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BOOKS REVIEWED

The Role of Domestic Courts in the International Legal Order. By Richard A. Falk. Foreword by Richard B. Lillich. Syracuse: Syracuse University Press. 1964. Pp. xvi, 184. $6.50.

In this skillful, passionate study of the present and potential role of domestic courts in developing international law and in aiding in the development of a sounder international legal order, Professor Falk challenges "the contemporary tendency to give foreign policy precedence over international law in domestic courts."[1] While perhaps somewhat less "radical" than he purports to be, his inquiry nevertheless is both perceptive and refreshing in its approach to that holy of holies, the act of state doctrine. The bulk of the book is devoted to this currently much debated area but in a way which permits a good deal of light to be shed on the general problems of building a legal order in a world of sovereign, self-defending national states. One of the virtues of Professor Falk's writing is that he moves systematically into and through his materials. In reviewing his approach, a similar building process is in order.

At the outset, Professor Falk rejects the notion that a legal scholar has no duty towards identifying, where possible, what the law should be. This to him must of course flow not from some claims to special access to truth but rather from a scrupulous evaluation of the state of the law and of the character of the social system within which the law is expected to function. Recognizing the utility of the positivists' approach in restricting the province of law to the restraints generally accepted as operative in state behaviour, and the tendency of all scholars to smuggle their own views into an analysis disguised as "facts," he nevertheless insists on the need for social observation rather than formal rules "as the method by which to specify the scope of operative restraints upon national behavior"[2] and on the scholar's ability, once he carefully identifies his own biases and approach, to prescribe for demonstrable ills.

Surveying the divided world and its decentralized divided law, Professor Falk stresses a limited form of "judicial deference" for national courts as the policy most likely to promote the growth of the international legal order except in two vitally important major cases: where "the subject matter of dispute is governed by substantive norms of international law that are adhered to by an overwhelming majority of international actors"[3] and where judicial deference to executive authority is not achieved "by sacrificing judicial independence."[4] This latter is inevitably bound to be a touchy matter. The objectives of deference, to Falk, are to take what are really not properly litigable cases from the courts and give them to the more flexible executive while asserting the independence of the courts from the need to make narrow, foreign policy oriented decisions where there is a true international consensus. National courts, by deferring where proper and by deciding in accordance with an existing international consensus (even if their own state does not officially share the view) where proper, thus become effectively "international institutions of restricted competence."[5]

1. Falk, The Role of Domestic Courts in the International Legal Order 4 n.5.
2. Id. at 3.
3. Id. at 9.
4. Id. at 10.
5. Id. at 11.

In his discourse, Falk first comments on the present role of states and the "functional obsolescence" of the state system. He moves on to an analysis of international jurisdiction from the perspective of an independent state. He seeks the elements constituting the international legal order through an analysis rather than a description of the extent of the legal competence possessed by a state. In describing international jurisdiction and horizontal and vertical conceptions of legal order, his debt to Myres McDougal is patent and is acknowledged. Falk finds little to prevent extending the conception of law to the horizontal pattern of order which is typical of the international system. This pattern naturally favors self-delimitation based on reciprocity and feasibility. Lacking centralized authority, a horizontal system stresses cooperation and is keyed on executive and judicial self-restraint. The existence of contending systems of public order is also briefly noted and described as is the fact that their existence has an effect as well on jurisdictional situations. Falk's discussion of this point is brief and, in his words, tentative. It is an area of the study that one might ask to have expanded and, in places, clarified by expansion.

In his fifth chapter (first written in 1961), the heart of the book, Professor Falk states the case for his view of the "optimum participation of domestic courts in the international legal order."[6] The trial court's opinion in *Banco Nacional de Cuba v. Sabbatino*,[7] is the take-off point for his critique though it serves rather as the "scaffolding for a theory"[8] than as a case study alone. In brief, in the decentralized international legal system we have today, with nuclear weapons, the cold war and divergent systems of public order to contend with, Falk suggests that powerful states must restrain their conduct to reasonable limits even when no prohibitive legal rule exists. Domestic courts, for their part, must recognize where systems diverge as well as where worldwide consensus happens to exist. Where legitimate divergence exists, where national courts will tend to be biased in favor of their own views of right, in Falk's view the courts should defer to the executive where a frankly political approach can be made. Rather than review *Sabbatino* at this date, it is perhaps enough to state Falk's criticisms of the district court decision: that the *Bernstein*[9] precedent was misused so as to allow intergovernmental hostility to influence the court's scope of inquiry; that the court went beyond former decisions in disregarding foreign governmental acts, such a rejection always formerly depending on a State Department mandate or a factor such as nonrecognition or extraterritoriality; and that inquiry should be permissible not merely if it fails to embarrass the executive but only if the executive directs it. *Sabbatino*, Falk states, "gives internal judicial implementation to political pressures."[10] Falk seeks to discourage judicial activism, as here, in "areas of legitimate diversity."[11] The Department of State in its brief amicus before the Supreme Court to a limited extent, and Mr. Justice Harlan, writing for the Court in its decision[12] reversing the district and circuit courts, reflect the approach advocated by Professor Falk.

6. Id. at 64.

7. 193 F. Supp. 375 (S.D.N.Y. 1961), aff'd, 307 F.2d 845 (2d Cir. 1962), rev'd, 376 U.S. 398 (1964).

8. Falk, op. cit. supra note 1, at 64.

9. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

10. Falk, op. cit. supra note 1, at 96.

11. Id. at 113.

12. 376 U.S. 398 (1964).

As a matter of interest, Congress has itself taken up the issue of *Sabbatino*. In an amendment to the Foreign Assistance Act of 1964, approved October 7, 1964, Congress tried its hand in moving the courts to follow the district court's approach, or at least to make the State Department act formally in each case. Section 301(d)(4) provides:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.[13]

At this writing, no court has as yet passed on the effect of this section.

The remaining two chapters deal at some length with the circuit court's opinion in *Sabbatino*,[14] *Sabbatino* and the Draft Restatement on Foreign Relations, the United States' brief amicus in *Sabbatino* and, at greater length, with the issue of "sovereign immunity" in the world today. His plea here again is for the courts to free themselves from self-imposed subservience to the executive, to refuse to play dead simply because the executive chooses to act and to adopt "the policy of extending law to cover in an orderly and a just fashion as many controversies involving international law as possible."[15] His comments on sovereign immunity, which, to him, lacks an adequate functional justification, warrant the reader's close attention.

Falk is biased; he says so and proves it. In a nuclear armed world, he sees no alternative to catastrophe in anything but a gradual substitution of global loyalties for national loyalties. This for him requires that national courts be willing to accept as a rule an effective consensus even if their own executive is displeased. This specifically requires that courts in the United States, the most powerful law-oriented nation, take special care to follow an international consensus, or to act appropriately if there is none, regardless of the momentary vagaries of American foreign policy. Falk recognizes that courts in totalitarian states are not similarly free but rejects this as a reason for blind U.S. judicial deference, prayerfully rather than naively. While less convinced than he of the creative importance of the role of domestic courts in the development of a viable, democratic order, this reviewer must confess that he shares the author's bias towards increased techniques of international accommodation. Of more technical importance perhaps, the book is exciting and offers many fresh insights in what is at this time a lively area of controversy in international law. For his review of the *Sabbatino* case alone, Professor Falk demands reading; his admirers

13. 22 U.S.C.A. § 2370(e)(2) (Supp. 1964).

14. 307 F.2d 845 (2d Cir. 1962).

15. Falk, op. cit. supra note 1, at 167.

and detractors will form small but vigorous armies. What more need be said about an author who "intends to be radical"?

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Financing a Theatrical Production: A Symposium of the Committee on the Law of the Theatre of the Federal Bar Association of New York, New Jersey and Connecticut. Edited by Joseph Taubman. New York: Federal Legal Publications, Inc. 1964. Pp. xxiv, 499. $15.00.

This Business of Music. By Sidney Shemel and M. William Krasilovsky. Edited by Paul Ackerman. New York: Billboard Publishing Company. 1964. Pp. xxvi, 426. $12.50.

My curse on plays
That have to be set up in fifty ways,
On the day's war with every knave and dolt,
Theatre business, management of men.—*W. B. Yeats*[1]

In my experience, the S.E.C. is nothing more than * * * red tape, delays, more delays, nuisance and cost. And to what purpose? Who is being protected, and from what? Certainly, the honesty of the producer is not guaranteed by these official requirements; if the producer turns out to be less than honest, the investor has not been protected from him.—*Herman Shumlin*[2]

Maybe things at the Abbey weren't so bad after all. As a producer Yeats could deal with erudite politicians like Douglas Hyde, relatively undemanding benefactresses like Lady Gregory, and unobtrusive writers like J. M. Synge.[3] There were certain unmistakable fringe benefits: *Playboy of the Western World* touched off a series of "spontaneous demonstrations"; and *The Countess Cathleen*, depending upon the censor, was denounced as anti-Irish, anti-Christian, or both. But for all this fun the Irish National Theatre for years seemed about as likely to make money as the New Haven Railroad. Unlike the New Haven's staggering annual deficits, the Abbey's amounted to only a few hundred shillings at most. The penury of Yeats's theatre, like the poverty of the 1840's, was small potatoes.

In the quarter-century since Yeats's death the world has grown wealthier and more sophisticated. "Art for art's sake" is hardly a fashionable slogan today. I sometimes find it hard to suppress the giggles at the image of Yeats's old lovers, each well up in the sixties, meeting for the first time in more than twenty years, to "descant and yet again descant/ Upon the supreme theme of Art and Song."[4] Now the supreme themes in "art" and "song" seem to be the preservation and exploitation of copyrights, mechanical rights, subsidiary rights, synchronization rights, and a host

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1. Yeats, Collected Poems: Definitive Edition 91 (1956).

2. Letter to Bernard A. Grossman, Sept. 8, 1962, in Financing a Theatrical Production 489 (Taubman ed. 1964). The asterisks appear in the printed text and may indicate the deletion of an adjective or two.

3. For all their other virtues, Hyde and Lady Gregory were not unobtrusive as playwrights. But then, neither was Yeats.

4. Yeats, op. cit. supra note 1, at 260.

of other rights that have, quite plainly, nothing to do with the old-fashioned question of whether something seems to be "right" aesthetically.

With civilization's progress, the "knave and dolt" of whom Yeats complained are identifiable in a bowl of alphabet soup. There's AFTRA, for example, and AGAC, and AGVA, and ASCAP,[5] and on and on and on. For producer Herman Shumlin, one gathers, the chief dolt is the SEC.

Mr. Shumlin's feelings about the Securities and Exchange Commission do not seem to have been shared by most of the participants in the Federal Bar Association's symposium on theatrical financing. There is, for the most part, agreement that nice people conform with certain bothersome mandates of federal and state legislation. Although one lawyer speaks wittily of "the connection between the S.E.C. and . . . Jack Gelber"[6] and another describes a rational scheme for inducing wealthy ladies to invest in repertory theatre,[7] most of the writers seem unwilling to indulge themselves in the fancy that the theatre is or ought to be anything more than commercial enterprise. The symposium was not of course concerned with aesthetic problems, and all that the reader may legitimately expect is a hardheaded discussion of legal and quasi-legal issues by specialists in a fairly arcane branch of law.

That expectation, I am sorry to say, is dashed. Symposia are primarily convivial occasions, and the Federal Bar Association's shindig seems to have been no exception to this rule. The book that resulted therefrom exudes the same kind of stickiness that one usually associates with charitable fund-raising dinners. Nothing is left out. In place of the customary postprandially affable toastmaster there is an editor whose main function seems to have been the arrangement of the text into prologue, five acts, entr'acte and epilogue. There is even the presentation, in what I take to be Latin, of an award to a distinguished citizen.

Apart from this feeling of chumminess, *Financing a Theatrical Production* has little to offer. The writers chat more or less autobiographically about their experiences with the SEC; one lawyer says that his form of limited partnership agreement is better than another's; government officials say that the government loves everybody; and certain well-known facts about the infant mortality of Broadway plays are presented. The symposium participants have contributed to the commercial theatre of New York, and it would be unkind to deny them the right to engage in amateur theatricals on their own.

A far less genteel production is *This Business of Music*. In their "practical guide" Messrs. Shemel and Krasilovsky have set themselves a formidable task: explaining and tying together the incredibly complex sets of relationships that make up the "music industry" in such a way as to enable readers of varying degrees of legal sophistication to obtain a working understanding of the problems involved. There is no cant, no ritual bow to Art, for even the most tolerant cultural relativist would be hard pressed to find anything of merit in the Beatles. Music, we learn, is the

5. The several sets of initials refer to American Federation of Television and Radio Artists; American Guild of Authors and Composers; American Guild of Variety Artists; and American Society of Composers, Authors and Publishers.

6. J. T. Sullivan, S.E.C. Practice and Procedure, in Financing a Theatrical Production, op. cit. supra note 2, at 159.

7. A. U. Schwartz, Some Thoughts on New Methods of Theatrical Investment, in Financing a Theatrical Production, op. cit. supra note 2, at 415.

business of marketing sound; the authors are conducting a course in business administration and not in the humanities.

They range over pretty much the whole of the music business, giving detailed and satisfying accounts of matters, like the policies of the major performing rights organizations (ASCAP and BMI) and various industry practices, that I used to think of as hopelessly incomprehensible. For the first time I find myself able to understand (I think) the complex of interrelationships among the various segments of the crazy network that comprises the music industry.

This benefit is, however, to some degree impaired by the total absence of documentation in the authors' discussion of legal problems. The discovery of a few howlers in the text[8] gives rise to this niggling question: Just how reliable is the book when it discusses legal questions rather than the denizens and mores of Tin Pan Alley? I would guess that it is highly reliable, but wish I could be more sure.

I half suspect that the book's editor, who is also the music editor of *Billboard*, prevailed upon the authors to eliminate from their manuscript the documentation of authority that so delights a lawyer's soul[9] in the belief that sales would be stimulated thereby. If this be the case, I hope the first edition sells out quickly and that the second edition restores the deleted material.

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8. Shemel and Krasilovsky say, for example, "a poem is not copyrightable unless published in a book . . . ." This Business of Music 73 (1964). Even if the authors mean that registration of a claim to copyright in a poem cannot be made until the work has been published in a book, the statement is patently incorrect. Who can doubt that a valid copyright may be obtained and registered in a poem disseminated, as a "broadside," on a single sheet of paper?

Interesting noncopyright questions are frequently ignored by the authors. Their standard form of agreement between recording artist and record company contains the following provision: "The artist represents that (s)he is, or within thirty (30) days from the date of this agreement will become, a member of the American Federation of Television and Radio Artists in good standing." Id. at 403. The provision would seem, at first blush, violative of section 8(a)(3) of the National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1964), but it may be that the authors know of some ruling to the contrary.

9. Compare 33 Fordham L. Rev. 125, 127 n.9 (1964).

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