assembly in 1948 is perhaps justifiable as a statement for the record of broad-gauge intentions, it has nevertheless pointed up glaring discrepancies between practice and preaching. And the

1. Pp. 157-158.

Draft Convention on Human Rights, intended to put teeth into the Declaration, is out of order at this time, Professor Corbett feels:

> "To cast in the form of a convention a scheme of rights so far ahead of anything yet realized is to run a more serious risk. The prospect of general ratification without paralyzing reservations is small, and of actual enforcement, smaller. In this way, the whole serious movement may be brought to confused and discouraging stalemate." [2]

Rather, he feels, we should profit by the experience of the International Labor Organization, which, since 1919, has worked patiently and effectively at improving labor conditions over a large part of the world. The measure of its success is that it came unscathed through the holocaust which destroyed its parent organization, the League of Nations. The "gradual" method is unspectacular and often maddeningly slow. This reviewer, however, shares with Professor Corbett the conviction that in gradual reform—an inch here and an inch there—lies our only hope of salvation.

While attractive in format and type design, the book has two shortcomings. One, the index is inadequate. Two, all footnotes have been placed at the conclusion of the text. A reader who likes his citations handy will feel, after a chapter or two, like a spectator at a ping-pong match.

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THE NATURE AND TAX TREATMENT OF CAPITAL GAINS AND LOSSES. By Lawrence H. Seltzer. National Bureau of Economic Research, Inc., New York, 1951. Pp. 554. $7.50.

This is an exhaustive, well documented and extremely interesting treatise on a subject which for a number of years has been a source of much controversy among economists, lawyers and our national legislators.

The work represents an eight-year study made by Dr. Lawrence H. Seltzer, Professor of Economics at Wayne University, and a member of the Research Staff of the Bureau, of the facts and issues involved in capital gains and losses, and their place in our tax system.

While it may be said by some that the tax treatment to be accorded capital gains and losses should be the concern only of lawyers and the Federal Treasury, Dr. Seltzer's analysis of the problem makes it clear that it possesses elements which are peculiarly within the province of the economist and the social scientist as well.

The author traces the origin of the special legal status accorded capital gains and losses by our tax laws to the period in English history when

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2. P. 297.

landed property constituted the largest single source of wealth and the courts considered that only the fruits or rents produced by the land was income. To this day in England, with some modifications, gain on the sale of capital assets is not considered income but merely an accretion to capital.

Neither our fiscal authorities nor our courts have ever followed this economic concept of income. Dr. Seltzer reviews the tax treatment accorded by our courts to gains derived from capital accretions beginning with *Grey v. Darlington,*[1] a case arising under the income tax law of 1862, down to the present time. An entire chapter, some forty pages, is devoted to a discussion of the devices used by taxpayers, or more correctly by their advisers, to convert ordinary income into capital gains, and the steps taken by the Bureau of Internal Revenue and Congress to meet the more obvious of these attempts.

The discussion of the economic nature of capital gains and losses is particularly good and should prove both interesting and helpful to tax lawyers whose professional contact with the subject all too infrequently involves the economic aspects of the question.

Lawmakers considering a tax statute are always faced with the problem of providing sufficient revenue to operate the affairs of Government properly, and at the same time encouraging, or at least not discouraging, investment capital. One of the most recurring objections to taxing capital gains as income is that it leads to the destruction of capital and constitutes double taxation. The author explores these objections thoroughly and reaches the conclusion that capital gains are properly includible in a concept of taxable income, although practical considerations may well require that they be accorded special tax treatment.

The available evidence compiled by the author and his assistants shows that realized net capital gains only moderately exceeded realized net capital losses during the thirty-year period of the study (1917-1946), and that the greater part of the gains in the aggregate was realized by individuals in the middle income group. As may be expected, the average number and the percentage of taxpayers enjoying capital gain rise sharply as the income tax scale rises, and many individuals only reach higher brackets by reason of their capital gains.

From an extensive analysis of the data, the author believes, contrary to the opinion of many, that the factor which most influences the investment of risk capital is not the tax treatment accorded gains, although it is true that it may be, and probably is, a major consideration of investors in the top income group.

The present applicable provisions of the Internal Revenue Code accord roughly parallel tax treatment to both capital gains and losses. Dr. Seltzer points out that this may produce highly unequal effects upon individual investors. Those who lose their capital early are hurt by the

1. 15 Wall. 63 (U.S. 1872).

limited loss allowance and may never benefit from the liberal treatment of gains. High tax rates make the deductibility of tax losses an important factor in reducing investment risks, even when the deductibility is limited to the amount of capital gains reported in a single taxable year. However, such persons, who might have substantial ordinary income in the year of capital loss but no capital gains and would thus pay a substantial tax could not be expected to show much appreciation of the fact that those persons who have capital gains get preferential tax treatment. When taxpayers have unrealized capital gains on their holdings and current capital losses, they can realize their gains free of tax to the extent of the losses allowed. The advantages of this provision of the Code accrues primarily to the large investors.

The policy of Congress to limit deduction of capital losses goes back to the Revenue Act of 1922. The chief reasons given for this innovation were the necessity for maintaining tax revenue and the prevention of excessive tax avoidance. However, as is pointed out, despite such limitations, a taxpayer to some degree can choose to realize losses in years when capital gains and other income are unusually large, and his other income small.

While there is no way to prove it, the point is made that this policy has doubtless had severe inequitable effects upon many investors whose timing of purchases and sales was not influenced by tax considerations. The author concludes that the desire to maintain Government revenue is not a sufficient justification for doing so at the expense of losers as against other taxpayers.

The present provisions of the Code, allowing as a deduction a maximum of $1,000.00 in any taxable year, over and above capital gains, is the smallest since 1917. This is partly alleviated by allowing the unused portion of the losses to be carried forward for a period of five years against capital gains in those years, plus an additional $1,000.00 thereof against ordinary income. While no figures of the amount of future deductible losses thus being built up are available, Dr. Seltzer stresses the fact that they can become quite substantial and a potential source of large deductions during a series of bad years.

Prior to the capital gains changes made by the Revenue Act of 1932, the capital gains tax yield was highly erratic. The author points out that during the market boom years of 1926 to 1929, individuals with net income paid more than 1½ billions of dollars in such taxes. In the next five years, allowance for capital losses exceeded the taxes paid in those years by 151 millions of dollars. From 1935 through 1941, the yield average only 80 million, including 1940 and 1941 when the losses exceeded the gains.

Due to present high ordinary income tax rates, it is doubtful that capital gains will ever again contribute as large a proportion of the total tax revenue as they did in the period 1926 to 1929. In 1947, capital gain tax totalled only 2.7% of total income tax receipts and it is not expected it

will vary much from this figure. Therefore, the fluctuating character of capital gains tax is not now quantitatively important in the tax scheme.

Each time Congress holds hearings on Internal Revenue amendments, there is much agitation, principally from investors and investment bankers to eliminate from the Internal Revenue Code the provisions taxing capital gains and allowing capital losses. This position is based upon the fact that the average annual net tax yields between the years 1917-1946 from this source have at best been small, uncertain and fluctuating, and therefore are not worth their administrative and legal cost. The author believes this conclusion is fallacious. He concedes that some cost of administration might be reduced, but the chief source of controversy would not be eliminated, namely whether certain transactions give rise to capital gains and losses (to be ignored completely in the computation of taxable income) or to ordinary income or loss, to be accounted for in full. There is something to be said for the proponents of both schools of thought. The capital gain tax has not produced much by way of revenue. On the other hand, much of the litigation which has arisen in this field over the years has been based upon the fundamental question of whether certain realized gain is ordinary or capital gain. Since no change which has been advocated would eliminate that problem, it can reasonably be argued that the capital gains tax should remain in order that the Treasury might at least reimburse itself for the cost of administration which would continue in any event.

We have mentioned Dr. Seltzer's excellent and full discussion of the increasing trend of taxpayers' attempts to convert ordinary income into capital gain. The treasury is very alert to these schemes, and the long list of cases in the courts is mute evidence of the battle. One of the harmful results to taxpayers, implicit in such a struggle, is the development of an attitude on the part of the Treasury that such a scheme is frequently present where none in fact exists.

The use of the corporate form for doing business has been a favorite means adopted by taxpayers to bring about such a conversion. The so-called Hollywood type of corporation is a good example. The collapsible corporation provisions of the Revenue Act of 1950 and the extension of this legislation in the Revenue Act of 1951 is additional evidence of the Treasury's awareness of the problem and the continuing effort it is making to overcome it.

There is a chapter discussing in some detail the treatment of capital gains and losses in other countries. The countries which make up the British Commonwealth generally exclude them from the provisions of the income tax. At the other extreme is Greece where capital gains are treated as ordinary income. Most of the countries of Europe have policies somewhere between these extremes. The author discusses the tax treatment as applied in France, Belgium, Netherlands, Sweden, Norway, Denmark, Finland and Switzerland.

The final chapter on competing proposals for the tax treatment of capital gains and losses should be most interesting to economists and to those generally interested in the social sciences, but less so to lawyers who are primarily interested in legal consequences.

The appendix of more than 200 pages, setting forth a wealth and diversity of source materials, statistics and pertinent data, including almost 100 tables and 25 charts, is most complete and should prove of inestimable value to those persons interested in the economics of the problem.

From the standpoint of the legal practitioner, Mr. Seltzer's book cannot be looked upon as essential to his working library. This, of course, by no means detracts from the many merits of the work, which unquestionably recommend it as a subject for study by those persons who may be concerned with framing our future tax policies.

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THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT. By Jacobus tenBroek. University of California Press, Berkeley and Los Angeles, 1951. Pp. 232. $3.00.

One of the most fascinating areas of historical research is that concerned with the origin and development of legal institutions. Laws do not come from nowhere. On the contrary, by the time a law or a constitutional amendment attains formal status, it usually reflects a considerable body of tradition and precedent. Professor tenBroek has set as his task the uncovering of the antecedents of the Fourteenth Amendment.

As the title would indicate, tenBroek's thesis is that the Fourteenth Amendment was the legal crystalization of the views of the antislavery movement. The author suggests that the privileges and immunities clause, the due process clause, and the equal protection clause of the Fourteenth Amendment must be understood in terms of abolitionist political theory.

Most of tenBroek's conclusions are beyond criticism. He has done a great deal of careful research into abolitionist newspapers, pamphlets, and legal briefs, and has given us a much deeper insight into the operations of the antislavery movement. The abolitionists employed what I call "true believer jurisprudence"; *i.e.,* they judged any case solely in terms of its effect on their cause. They were prepared to assert a states' rights view of the powers of the central government when the problem in hand was the enforcement of the federal Fugitive Slave Law. They were equally ready to support a centralist position when the question of national authority to prohibit slavery in the territories was under consideration. Law was useful and good when it forwarded the aims of the antislavery movement; it was a "stench unto the nostrils of the Lord" when it aided the slaveholders.

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I have, however, two objections to tenBroek's study. First, he claims too much for it. The work begins with the assertion that prior research on the Fourteenth Amendment has been confined to the

> "congressional, popular, and ratification debates at the time of the adoption of the Fourteenth Amendment and immediately thereafter. December, 1865, the date when the first draft proposals for the Fourteenth Amendment were introduced into Congress, has stood as an unassailed temporal barrier to almost all inquiry." [1]

This statement seems a bit strong. TenBroek cites Howard J. Graham's analysis of "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment" [2] which surely struck far beyond the "temporal barrier," and he apparently missed entirely John P. Frank and Robert F. Munro's "The Original Understanding of 'Equal Protection of the Laws' " [3] which devoted space to the abolitionist origins of the equal protection clause. By the time these substantial contributions are tallied up, tenBroek's virgin wilderness is considerably deforested.

Second, tenBroek seems to have tried to open too many doors with his key. He devotes a whole chapter to the subject "Paramount National Citizenship" in which he asserts that "the doctrine of a national citizenship superior to state citizenship and possessing attributes of its own remained unformulated" [4] until the 1830's and after, when the abolitionists sunk their teeth into the problem. Space does not here permit a recapitulation of my research into this subject, incorporated in *The Early Development of United States Citizenship*.[5] Suffice it to say that a practical conception of paramount national citizenship existed as early as 1795 when the Congress authorized the federal courts of the Northwest Territory to naturalize aliens, thus creating national citizens without state allegiance. In 1832 Chief Justice Marshall stated, without explication, "A citizen of the United States residing in any State of the Union is a citizen of that State." [6] The abolitionists undoubtedly propagandized on behalf of paramount national citizenship, but the idea did not originate with them.

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1. P. 2.
2. [1950] WIS. L. REV. 479,610.
3. 50 COL. L. REV. 131 (1950).
4. P. 73.
5. Cornell University Press (1949).
6. Gassies v. Ballon, 6 Pet. 761 (U.S. 1832). This is not to assert that Marshall's view was generally accepted. For reasons discussed in ROCHE, *op. cit. supra* note 5, at 17 *et seq.*, national citizenship did not become paramount until the passage of the Fourteenth Amendment.

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