



1967

West Berlin: The Legal Context edited by Roland J. Stanger

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Recommended Citation

Mullins, Eugene (1967) "West Berlin: The Legal Context edited by Roland J. Stanger," *Kentucky Law Journal*: Vol. 56 : Iss. 2 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol56/iss2/4>

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Book Reviews

WEST BERLIN: THE LEGAL CONTEXT. Edited by Roland J. Stanger.
Columbus, Ohio: Ohio State University Press, 1966. Pp. 133.
\$4.75.

This small book, published under the auspices of the Mershon Committee for Education in National Security, consists of four essays originally presented at a regional meeting of the American Society of International Law. Rather than allow addresses by Stanley Metzger, J. W. Bishop, Hans Baade, and Saul Mendlovitz lie fallow in the minds of a specialized audience, a wider circulation of their ideas concerning the legal status of West Berlin has justifiably been sought with this publication.

The authors do not pretend that international law could overwhelm the political power factors or singlehandedly stabilize the Berlin problem. However, neither do they maintain that the parties to the Berlin controversy totally disregard international legal norms. The factors producing a readily available excuse for disorder are discussed by Metzger and by Bishop. Their efforts remove any possible misconceptions regarding the events surrounding the partition of Germany. The facts are given briefly and are bolstered by abundant citations to source materials. In addition, an excellent synthesis of the historical factors is presented by Professor Metzger who demonstrates clearly that the 1945 victory of the Allies was tainted by fear of a resurgent Germany. Some leaders advocated the dismemberment of Germany into separate nations, while others advanced the idea of pastoralizing the German economy, thus pulling its industrial teeth. Although the methods differed, all desired to emasculate a nation which had carried on two world wars of unheralded destruction. However, abstract planning gave way to pragmatism. During a period of wartime and post-war adjustment, the Allies found, by a process of trial and error, the initial division of Germany and Berlin for occupation purposes to be the most satisfactory settlement available under contemporary world conditions. Metzger concludes that this settlement should not be disturbed until world conditions are genuinely altered.

Professor Bishop, with touches of deft, dry humor, asserts that the present legal complications were the unplanned and largely unforeseen result of history and human disorder. He summarizes the basic Soviet legal position on Berlin: any agreements concerning Berlin are

inseparable from the broader agreements on Germany (especially disarmament); the West, having failed to observe the broad agreements, can no longer rely on the Berlin agreements. In the remainder of his essay, Bishop briefly discusses the main legal questions involving Berlin: 1) the source of the Western Allies' rights in Berlin; 2) the present status of access agreements; 3) the effect of access agreements upon West German and West Berlin native traffic; and 4) the legality of the Berlin wall.

Professor Hans Baade points out three basic legal issues *vis-à-vis* the occupation of Berlin. These are: 1) the legality of the current occupation of West Berlin by France, Britain, and the United States; 2) rights of access through East Germany; and 3) the effect of a peace treaty between East Germany and the Soviet Union upon these rights of occupation and access. Even more fundamental to Baade is a question which at first glance seems more academic than practical—what is the legal status of Germany itself. In other words, what happened to the Reich of 1871—the (until 1945) “modern” Germany, which became unified after so many centuries out of a patchwork of principalities only to play a disastrous role in history? Basic concepts of “state” and “nation” in terms of orthodox international law are necessarily evoked as Baade outlines the doctrinal positions of West Germany, the Western Allies, and the Soviet bloc on the legal fate of Germany. Although providing few answers, Baade presents several thought-provoking questions concerning Germany. Did the Reich disappear with the unconditional surrender of Germany, leaving behind only an ironic smile, like the Cheshire cat? If the Reich still lives, which (if either) of the two German governments is its legitimate successor; or does the Reich survive as a theoretical roof over both? Where does Berlin fit into this disordered situation: does it properly belong to East Germany, to West Germany, or to neither?

Baade wistfully mentions in his conclusions the faint possibility of international litigation, but this is admittedly unrealistic. He does point out the rationality of the use of international law to justify one's own position before world opinion. All parties to this multi-centered dispute have at different times cited international law principles favorable to themselves. As Baade notes, legal arguments are themselves subject to negotiation, whether or not they are strictly justiciable.

In contrast to the legalistic analyses of the other three writers, Saul Mendlovitz embarks upon a policy-oriented discussion of whether international legal norms are relevant to Berlin. He concludes that international law does influence international behavior, at least to a

limited extent. "The appearance of legal legitimacy was considered important enough to work for,"¹ by the Soviets and East Germans. Clearly, the Western Allies have made certain that their responses to East German border guards' harassment have not given implied "recognition" to East Germany as a state.² At a minimum, international law is paid lip-service, and the respective nations habitually seek legal justifications for their behavior. International law, he asserts, does provide a "stabilizing rhetoric" for negotiations.³

Mendlovitz departs even further from orthodoxy and proposes a different approach to the analysis of international law problems in general and to Berlin in particular. The suggested technique would analyze each party's contentions in terms of the potential impact upon the precarious stability of world peace. We must examine "how, if issues were decided in a particular fashion, a more stable and peaceful world would result."⁴ Furthermore, "international lawyers, whose client is peace, will serve that client well only if they provide direction on matters heretofore considered 'purely political.'"⁵ In other words, international law must expand beyond black-letter formalisms in a search for a legal order among nations.

Thus, the book concludes with the offerings of a new methodology, or at least an altered perspective, for the Berlin legal context. The four writers have outlined the issues and the history and have offered vaguely possible non-violent solutions to a complex politico-legal question whose ultimate answer lies more probably in the realm of politics and power than in reason and law. At present, the West Berlin front is quiet. Viewed in such an atmosphere, the basic hopefulness of the authors for a peaceable solution to the Berlin problem seems realistic. No semi-war hysteria aroused by belligerent incidents and threats exists at present. Our attention is focused elsewhere, and no one seems presently disposed to alter the status quo. The authors are fortunate to have published their work during a period of sanity on both sides in European policies, whatever Berlin's ultimate potential for disorder and violence. While not exhaustive, the high points of dispute have been thoroughly covered, with sufficient footnote references to embark the more serious reader upon his own voyages into the Berlin legal dilemma.

Primarily, this brief collection of essays is significant in providing

¹ S. Mendlovitz, *A Relevant Legal Context for the Problem of West Berlin*, in *WEST BERLIN: THE LEGAL CONTEXT* 108 (1966).

² *Id.* at 104-05.

³ *Id.* at 110-11.

⁴ *Id.* at 116.

⁵ *Id.* at 122.

a realistic picture of one continuing distressed area on the international scene. The efforts of the authors should serve as a mild counterweight to transient newspaper clippings, semi-official propaganda, and the general exaggeration of opinionated amateurs. The four contributors neither over-estimate the role, or potential, of international law nor entirely discount it. Within their limited framework they have constructed a small symposium which distills the essentials of a large problem while shedding light upon the field of international law as a whole.

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ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER. Edited by Morris D. Forkosch. Indianapolis: Bobbs-Merrill, 1966. Pp. 667. \$17.50.

Not long ago a perceptive critic described our times as "the century of indigestible *Symposia*."

It happened just a century ago [he explained] that some forty German classical scholars presented their teacher, Friedrich Ritschl, with the first *Festschrift*, the *Symbola philologorum Bonnensium* (1867). It was soon to be followed by the *Commentationes philologae* with which the sixtieth birthday of Theodor Mommsen was celebrated (1877) by nearly eighty scholars including a dozen Italians, Frenchmen and Englishmen. From the 1880's onwards *Festgaben*, *Melanges*, *Miscellanies*, *Studi*, have been gradually spreading over all branches of learning throughout the western world. Simultaneously, the range of occasions on which they were presented has been multiplying: sixtieth, sixty-fifth, seventieth birthdays, retirement from an editorial office or a professorial chair, and the pious memory of a deceased teacher provide most frequently the inducement for increasing further this flourishing academic retail business.

The time has come to take stock of the situation. . . .

The above outburst, directed at the cataloguing problems that such *Festschriften* volumes visit upon librarians and scholars using the essays buried within them, failed to mention the difficulties they present to reviewers. But such difficulties exist and they are none the less oppressive and foreboding. Confronted by a veritable smorgasbord, the reviewer can scarcely do more than describe the bill of

* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Kentucky Law Journal, the Department of the Navy, or any governmental agency.