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PROFESSOR BISHOP'S CONTRIBUTIONS TO INTERNATIONAL LAW

*Brunson MacChesney**

IT is a privilege and a pleasure to participate in this issue of the *Michigan Law Review* honoring an old friend and distinguished international law teacher and scholar, Professor William W. Bishop, Jr. I would like to use this opportunity to make a few necessarily brief comments on Professor Bishop's many contributions to the field of international law.

It is obvious that one of Professor Bishop's greatest contributions has been the teaching of international law at Michigan to many generations of students. His reputation as a magnificent teacher is well known, and was formally recognized by the University when it bestowed on him the Distinguished Faculty Achievement Award in 1965. It was particularly fitting that he became the Edwin DeWitt Dickinson University Professor of Law in 1966, a professorship named after the great international lawyer under whom Professor Bishop and I studied at Michigan many years ago. Shortly after Professor Dickinson died, Professor Bishop wrote a thoughtful tribute to him in the *American Journal of International Law*.¹ Some years later, I had the pleasure of writing a short note in the same journal² welcoming Bill's appointment to that named professorship.

It is somewhat harder to determine whether I can claim to have been a student of Professor Bishop as well as of Professor Dickinson. Suffice it to say that Professor Bishop served as a teaching assistant in Professor Dickinson's international law seminar in 1933, when we first became acquainted. I do not know whether Bill would want to claim me as a former student, but I can claim to be considered at least half a student of his!

Closely related to Professor Bishop's contribution to teaching is the excellent international law casebook³ that he pioneered after World War II. Many of us around the country used his preliminary editions. The first permanent edition appeared in 1953 and was widely employed by teachers at other schools. It came to be known

* Edna B. and Ednyfed H. Williams Memorial Professor of Law, Northwestern University. B.A. 1931, Yale University; J.D. 1934, University of Michigan.—Ed.

1. Editorial Comment, 55 AM. J. INTL. L. 637 (1961).

2. Editorial Comment, 60 AM. J. INTL. L. 384 (1966).

3. INTERNATIONAL LAW (3d ed. 1971).

as an outstanding teaching tool. The second edition, published in 1962, essentially followed the original arrangement but was expanded to encompass new developments. The third edition in 1971 included intervening developments and rearranged some of the materials. It added a new chapter on the United Nations and force and a new section on disarmament, expanded a section on developments in the European Economic Community, placed greater emphasis on the subject of individual and human rights, and gave more extensive treatment to the expropriation problem. Some indication of the growth of new problems in international law is found in the fact that the text expanded from 685 pages in 1953 to 1058 pages in 1971.

Needless to say, Professor Bishop's scholarly contributions to international law extend beyond his excellent casebook. He has published numerous articles and comments and has delivered two courses of lectures at the Academy of International Law in The Hague. Although this is not the place to discuss each of his publications in detail, I have read or reread all of his writings contained in the list of "Selected Publications" (printed in connection with the publication of his 1965 Hague lectures) and propose to comment briefly on views expressed in some of them and indicate the subject and scope of the others. Although his writings range widely over the whole field of international law, he has written frequently about fisheries, the law of the sea, jurisdiction and jurisdictional immunities, and both domestic and international treaty problems.

Professor Bishop's first paper on fishery problems was an editorial comment in the *American Journal of International Law*, entitled "The Need for a Japanese Fisheries Agreement."⁴ He argues that foreign fishermen should be excluded from a fishery when there has been no previous activity in the fishery (whether or not such a right to exclude exists under international law) and, further, that in areas close to another nation's coast, foreign fishermen should be excluded even if there has been previous activity. This position foreshadowed his continuing advocacy of the doctrine of "absention." In a subsequent editorial comment dealing with the International Law Commission's Draft Articles on Fisheries,⁵ he endorses the draft in general as fair and reasonable, but suggests adding a provision incorporating the "abstention" doctrine and deleting provisions giving nonfishing states the right to compel arbitration with the coastal state. Subsequently, Professor Bishop wrote an article for the *Columbia Law Review*, in an issue dedicated to Judge Jessup, entitled

4. 45 AM. J. INTL. L. 712 (1951).

5. 50 AM. J. INTL. L. 627 (1956).

"The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas."⁶ In this article, Professor Bishop approves of the convention as a whole, but notes that the new priority given the coastal state will be workable only if the convention's restrictions on the coastal state are observed in practice and its arbitration procedure works effectively. Once more, he advocates "abstention," a proposal that was defeated at the Geneva Conference.

Professor Bishop had an interesting exchange that involved both jurisdictional issues and the law of the sea in his correspondence with Congressman Meador concerning some provisions of the then-pending Submerged Lands Act. In this exchange, which can be found in the *Congressional Record*,⁷ Professor Bishop points out that the proposed nine-mile claim for the Gulf states might jeopardize our three-mile territorial waters limit position. In addition, he warns of further dangers if continental shelf claims are not properly limited to exclude the claims of sovereignty so dear to our Latin American friends. Also appearing in the *Congressional Record* is a reprint of a paper he delivered at the Sixth Conference of the Inter-American Bar Association in Detroit on the "Exercise of Jurisdiction for Special Purposes in High Seas Areas Beyond the Outer Limits of Territorial Waters." In this paper, he discusses at length the 1945 Truman proclamations on the continental shelf⁸ and fisheries⁹—proclamations that he helped draft.

Both of these proclamations explicitly recognized that the character of the waters above the continental shelf as high seas and the traditional concept of freedom of navigation were not affected by their terms. While the shelf proclamation asserted the right of exclusive jurisdiction and control of the seabed resources, the fisheries proclamation recognized the fishing rights of other states that had previously fished in a coastal fishery and called for mutual agreement in regulating such fisheries. Moreover, the fisheries proclamation asserted conservation rights only when proximity to the coast was coupled with a history of substantial fishing in the area. Not surprisingly, Professor Bishop approves of both proclamations as reasonable and properly circumscribed attempts to adjust the varying interests of numerous states. In contrast, Professor Bishop severely criticizes the then extant claims of various South American countries to exclusive jurisdiction over fisheries out to a distance of 200 miles. What a

6. 62 COLUM. L. REV. 1206 (1962).

7. 99 CONG. REC. 2491 (1953).

8. 59 Stat. 884 (1945).

9. 59 Stat. 885 (1945).

contrast to the claims of a 200-mile economic zone put forward by many countries today!

In the area of jurisdictional immunities, Professor Bishop has written both an article and an editorial comment for the *American Journal of International Law*. In the article, "Immunity from Taxation of Foreign State-Owned Property,"¹⁰ he reviews the relevant American cases and finds that there is a rule of international law granting immunity to both the personal and real property of a foreign state. He also believes that the rule should cover property used by consuls. He argues that treaties dealing with this problem should adopt the "restrictive" approach, which distinguishes between public and commercial acts, rather than the absolute immunity approach. Furthermore, Professor Bishop advocates the development of such a restrictive rule in state practice. In a subsequent editorial comment,¹¹ he applauds the famous Tate letter, which announced that, in the future, the Department of State would apply the policy of restrictive immunity in dealing with the requests of foreign governments for immunity. He finds the new policy to be in accord with trends in state practice and correctly predicts that the letter will not be construed to extend to execution of judgments (although he favors execution on property used commercially). He notes the characterization problems inherent in the attempt to determine, through examination of its nature or purpose, whether a particular activity is commercial or public, and he expresses the view that there is no established international standard on this issue. He argues that, in deciding this question, the forum should take note of the decisions of other states that use the doctrine of restrictive immunity. He quite properly does not predict the subsequent development in State Department practice of ignoring the policy of the Tate letter whenever expediency suggests doing so. Of course, the enactment of pending legislation on sovereign immunity would provide a new statutory basis for dealing with these matters.

Several of Professor Bishop's articles and comments deal with the agreement-making power, both domestically and internationally. In the first of these articles, "The Structure of Federal Power over Foreign Affairs,"¹² he discusses comprehensively all aspects of that power. With reference to treaties, he concludes that any treaty of international concern not violative of the Constitution is valid. This

10. 46 AM. J. INTL. L. 239 (1952).

11. *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INTL. L. 93 (1953).

12. 36 MINN. L. REV. 299 (1952).

article was written before Professor Henkin advanced the argument that "international concern" is not a true limitation on the treaty power.¹³ Professor Bishop has not published any comment giving his reaction to this proposal. He disagrees, however, with Professor McDougal's thesis that treaties and executive agreements are "interchangeable instruments of national policy."¹⁴

Professor Bishop advocates the use of "federal-state" clauses in treaties where necessary to accommodate federal and state interests. Such a clause provides that, in a federal state, the treaty will not bring within federal authority any matter that, without the treaty, would not be within the federal jurisdiction and that the federal state shall only be obligated to recommend any such provisions to its constituent states. This position was, of course, what the notorious Bricker Amendment attempted to write into the Constitution as an inflexible limitation on the treaty power. I do not agree with Professor Bishop on the desirability of "federal-state" clauses. Rather, I believe that we should apply federal power under treaties to its broadest constitutional extent. In the past, the chief use of such clauses had been in conventions adopted by the International Labor Organization. More recently, however, a proposal by the United States to include a "federal-state" clause in the Human Rights Covenants was rejected.

In a subsequent article, "Unconstitutional Treaties,"¹⁵ Professor Bishop deals with the question of whether an international agreement that violates the constitution of one of the contracting parties is binding internationally on that party. He surveys international practice on this issue and finds that no customary international law rule has been established. He proposes a compromise solution between the extreme propositions that all unconstitutional treaties are void and that all such treaties are effective internationally. He suggests drawing a distinction between constitutional violations that would be obvious to another state and those that would not be obvious. It is interesting to note that Article 46 of the Vienna Convention on the Law of Treaties, the so-called Treaty on Treaties, reaches essentially the same position.

In a comment written jointly with Denys P. Myers, "Unwarranted Extension of Connally-Amendment Thinking,"¹⁶ Professor Bishop rightly criticizes the then current efforts of some senators to add the

13. "International Concern" and the Treaty Power of the United States, 63 AM. J. INTL. L. 272 (1969).

14. See 36 MINN. L. REV. 299, 313-14 & n.36.

15. 42 MINN. L. REV. 775 (1958).

16. 55 AM. J. INTL. L. 135 (1961).

obnoxious "self-judging" Connally reservation to compromissary clauses contained in both multilateral and bilateral agreements providing for compulsory reference to the World Court of questions of interpretation and application of such agreements. The authors point out, without reopening debate on the merits of the Connally Amendment to our acceptance of the optional clause of the Court's statute, that the compromissary clauses refer to the Court a much narrower range of questions than does the optional clause.

In a series of articles and comments on various other topics, Professor Bishop has discussed "International Law and the American Lawyer,"¹⁷ "The International Rule of Law,"¹⁸ "Postwar Trends and Developments in International Law from a North American Viewpoint,"¹⁹ and "International Law in American Law Schools Today."²⁰ In all of these papers, he demonstrates his concern for the problems of international law at the teaching level, in law practice, and internationally, as well as his informed understanding of the international legal system with all its strengths and weaknesses.

It might also be of interest to refer to his first published comment, written jointly with George Gisler for the *Michigan Law Review*, on "International Law Problems in the Extradition of Samuel Insull,"²¹ which explores the complexities engendered by the efforts of an Illinois citizen to escape trial. While their comment might be regarded as an invasion of the domestic jurisdiction of Illinois, I managed to preempt another famous extradition case arising in Illinois, *Factor v. Laubenheimer*,²² with a student Note in that review.²³

I conclude this brief survey of Professor Bishop's writings by commenting on his two most important publications, the Hague lectures given in 1961 and 1965. The 1961 lectures, "Reservations to Treaties,"²⁴ are a thorough and thoughtful treatment of his significant topic in the law of treaties. After an extensive discussion of practice and case law, he analyzes the current views of the International Law Commission, the American Republics, and the Soviet Union. He concludes that the older requirement of unanimity of acceptance of reservations has been eroded by subsequent developments and that the more recent trend toward facilitating the making of reservations is desirable. Whether unanimity or the newer per-

17. 28 MICH. ST. B.J. 42 (May 1949).

18. 59 MICH. L. REV. 553 (1961).

19. 47 PROCEEDINGS AM. SOC. INTL. L. 21 (1953).

20. 47 AM. J. INTL. L. 686 (1953).

21. 31 MICH. L. REV. 544 (1933).

22. 290 U.S. 276 (1933).

23. 32 MICH. L. REV. 417 (1934).

24. 103 RECUEIL DES COURS 245 (1961).

missibility of reservations accepted by less than all the parties should prevail depends on the nature of the treaty. In humanitarian conventions such as the Genocide Convention, no single state should be able to "veto" a less than complete agreement that is acceptable to the other states concerned. Professor Bishop rejects the extreme Soviet view that a state has a sovereign right to make any reservation it pleases without regard to the views of other states.

It would be impossible to do justice on this occasion to Professor Bishop's 1965 Hague lectures, the "General Course of Public International Law, 1965."²⁵ In thirteen chapters, covering more than 300 pages, he discusses all the fundamental questions in international law with his customary clarity and insight. In delivering this major course at The Hague, Professor Bishop has made a notable contribution to the literature of our field. It is a commentary on the rapid changes in some areas of our subject that the material on the law of the sea and on expropriation has been overtaken by recent developments. His proposition that a contiguous zone for fisheries should not extend more than twelve miles from the coast would not receive serious consideration in the current law-of-the-sea negotiations. His sanguine views on the problem of expropriation have been severely affected by subsequent actions in the United Nations and elsewhere. In his chapter on force, he takes positions on two issues that have spawned divergent views among the writers. He supports an interpretation of Article 51 of the United Nations Charter that would allow the right of self-defense *only* if an armed attack occurs,²⁶ thus agreeing with Professor Henkin and disagreeing with Professor McDougal. To the controversial question whether intervention by one state on behalf of the government in power in another state is permissible, he gives an affirmative answer,²⁷ a view with which some of us would agree and others, such as the late Quincy Wright, would vigorously disagree.

Apart from teaching and writing, Professor Bishop has contributed significantly to international law in many other capacities. He served with distinction as Editor-in-Chief of the *American Journal of International Law* from 1953 to 1955 and from 1962 to 1970, and he has been a member of the Board of Editors since 1947. As editor of the most prestigious journal of international law for so many years, his influence on the development of international law has been worldwide in scope. He was an Assistant Reporter on *Jurisdiction with*

25. 115 RECUEIL DES COURS 147 (1965).

26. *Id.* at 437.

27. *Id.* at 440.

Respect to Crime of the Harvard Research in International Law, and a member of the Advisory Committee of the American Law Institute on the *Restatement of Foreign Relations Law of the United States*. He has participated actively in the affairs of the American Society of International Law, and, apart from his valuable services on the *Journal*, has been vice-president and is now an honorary vice-president of the Society. He was elected as an Associé de l'Institut de Droit International in 1961, and has recently been named as one of four United States members of the Permanent Court of Arbitration.

In addition to these academic activities, Professor Bishop has contributed to international law in practice as an assistant legal adviser in the Department of State from 1939 to 1947. I have already mentioned his role in connection with the Truman proclamations; he also had extensive experience with international claims, which is well reflected in his casebook. Finally, during this period, he served as legal adviser to the United States delegation at the Council of Foreign Ministers of London, Paris, and New York in 1946, and also at the Paris Peace Conference in 1946.

Professor Cavers, in his excellent 1965 Cooley Lectures delivered at The University of Michigan on *The Choice-of-Law Process*, noted that "the mark of the true conflict-of-laws scholar" is "a keen sensitivity to the deficiencies in the theories of his fellows."²⁸ Perhaps those of us in public international law are more tolerant of our fellows so that Cavers' dictum should not be extrapolated. In any event, I have been unable to find any serious deficiencies in the work of Professor Bishop. The reason may be that, since I agree so generally with him, his views appear to me to be eminently reasonable and sound. I have, however, noted one idiosyncrasy that identifies our subject as human. In reading his writings as a whole, I have noted a severe addiction to the use of the exclamation point. Although I have no statistics to offer, and must confess that I myself have at least a mild case, I offer you Professor Bishop as my candidate for national champion!

In concluding these informal comments on Professor Bishop's contributions to international law, I reiterate my respect for him as an international law scholar and teacher, and express again my appreciation for the privilege of joining in a well-deserved tribute to an old friend.

28. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 75 (1965).

