

Law and Policy in International Decisions

Urging decision-makers to cut international law to fit their policies undermines the basic policy of having law.

Roger Fisher

Too often international scholars have devoted their primary attention to refining the substantive rules of international law while almost ignoring the problems of relating these rules to the actual conduct of nations. Their task has been conceived as one of having a set of rules ready for the world to use when some day it comes to its senses and decides to abide by international law. In the minds of many, even in areas where international law is thought applicable, legal questions are quite distinct from political ones. The legal question is "What is the law?" The political question is "Shall we respect the law?" The two books considered here, *Studies in World Public Order* by Myres S. McDougal and his associates (Yale University Press, New Haven, Conn., 1960. 1058 pp. \$15) and *The Political Foundations of International Law* by Morton A. Kaplan and Nicholas DeB. Katzenbach (Wiley, New York, 1961. 372 pp. \$6.95), make no such mistake. They are concerned with the process of international decision-making. They are concerned with the relationship between international law and international politics.

In *Studies in World Public Order* Myres McDougal, with the help of his colleagues and associates, presents his case for a policy-oriented theory of law. Save for a short introduction, nothing is said here for the first time. A dozen essays, all published over the years from 1953 to 1959, on such topics as hydrogen bomb tests, perspectives for law in outer space and for an international law of human dignity, and the rights of man in the world community have been pulled together

and placed between hard covers. But this book is more than a collection of essays. It is the first opus in a series that will present a general theory of law and apply it to problems of international order.

For years Harold Lasswell and Myres McDougal have been endeavoring, in collaboration with various associates, to formulate and recommend appropriate general theory and intellectual procedures for better understanding law and for making law better serve the community. Their branch of the school of legal realism first applied its talent to issues of domestic law. This book reflects that talent's application to international problems. The first two essays suggest the general approach; each of the others deals with a specific problem and "has been designed both as a test of the general framework of inquiry and as a possible contribution to policy" (page x).

The casual reader is hardly likely to pick up this book for evening reading. Although the style is lightened by McDougal's vigorous and sarcastic attacks on others, it is weighted down with the jargon that too often accompanies the prolonged building of theoretical models. And although republishing these essays without editing saved time for the authors, it does not save time for the reader.

As the authors point out, the essays were written not only to illustrate the general theory of international law but also as contributions to policy. This dual purpose makes the book unwieldy for the nonlegal reader. The longest essay in the collection, for example, argues that under a wise and proper interpretation of the United States Constitution the President and a majority

of the Congress may enter into any kind of international agreement—that is, there is no constitutional necessity of using the "treaty" procedure with the consequent requirement of a two-thirds vote of the Senate. The case for this interpretation of the Constitution is made so forcibly and is so well-documented that it consumes some 300 pages and involves a thousand footnotes. Amid such a welter of trees it is easy to lose sight of the forest. But the general theory is there, and it is repeatedly presented with vigor and conviction.

One cannot fairly summarize, in a review, two decades of intellectual theorizing. Nonetheless, it is important that the literate public understand what McDougal and Lasswell and their cohorts are saying about international law. At a time when the single most important problem facing the world is to preserve and improve the international order, somebody besides the international lawyers should understand wherein we international lawyers disagree.

Extrapolative Fallacy

Stated sympathetically, McDougal starts with the proposition that law is a means to an end. Laws are designed to serve social purposes. Instead of training lawyers in legal techniques and technicalities, legal education "must be conscious, efficient, and systematic *training for policy making*" (page 46). Those who are going to make decisions that will affect the distribution within the community of values such as power, respect, knowledge, income, and the like should understand the distribution of values appropriate to a democratic society and should use the law as one technique to bring about this distribution. Deciders should think in terms of goals, in terms of fundamental community policies, and should devote their "imaginative attention to actualizing the most favored possibility."

Most fundamentally McDougal is opposed to the notion that rules should dictate decisions:

... both relevant policies and technical rules are commonly and necessarily formulated in pairs of opposites and ... the appropriate function of such formulations is not to dictate decisions but to guide decision-makers to all the factors in a context which should be taken into account in making rational decisions ... (page 333).

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Seeking a realistic analysis of the decision process, McDougal finds that the deciders are not actually bound by rules and prescriptions but rather have them at their disposal. Decision-makers, he discovers, can come out any way they want to and how they will want to depends upon their biases and policy objectives. McDougal welcomes this fact with open arms. He urges that we recognize the flexibility of the rules and use them consciously and explicitly to serve the proper ends of a democratic society: "What law 'is' . . . depends primarily . . . upon the ends preferred" (page 93).

This "realistic," "sociological" approach to law—and, in particular, to international law—has appealed to many. Far beyond the nine authors who contributed to *Studies in World Public Order* the school can claim converts who find the analysis valid and useful. Beyond question, McDougal's work is important, and it has made a valuable contribution to our understanding of significant aspects of the law and of the decision process. Having said this I must also say that I disagree almost completely with McDougal's approach. There are substantial elements of truth in his cynical diagnosis of how decisions are sometimes made. But for this country and others to accept his analysis and recommendations as the basis for future action would, in my view, be little short of disastrous.

The school of legal realism drew strength from the fate of the early New Deal legislation in the courts. Judges who held new laws unconstitutional were readily discovered to be imposing their personal political views upon the country. Legalistic and technical analysis was found to stand in the way of the true realization of the American dream.

Against this background it was easy to describe the situation: judges and other decision-makers used legal techniques to cover up and to carry out their own foregone conclusions—conclusions which were reached as a result of psychological and sociological predispositions and policy objectives. It was also easy to urge judges and others to be "realistic," to recognize the power that they had and to use it for good ends. Judges should realize that the rules and laws are really quite flexible. Rigid laws should not be allowed to stand in the way of any legitimate policy objective. Legal education

should be devoted to teaching students democratic objectives and enough skill to avoid having "rules" stand in their way.

Rules or Policy

No doubt domestic law has suffered from the encrustation of form and of rigid rule divorced from purpose. And only the naive would assume that a judge is unaffected by predispositions and biases, whether psychological, social, or economic. But the realists went overboard in considering applications to domestic law. They tended to underestimate the extent to which most men, and particularly most judges, are influenced by principle and by rule. They underestimated the value of professing to be bound by rules and of behaving as though bound.

McDougal's all-purpose remedy is "more policy, less rules." This remedy was developed to treat a domestic symptom in which the national interests were being frustrated by a strong and entrenched legal system. Here, with reason, one could call for recognition of the extent to which policy considerations were in fact dictating decisions and could urge that the policy ingredient in law should reflect wiser policies and should play a larger role.

On the international scene, however, the critical symptom is not an unduly strong and entrenched legal system. Here national action has not been frustrated by the application of archaic rules without regard to the political interests at stake. Quite the contrary. Each country has felt free to construe international rules in the light of its national policies and to ignore traditional law which seemed to conflict with its policies. International decisions have usually been dominated by immediate policy considerations. It is into this scene that McDougal appears with his cure-all remedy of domestic vintage, urging "more policy, less rules." Is it a wonder that some of us, seeking to strengthen the rules and to persuade countries to pay more attention to them, regard McDougal as spreading the contagion rather than the cure?

It may be no criticism that McDougal's system provides no criteria for weighing the relative value of the conflicting policies. The application of his approach to any specific case is not easy. He takes away the rules and principles which might form the basis

for a decision and asks the decision-maker, whether statesman, legislator, or judge, to consider all the possible policy factors that are applicable and, in the light of them and of his own policy preconceptions, to decide what is reasonable. One might well say: "What good is a system of analysis which does not help decide questions?" McDougal's answer must be that the world will be a better place if decision-makers consciously and explicitly decide each case by what seems reasonable in that instance than it will be if they decide by reference to a standard. McDougal does admit that among the policies to be considered are those of stability and fulfilling community expectations. But, in urging deciders to look away from rules to policy, he overlooks the fundamental policy of having disputes, differences, and questions of right, professedly and in fact, decided according to rules.

Law and National Conduct

It is not an accident that every society has developed rules and a system of law. Such rules provide the order and stability that are essential for achieving other values. But the policy of deciding questions according to rules goes beyond questions of stability and fulfilling expectations. Almost by definition every close question of law could come out either way without upsetting stability or community expectations. For the decision to be satisfactory to the community, it should be understood that it has been decided according to rule. It should not be "a special decision just for this case" or one admittedly based on policy preconceptions. Elemental fairness requires that similar cases be treated similarly. People and countries will tend to respect a system based on the premise that their conduct is governed by objective rules applied across the board. Of course the rules should be construed and applied sensibly in light of their purpose, and of course their application will be influenced by human judgment and preconceptions, but the heart of the conception of law is that there are rules which govern cases. People and countries will tend not to respect a system based on the premise that there are no rules and that everyone decides for himself what is reasonable under the circumstances. How destructive of international law this policy-

oriented analysis can be suggested by the essay on the legality of the hydrogen bomb tests in the Pacific. The authors conclude that really there is no relevant law other than the proposition that whatever is reasonable is legal. They then conclude that in the present world situation it would be unreasonable for the "proponents of the dignity of man" to write self-inhibiting meanings into international law.

We do not, however, regard it as a rational response for the free world unilaterally to disarm itself by the unnecessary extrapolation of broad prescriptions from the customary international law of the sea . . . (page 842).

If the limits of permissible national conduct are to be defined by such self-judging criteria, I see little hope for international order. It is one thing to urge an organized national community, in which common values are widely shared, to construe its rules in the light of those values. It is another thing to tell the world community, a community whose members hold sharply conflicting views, that their conduct should not be governed by rules and that each nation should pursue its ends by whatever means seem reasonable to it. Such advice seems ill suited to the task of persuading governments that their enlightened self-interest lies in exercising restraint along lines which other governments may also be prepared to respect.

To be sure, McDougal himself does not wholly abandon rules and prescriptions. Often he argues like a lawyer, citing precedents and doctrine, not as guides to policy but as controlling authority. He repeatedly and explicitly recognizes the important policies of stability and order. But in the name of policy he suggests the explicit substitution of reasonableness for rules. He abandons the premise that rights and duties are governed by rules. To do so is to undercut the very foundations of fairness and order upon which the attainment of his policies depends. To accept his policy-science is all but to ignore the policy of having law.

Principles, Not Expediency

The Political Foundations of International Law deserves a detailed review which space does not permit. Its authors, although acknowledging a

large debt to McDougal, appreciate the importance of making the decisions according to principle rather than *ad hoc* expediency. They accept much of the wisdom of the policy-oriented analysis but broaden it to include and to emphasize, as one of the important policies to be considered, the policy of governing a nation's conduct by rule. They point out the advantages that follow if "the United States establishes clear principles governing its policies and demonstrates that it intends to follow those principles, regardless of what that decision costs in any individual instance . . ." (page 345). After an organized discussion of the relationship between international law and international politics they conclude:

States are not free to violate norms without real costs or, in many circumstances, without being coerced or penalized by other states that have interests in maintaining the norms. Thus, the sanctions of international law may stem either from international motivation or from external action. In either case, these sanctions are real. And in either case, the life of the state is a life governed, in part at least, by law, rather than merely by appetite (page 354).

One welcomes this book warmly. It deals explicitly and in an organized fashion with the critical question of international law, the relationship between norms and conduct. Although much of what is said is neither new nor startling, it needed to be said, and it invites further work in the area. In emphasizing the extent to which international law rests upon political foundations the authors perhaps underestimate the extent to which international politics rests upon law. Every political state is a legal structure. Every government and every army depends for its existence upon continued respect for the laws that hold the structure together, the internal rules about authority and obedience. Nations and the officials who run them recognize that their survival depends upon avoiding anarchy. For one reason or another they respect the legal rules that give them power. In this day of nuclear weapons, survival also depends upon avoiding international anarchy, upon respect for the rules which will lessen the chance of collision. We need not only an understanding of the political foundations of international law; we also need to understand the legal foundations of international politics.

Mostly Plant Anatomy

Plants, Viruses, and Insects. Katherine Esau. Harvard University Press, Cambridge, Mass., 1961. 110 pp. Illus. \$3.75.

Katherine Esau is professor of botany and botanist in the Experiment Station at the University of California, Davis. She is well known for her studies on the anatomy of plants, especially that of the sugar beet and its interrelationship with the curly-top virus. The book is an expanded account of the 1960 John M. Prather lectures in biology at Harvard University, combined with material given at a colloquium and at seminars during this period.

There are seven chapters, the first giving a historical account of early investigations, especially those of Malpighi and Nehemiah Grew, into the movement of nutrient substances in plants. Chapters 2 to 4 deal with modern work on the movement of organic solutes in relation to structure and function of the sieve element. Chapter 5 discusses the conducting tissues in buds and growing roots. The last two chapters are concerned with the movement of viruses in plant tissues and with insects as feeders in the conducting tissues. The book is illustrated with 15 line drawings of plant tissues and there are 12 pages of photomicrographs. There is an index and a good bibliography.

The chapters on the translocation of food materials are well written and clearly explained, and the author gives a helpful concluding statement at the end of each chapter. This part of the book will be read with interest by plant anatomists and physiologists. The book, however, if we consider the title, is rather overweighted on the anatomical side; there are 73 pages devoted to this aspect and only nine and eight, respectively, to the last two chapters dealing with the translocation of virus and the feeding methods of insect vectors. The plant virologist may be a little disappointed at the rather meager treatment of the virological approach.

The format is good, the print is clear, and the reproductions of the photomicrographs of plant anatomy are excellent.

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