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Jessup: Transnational Law

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RECENT BOOKS

TRANSNATIONAL LAW. By *Phillip C. Jessup.* New Haven: Yale University Press. 1956. Pp. 113. $3.

In this series of Storr lectures delivered at the Yale Law School, Phillip C. Jessup launches an assault on the barriers of classifications and distinctions traditionally separating legal disciplines which in his view hamper progress toward solutions of problems of "transnational" character. In order to minimize the distinctions a new concept is offered: transnational law "to include all law which regulates actions or events that transcend national frontiers." Transnational situations arise when the passport of an American is challenged in Europe; when an American corporation extracts oil in Venezuela; when the United States Government negotiates with the Soviet Union on the unification of Germany; when the United Nations buys and ships milk for the Children's Emergency Fund; when the International Chamber of Commerce as a "non-governmental organization" takes part in a conference called by the Economic and Social Council of the UN. Transnational law includes both private and public international law, national law, as well as other rules from a variety of sources which do not wholly fit into standard categories such as perhaps the rules of procedure and regulations of the General Assembly of the United Nations. The rules of transnational law may be applied by a national court, the International Court of Justice, an international arbitration tribunal, the Court of Justice of the European Coal and Steel Community as well as by governmental negotiators seeking political adjustment of conflicting national interests: thus, it is necessary to avoid thinking in terms of any particular forum.

The author who so brilliantly represented the United States in the United Nations debates on the Moroccan controversy demonstrates the "universality of human problems" underlying transnational situations in a little two-scene drama: an over-protected wife matured since her early marriage and tired of her domineering husband goes to Reno to get a divorce; Morocco, grown self-confident under the impact of nationalism and tired of being protected by France, goes to the UN to get her independence. In this vein the author develops in the first chapter the theme of the basic similarity of legal problems arising between individuals, corporations, communities, states, organizations of states.

In the second chapter entitled "Power To Deal With Problems" the learned Hamilton Fish Professor of International Law and Diplomacy at Columbia University focuses upon the problems of jurisdiction and particularly upon the distinction between jurisdictional rules in criminal and civil cases. This distinction is sharpened by the practice in international law treatises of dealing substantially with *criminal* jurisdiction only. On the other hand the books on conflict of laws (including the *Restatement*) generally confine their attention to *civil* jurisdiction. Should there be

different jurisdictional rules, he inquires, for the criminal and for the civil proceedings under the Sherman Antitrust Act where the case involves transnational elements? Granted the "due process" requirements under the United States constitutional law, the question is raised whether there is (from the standpoint of transnational law) a fundamentally good reason for insisting on different jurisdictional requirements in civil and criminal cases and indeed for relegating the two types of jurisdiction to two different bodies of law, international law and conflict of laws.

A fleeting parallel review is given of the bases claimed by states as adequate for exercise of criminal and civil jurisdiction. Nationality and "temporary allegiance," the territorial principle, the protective and universal principles and the principle of passive personality (nationality of the victim) are examined as bases for *criminal* jurisdiction asserted by states under international law. To these are juxtaposed the *Restatement* bases for the exercise of *civil* jurisdiction: physical presence within the state, domicile, consent, certain acts done within the state, and—in a limited sense—nationality. No pretense is made to completeness and one only wishes the author had developed further this interesting confrontation. In the view of this writer a full study may well lead to the conclusion that at least in some respects different requirements are desirable for criminal and civil jurisdiction even if the problem is viewed from the broadest policy perspective.

The author points to an increase in the exercise of criminal jurisdiction based on the protective principle, with respect to acts affecting the security and integrity of the state. That this principle "lends itself to extravagant extensions of State power" is apparent not only from the examples offered by the author, but also from a provision of the United States Atomic Energy Act. According to this provision it is unlawful "for *any* person to . . . directly or indirectly engage in the production of any special nuclear material *outside* the United States"[1] except under specified conditions. The "person" is defined as "any individual, corporation, . . . group, any State . . . any foreign government. . . ."[2]

A novel type of jurisdictional problem which might be added to those mentioned by Dr. Jessup arises from the creation of "supranational" institutions with direct powers over individuals and corporations. A German coal consumer group in the European Coal and Steel Community asked a German court in Stuttgart to enjoin a German selling agency from putting into effect a new selling arrangement which the plaintiffs considered restrictive and as such contrary to the Community Treaty as well as violating their property rights under the German Civil Code. Under the Treaty the High Authority, a Community organ, has the exclusive right (subject to an

1 68 Stat. 932 (1954), 42 U.S.C. (Supp. V, 1958) §2077(a)(3).
2 68 Stat. 923 (1954), 42 U.S.C. (Supp. V, 1958) §2014(q).

appeal to the Community Court of Justice) to determine the existence of such Treaty violation. The German court held that it had no jurisdiction to grant relief until the High Authority had made such determination.[3]

It is interesting to note that in the author's view the bases of jurisdiction mentioned earlier such as territoriality or nationality do not provide per se a limitation on jurisdictional power. Such limitation flows from "what we may call a balance of power, which it has been found appropriate and convenient to establish among the states of the world."

If, as the author affirms, the traditional bases of territoriality, nationality and the like are not adequate in that they have developed "beyond the boundaries of their historic justifications" largely through legal fictions, what then should be the test for the proper exercise of jurisdiction by a state in a transnational situation? To this question the author offers the following answer: "It would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and convenience of all members of the international community. The fundamental approach would not start with sovereignty or power but from the premise that jurisdiction is essentially a matter of procedure which could be amicably arranged among the nations of the world." (p. 71)

The third and last chapter of this stimulating book deals with "The Choice of Law Governing the Problems." The International Court of Justice applies *international* law from sources defined in its statute: treaty law, rules of customary international law, "general principles of law recognized by civilized nations" and as subsidiary sources, judicial decisions and teachings of scholars. What law is applied by the Administrative Tribunal of the United Nations if a plaintiff employee of the United Nations seeks damages for a breach of his employment contract concluded and to be performed in New York? Neither the UN Staff Regulations nor the Staff Rules which are made part of such contract will supply answers to every disagreement under the contract. "To what law will the Tribunal look for further guidance?" What law governs a contract for the purchase by the United Nations of supplies and equipment when suit is brought thereon in a New York court? It seems to this reviewer that this last query cannot be answered in isolation from the very basic and general question: what choice of law rules will an American court follow in a transnational transaction considering the present state of the "choice of law" rules in the United States?

It seems regrettable to this writer that relatively little systematic thought has been given in the literature to the restraints which might be derived from public international law, upon the freedom of national courts in the

[3] City of Stuttgart v. Oberrheinische Kohlenunion A.G., Landgericht Stuttgart, Germany, Aug. 10, 1953, Recueil Sirey, Jurisprudence 4, 1 (1954).

choice of law (and for that matter in the choice of rules governing *civil* jurisdiction). This is due in part to the fact there are only very few instances of diplomatic intercession based on an alleged violation of a conflict of laws rule except of course where such rule was embodied in a treaty, a common practice—as Dr. Jessup points out—in Latin America and in Europe. In the United States—because the choice of law rules are considered within the domain of the individual states—a treaty obligation governing the choice of law is a rare bird indeed: for instance, under the Articles of Agreement of the International Monetary Fund an American court is bound to give certain effect to certain foreign exchange regulations enacted by other states, members of the Fund regardless of any choice of law rule of the forum.[4] Thus public international law, it appears to this reviewer, in its present state of development and in the absence of treaties is not likely to offer much guidance here. Nor do the rigid formulae of the *Restatement* provide adequate solutions even to intranational choice of law problems among the states of the Union. Professor Jessup suggests that the court might follow Dean Cavers' view that the choice of law "would not be the result of the automatic operation of a rule or principle of selection but of a search for a *just* decision in the . . . case."[5] This writer has some question whether this approach leaving the choice of the law to the "personalized" concept of justice of the individual judge offers a satisfactory solution in transnational transactions. Another approach advocated by other authorities calls for choosing the law of the state with prevailing interest.[6] Professor Yntema urges that in the absence of an established rule the court should choose the law reflecting most closely modern legislative trends as determined by a comparative analysis of the legislation in the field.[7] The American experience dramatizes the difficulty of developing rational generally acceptable rules of choice of law. The problem of obtaining an international consensus on rules which would be followed in transnational cases by most or all states of the international community is nothing short of baffling. In any event, Dr. Jessup urges that in the choice of law neither the character of parties (whether individuals, corporations, states or international organizations) nor the type of forum (national, international—and one may add "supranational") nor the distinction between civil and criminal law or public and private law should control the choice of the rule to be applied.

Professor Jessup points to what he considers "helpful precedents" in

[4] Art. VIII 2 (b) of the Articles of Agreement of the International Monetary Fund; Bretton Woods Agreement Act, 59 Stat. 512 (1945), 22 U.S.C. (1952) §286.

[5] Cavers, "A Critique of the Choice-of-Law Problem," 47 HARV. L. REV. 173 at 193 (1933).

[6] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954); Briggs, "Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws," 6 VAND. L. REV. 667 (1953).

[7] Yntema, "The Objectives of Private International Law," 35 CAN. B. REV. 771 (1957).

the predominantly transnational maritime law where the general process has been toward uniformity of *substantive* rules of law thus reducing the difficulties arising from the choice of conflicting laws. The legal instrumentalities employed in this unifying process consisted of voluntary inclusion of standard provisions into contracts by parties, adoption of identical legislation in many states and finally negotiation of international conventions unifying certain rules of law.

There is obviously no room for disagreement with the author's conclusion that "if there be any virtue in developing transnational law, much more exploration and analysis would need to precede the ponderous tread of governmental action." It seems to this writer that intensification of comparative studies of legal and social systems is a matter of necessity. The study under Professor Schlesinger at the Cornell University Law School seeking to define the substance of the "general principles of law" could lead to some of the head waters of the stream of common legal experience from which a transnational law must draw.[8] Dean Roscoe Pound said recently that "the complex, crowded, economically unified and mechanically operated world of today increasingly makes for a world law with local regime of laws made for and adapted to, local special conditions and needs." He observed that "reliance upon judicial discovery or application of reason to experience is superseding the political idea of necessary legislative prescribing of rules."[9] This thought offers a further interesting line of inquiry as do a number of suggestions for studies sketched in broad contours in Dr. Jessup's most challenging volume.

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[8] Cf. Hazard, "The General Principles of Law," 52 AM. J. INT. L. 91 (1958).
[9] N.Y. TIMES, Nov. 14, 1957.